Gentle Readers

Special Reports for HR Professionals 2005

Collection of email reports.

GENTLE READERS: Special Reports for HR Professionals - 2005

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Gentle Readers,

Happy New Year to each of you. We hope this year will bring you good health and happy memories. Among our news items this week... articles on EEOC guidance, labor law compliance posters and the return of PeopleClick EEO/AAP software to the HR Web Store.

Bill Truesdell
Editor

IN THIS REPORT (Report #324, 1/7/2005)
---------- (Sent to over 1,500 subscribers)

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1. EEOC ISSUES GUIDANCE ON ADA TO FOOD SERVICE INDUSTRY

The Equal Employment Opportunity Commission (EEOC) has issued written guidelines to enforcement of the Americans with Disabilities Act (ADA) for the restaurant and food service industry.

The Food and Drug Administration (FDA) and the Centers for Disease Control and Prevention (CDC) publish a Food Code to help protect the public from diseases transmissible through food. There are four pathogens included on the CDC list:

- Salmonella Typhi
- Shigella spp.
- Shiga toxin-producing Escherichia coli
- Hepatitis A virus

These pathogens are called the Big 4. They are easily transmissible through food.

If, on the rare occasion, an employee is disabled by one of these diseases, the employer must consider the ADA in addition to the provisions of the FDA Food Code. Employers may follow the Food Code's guidance that the employee be excluded from the food establishment if it is determined that:

- There is no reasonable accommodation that would eliminate the risk of transmitting the disease while allowing the employee to remain in her food handling position; or,
- All reasonable accommodations are too difficult or expensive and there is no vacant position not involving food handling to which the employee can be reassigned.

For the complete document, please go to
http://www.eeoc.gov/facts/restaurant_guide.html

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2. ARE YOUR LABOR LAW COMPLIANCE POSTERS CURRENT?

Seven states have made changes in their labor laws that affect workplace
compliance posters. They are:

- Delaware
- Massachusetts
- New Jersey
- New York
- Oregon
- Vermont
- Washington

If you have employees in any of these states, you will need to get new posters for 2005. Changes effective January 1, 2005, have caused posters dated prior to 1/1/2005 to be out-of-date. They must be replaced.

Likewise, new minimum wage levels in some states have caused the need for new posters in those geographies. They include:

- California ($6.75/hour)
- District of Columbia ($6.60/hour effective 1/1/2005)
- Illinois ($6.50/hour on 1/1/2005)
- New York ($6.00/hour on 1/1/2005)
- Oregon ($7.25/hour on 1/1/2005)
- Vermont ($7.00/hour on 1/1/2005)
- Washington ($7.35/hour on 1/1/2005)

Get an all-on-one poster from the HR Web Store that will keep you in compliance with both federal and state labor law poster requirements. Our All-On-One posters are going to be ready for shipping in mid-January. You may order at any time by either visiting us on-line at the HR Web Store (www.hrwebstore.com) or by calling toll-free to 1-888-671-0404. The first of a new year is the perfect time to audit your posters at each work location to determine if you should order replacements. Our laminated sheet posters are only $29.95 each.

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3. HR WEB STORE NOW OFFERS PEOPLECLICK EEO/AAP SOFTWARE

As you undoubtedly know, January 1, 2005, marks the transition from 1990 Census data in affirmative action plans (AAP) to mandatory use of 2000 Census data. We now offer two outstanding software packages in the HR Web Store that meet those requirements. Each has been updated with 2000 Census data file access so you can produce your AAPs in compliance with Office of Federal Contract Compliance

Programs (OFCCP) requirements.

You will find all of these fine software packages at:
http://www.management-advantage.com/products/hum-resource-sw.htm

New PeopleClick software programs available in the HR Web Store:

- AAPlanner 6.2
  This program has the same "look and feel" as its parent 6.0 version. It now uses the new Census 2000 EEO File table of geographical locations and occupational categories. It produces all required reports based on your employee data inputs. It acknowledges the elimination of the term "underutilization" and titles its analysis report "Incumbency vs. Estimated Availability." While report titles can be changed, this new description pretty well sums up the regulatory changes. This software allows unlimited AAP preparation. That means unlimited plans in a year and unlimited years of use. A demo disk is available for $5.00 plus S/H and California sales tax if applicable.

- PeopleClick PayStat
  If you have been following current events in the federal enforcement arena, AAP audits are now focusing on finding systemic employment discrimination, including compensation discrimination. As you know, that effort usually relies on statistical analysis. Here is a software program that allows you to test your own compensation programs before the OFCCP comes to visit. Identify and correct any problems you might have right now, before the enforcement folks show up. A demonstration of the program is included on the demo disk containing demonstrations of the other PeopleClick programs. While there is no guarantee you will pass inspection, this analytical tool can save you a great deal of embarrassment or worse.

- PeopleClick Monitor
  One of the requirements, outside the need for written AAPs dealing with Minorities and Women, Disabled, and Veterans is the need to conduct disparate impact tests on your new hires vs. job applicants, promotions and terminations vs. eligible for those actions. With Monitor, you can do all these and more. You can test at any level of the employment process. You can choose the test you wish to apply, whether it is the 80% test, statistical significance, or probability testing using Fisher's Exact formula. There is also a demo of this program on the demo disk.

Now you can choose between the offerings of two outstanding software publishers ... PeopleClick and Biddle Consulting Group's AutoAAP software.

Why not make your professional life easier by using one of these super tools? If you have more than one AAP to produce each year these software programs are going to save you a whopping amount of time each and every year.

Gentle Readers,

This week we tell you about a way to get the scoop on OFCCP's new statistical analysis of compensation programs, a chance for California employers to receive recognition for their wellness programs, and the way you can get a free copy of last year's "Gentle Readers" newsletters.

Bill Truesdell
Editor

IN THIS REPORT (Report #325, 1/14/2005)
---------- (Sent to over 1,500 subscribers)

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1. WORKPLACE WELLNESS AWARDS AVAILABLE TO CALIFORNIA EMPLOYERS

If you are an employer with California-based employees, and you have policies and practices that support employee wellness, you might like to submit your candidacy for the California Task Force on Youth and Workplace Wellness "Fit Business" Award.

Awards will be given for employers in various size categories from those with less than 25 people to those with more than 1,000.

There are many things that can qualify your organization as a workplace wellness company. Consider these. Do you ...

- Offer fruits (dried and fresh), vegetables, low-fat snacks, or other healthy food options in vending machines or cafeterias?
- Provide healthy beverage choices in vending machines?
- Offer incentives to employees for eating healthy?
- Provide employees opportunities for physical exercise either on site or through a nearby facility?
- Offer employee health risk appraisals and/or fitness screenings?

You can apply on-line if you go to www.wellnesstaskforce.org . There is no charge and you just might get some recognition for your wellness program efforts. The deadline for applications is 3/15/2005.

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2. OFCCP's PROPOSED GUIDELINES TO COMPENSATION ANALYSIS

Attention all affirmative action employers. Mark your calendars for January 27th at 11:00 a.m. PT. That's when the Biddle Consulting Group will host a FREE webinar on the government's latest enforcement effort. Patrick M. Nooren, Ph.D. will host the event and lend some simple explanations to what the government has made very complex.

Topics will include:

- New Proposed Office of Federal Contract Compliance Programs (OFCCP) Regulations
  - Federal Register publications
  - OFCCP Presentations
  - Regional Statisticians at OFCCP
- What is Regression Analysis?
  - Overview
  - SSEGs
  - Factors and Discrimination
- What It All Means to Contractors
  - Expectations - OFCCP & Contractors
  - Compensation Analysis and AAPs
- Summary, Overview, and Recommendations

Don't be left out. Get the inside information you need to work with government auditors. It's FREE. You can register on-line at: http://bcgevents.webex.com/ .

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3. FREE INDEXED COMPILATION OF 2004 NEWSLETTERS NOW AVAILABLE

We have added 2004 editions of "Gentle Readers for HR Professionals" to the HR Web Store web site. You can download a copy of the PDF file for FREE and have on hand a completely indexed compilation of last year's news and alerts.

You will find previous years are also available at http://www.management-advantage.com/newsletr/newsletr.html .

You will need a copy of Adobe's PDF Reader to access these files once you have downloaded them. You can get a FREE copy of that reader at http://www.adobe.com/products/acrobat/readstep2.html .

While you're at it, why not take a look at the subjects included in our library of newsletters located on the same page.

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4. FREE 2005 CATALOG AVAILABLE FOR DOWNLOAD

We are pleased to announce that our 2005 catalog is ready for your access at http://www.management-advantage.com/catalog.htm

It has been expanded by more than 30% this year. Now there are over 130 products for you to choose from in your search for professional materials that will support your employee management efforts.

Don't forget, we also offer self-help resources like our series of books on stress management, our diabetes control handbook and job search tools. There are the specialized references you won't find anywhere else. Such things as Breakthrough Technical Recruiting, and others like it.

Download your copy of the PDF file today. You'll get all 49 pages of full-color display packed with tools you will be able to directly apply to your job.

And, don't forget that we offer a complete line of employment law compliance posters with the "All-On-One" display on one laminated sheet. Compare our price of $29.95 each and you will find it to be the best offer in the marketplace.

If you would rather receive your catalog file on a CD-ROM, just give us a call at 925-671-0404 and we will mail it out to you directly. There is no charge for the disk or the mailing.

We look forward to counting you among our many satisfied customers during 2005.

Gentle Readers

Who offers the best employment environment? Is your city or county a federal contractor, and does federal government use of biometric ID cards portend what is in store for the rest of us?

Bill Truesdell
Editor

IN THIS REPORT (Report #326, 1/21/2005)
------------- (Sent to over 1,500 subscribers)

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1. FORTUNE MAGAZINE'S BEST COMPANIES TO WORK FOR

It's that time of year again, when Fortune Magazine publishes its list of "100 Best Companies to Work For."

This year, the top five companies got their positions on the list because of some rather interesting characteristics. Considerations include culture and employment policies. Employee opinions are also taken into consideration.

Here's what Fortune found about four of those top five employers:

- Wegmans offers its employees health care, a defined contribution retirement plan, a 401(k) plan, and an employee scholarship program that has given nearly $54 million in tuition assistance to 17,000 employees since it began in 1984.

- W.L. Gore, maker of Gore-Tex fabric, has its employees evaluate fellow team members, and the quality of those evaluations determines employees' annual compensation.

- Genentech threw a lavish party for employees and their guests with Elton John as the headliner. The celebration stemmed from the company launching three new drugs in an eight-month period between June 2003 and February 2004.

- Republic Bancorp offers 27 days of paid vacation and holidays to full-time employees.

For more about this year's list, see the current issue of Fortune Magazine.

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2. MANY CITIES AND COUNTIES ARE FEDERAL CONTRACTORS

According to John Fox, Labor Law Department Chair at Fenwick & West, (jfox@fenwick.com) many cities and counties are inadvertently finding themselves faced with the fact that they are federal contractors. That means they require written affirmative action plans (AAPs) for minorities and women, disabled and veterans.

How can this happen?

We all know that grants are exempt from consideration when determining if an organization is a federal contractor. Most cities and counties in the country receive federal grants of one kind or another. Because they are exempt, city and county HR managers tend to believe that their organizations don't have to be concerned about developing written AAPs.

Yet, according to Mr. Fox, more and more local governments are being contracted to provide fire fighting services to federal lands.

If your local government is now providing fire fighting services to the federal government, you should check with your legal counsel to be sure you are properly adhering to regulatory requirements that you have written affirmative action plans.

If you need help with your development efforts, give us a call, toll-free at 1-888-671-0404, or send an email to AAP@management-advantage.com.

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3. FEDERAL GOVERNMENT AGENCIES TESTING NEW ID CARDS

The federal government has begun experimenting with new technology in the form of biometric security ID cards for workers and contractors. The cards use finger prints and facial recognition technology to identify cardholders.

A rollout is already underway at the Department of Transportation and some other agencies.

The National Treasury Employees Union has raised privacy and logistical concerns regarding use of the new cards, claiming that they could become too invasive if they are used to monitor employee movements throughout a building. They also express concerns that plans to add pay grade and rank to the face of the card could result in a security risk if a card were lost or stolen.

It is expected by observers that final card standards will be published in the Federal Register on February 25, 2005.

Gentle Readers,

Are your employees "emotionally engaged?" How about your record systems? Are they all electronic? Have you eliminated all the paper from your operations?

Bill Truesdell
Editor

IN THIS REPORT (Report #327, 1/28/2005)
---------- (Sent to over 1,500 subscribers)

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1. "EMOTIONAL ENGAGEMENT" KEY TO PERFORMANCE

The federal Merit Systems Protection Board (MSPB) has published a study by the Corporate Leadership Council that employees must be emotionally engaged in order to produce good performance. The study drew the same conclusion that Herzberg drew from his studies many years back... pay does not appear to motivate employees even though it can be an effective rectuitment tool.

The study report said that "when employees are actively engaged, they are willing to go above and beyond the call of duty to help meet their organization's goals," and "the higher the percentage of the workforce that is actively engaged, the more productive the organization is likely to be."

The study broke engagement into two components, rational and emotional. It said "rational commitment is based on professional, developmental and financial needs and is the most fundamental employee-employer bond, but that emotional commitment is needed to improve organizational performance and employee 'discretionary effort."

Emotional commitment, according to CLC, is based on the extent to which employees identify with the missions, processes and organizational
culture.

It said managers play an important role in securing that emotional commitment, enabling commitment to the job, team and organization through feedback, development, problem solving, and rewards and recognition.

(Source: Federal Manager's Daily Report, Thursday, January 20, 2005, fmdr@fedweek.com)

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2. GOVERNMENT MOVES TOWARD PAPER-LESS PERSONNEL FILES

There has been much talk about the "paper-less" office, but we have seen few examples that could boast it had made a complete transition to electronic data management. Yet, many organizations are beginning the process, moving in that direction.

The U.S. Government is actively involved in making those changes. If you were to visit the Nimitz-class aircraft carrier, the U.S.S. Ronald Reagan, you would find a perfect example of a paper-less environment. Everything is done by electronic record-keeping on that ship which houses 6,000 people. None of those people need carry money while on the ship, either. A personal "account card" can be swiped for all transactions while on board, from buying gum to securing postage.

Now, the federal Office of Personnel Management (OPM) has announced its selection of Integic Corporation as the vendor that will help move the government toward paper-less personnel files. According to the press release at http://www.integic.com/aboutus/release.cfm?num=88 Integic will be helping Health and Human Services, the Department of State, the Coast Guard and the Transportation Security Administration implement the paper-less personnel file program.

Integic says it estimates that its products will contribute to about $700 million in savings through the e-gov initiative over 10 years after it is fully implemented.

Gentle Readers,

The EEOC has announced a new award you may find interesting, and we review requirements for obtaining race, ethnicity and gender data from employees and applicants.

Bill Truesdell
Editor

IN THIS REPORT (Report #328, 2/4/2005)
---------- (Sent to over 1,500 subscribers)

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1. HOW SHOULD CONTRACTORS OBTAIN ETHNIC ID ON EMPLOYEES AND JOB APPLICANTS?

This has long been a subject of discussion among employers and government enforcement folks. The Equal Employment Opportunity Commission (EEOC) and the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) generally accept ID that is made by the individual as a self-identification, or by the employer making a personal observation of the individual.

Here is what the OFCCP's web site has to say about the question: (http://www.dol.gov/esa/regs/compliance/ofccp/faqs/emprfaqs.htm#Q7)
What is the correct procedure for a contractor to obtain the ethnic information of its employees and applicants?

"OFCCP regulations at 41 CFR 60-1.12(c) indicate that for any personnel or employment record a contractor maintains, it must be able to identify the gender, race, and ethnicity of each employee and, where possible, the gender, race and ethnicity of each applicant."

"OFCCP has not mandated a particular method of collecting the information. Self-identification is the most reliable method and preferred method for compiling information about a person's gender, race and ethnicity. Contractors are strongly encouraged to rely on employee self-identification to obtain this information. Visual observation is an acceptable method for identifying demographic data, although it may not be reliable in every instance. If self-identification is not feasible, post-employment records or visual observation may be used to obtain this information. Contractors should not guess or assume the gender, race or ethnicity of an applicant or employee."

"A contractor's invitation to an employee or applicant to self-identify his or her gender, race, and ethnicity should indicate to individuals that supplying such information is voluntary. OFCCP would not hold a contractor responsible for applicant data when the applicant declines to self-identify and there are no other acceptable methods of obtaining this information."

41 CFR 60-3 (Uniform Guidelines on Employee Selection Procedures - 1978) specify that sex, race and ethnicity data shall be used by employers with 15 or more workers, subject to the Civil Rights Act of 1964, to conduct statistical analysis of employee and job applicant movement if that movement involves any selection devices or procedures.

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2. RECORD SHREDDING SOON TO BE REQUIRED

The "Fair and Accurate Credit Transactions (FACT) Act of 2003 (HR 2622) was passed by Congress and signed into law on December 4, 2003 by President Bush. It was intended primarily to help consumers fight the growing crime of identity theft, and many of its provisions went into effect on December 1, 2004. Other provisions required rulemaking by various federal agencies, with effective dates that will vary depending on the rule involved.

One important rule was finalized by the Federal Trade Commission (FTC) in November 2004 and will become effective on June 1, 2005. It is known as the "Disposal of Consumer Report Information and Records," and it affects businesses from the very largest to the smallest one-person shop.

The rule requires the destruction of all papers or electronic records containing consumer information (defined as any record that is a consumer report or derived from a consumer report, as defined in the "Fair Credit Reporting Act") so that the information cannot practicably be read or reconstructed. In lay terms this means "burning, pulverizing or shredding" paper documents and "destroying or erasing" electronic media.

Naturally, there are some penalties for non-compliance. In addition to federal and possibly state fines (several states, including Georgia and Wisconsin, already mandate the disposal of records containing personal information), there is the possibility of civil liability and class-action litigation. All this makes the relative cost of shredders and electronic disk "wipers" seem relatively minor by comparison.

While employee records are not technically the same as consumer records, there are some cross-over requirements. To be safe you should check with your management attorney to make sure you are current in your compliance requirements for your state.

We always recommend shredding employee as well as financial records when they are no longer required. The best shredding job is done by a cross-cut machine that makes confetti out of

the document.

Get a PDF copy of the FTC regulation at
http://www.ftc.gov/os/2004/11/041118disposalfrn.pdf

(Source: BBBOnLine Update: Vol. 5, No. 1, January 2005)

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3. EEOC ANNOUNCES "FREEDOM TO COMPETE AWARD"

This past Monday, January 31, 2005, Cari M. Dominguez, Chair of the U.S. Equal Employment Opportunity Commission (EEOC), announced the agency is accepting nominations for the first-ever "Freedom to Compete Award," which will be presented to employers, organizations, or other entities that have demonstrated results through best practices in promoting fair and open competition in the workplace.

In 2002, the agency launched the "Freedom to Compete" Initiative, a national outreach, education and coalition-building campaign to provide free and unfettered access to employment opportunities for all individuals. The central theme of the initiative is that every individual deserves the opportunity to compete and advance as far as his/her talent and ability allows - without regard to discriminatory barriers based on race, color, gender, religion, national origin, age or disability. As a part of the Freedom to Compete campaign, EEOC has been forging strategic alliances and partnerships with a cross-section of stakeholders to influence positive change in the workplace. The Freedom to Compete Award, which is part of the coalition-building process, includes the following eligibility criteria for nominees:

- The nominee must be a public or private employer, corporation, association, organization or other entity whose activities exemplify Freedom to Compete Goals.

- Nominees must have implemented a specific practice that has removed barriers that hinder free and fair workplace competition and has increased access, inclusion, and/or promotional opportunities for qualified workers.

- Recipients of the Freedom to Compete Award will agree to participate in programs, meetings, or other collaborative efforts with the Commission to publicize the award-winning practice and share information to assist other entities seeking to replicate the practice.

Nominations may be made by the public or any entity may nominate itself. The nomination submission requires an application essay of 1,000 words or less with the following information:

- Profile of the organization, including its mission, size, number of employees, nature of work, and description of products or services;

- Description of the specific practice, including what led to its implementation, the level and commitment and/or executive involvement, and tangible results;

- Description of what made the practice effective and how it has positively affected the lives of employees; and

- Description of potential joint activities the organization and EEOC can undertake to share the practice with other entities and promote Freedom to Compete principles.

Nomination packages must be received no later than March 18, 2005 and may be sent by email to Freedom.Award@eeoc.gov, standard mail, or otherwise delivered to Jay Friedman, EEOC, Office of Research, Information and Planning, 1801 L Street, N.W., Washington, DC 20507.

Gentle Readers,

Employment screening is in the news again this week, along with an announcement from the EEOC about support tools for small employers.

Bill Truesdell
Editor

IN THIS REPORT (Report #329, 2/11/2005)
-------------- (Sent to over 1,500 subscribers)

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1. EEOC ISSUES NEW TRAINING GUIDE FOR SMALL EMPLOYERS

On Monday this week (February 7, 2005), the Equal Employment Opportunity Commission (EEOC) announced the release of a new publication for training supervisors in small businesses.

"The ABCs of EEO for Small Businesses and Supervisors" is designed to assist small business owners and front-line supervisors with issues that employers face every day. The package includes subjects such as hiring, harassment, accommodation, evaluations, promotions, discipline, discharge and job references.

For example, in the chapter on workplace harassment, the guide discusses employer liability for harassment created by supervisors, employees, contractors and customers. Other topics include what an employer should do in the event that an applicant or employee files a discrimination charge against his or her company or agency. The book also contains a glossary of terms, helpful checklists and reference lists to assist supervisors further.

The guide was produced by EEOC's Training Institute, a division of the agency that offers fee-based technical assistance for employers under the auspices of the EEOC Education, Technical Assistance and Training Revolving Fund Act of 1992.

The guide is available for purchase at a cost of $14.95 (either paperback or CD version) through the agency's web site at www.eeotraining.eeoc.gov .

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2. COURT SAYS PRE-EMPLOYMENT TEST AT ARMOUR MEAT PACKING DISCRIMINATES

The Equal Employment Opportunity Commission (EEOC) brought suit against The Dial Corporation at its Armour meat packing plant in Fort Madison, Iowa, saying a pre-employment strength test used by the company had a disparate impact against women. And, a federal district court has agreed with the agency.

On February 3, 2005, Chief Judge Ronald E. Longstaff of the U.S. District Court, Southern District of Iowa, rulled in EEOC v. The Dial Corporation (#3-02-CV-10109) that Dial's "work tolerance test" (WTS) was passed by 97% of male job applicants and by less than 40% of female job applicants. More importantly, Dial had failed to prove that the test was necessary for performance of entry-level jobs in the plant's sausage-making department. A jury in this case ruled that Dial's use of the test intentionally discriminated against women in violation of Title VII of the Civil Rights Act of 1964.

The court's decision rejects the validity of the strength test, which was implemented by Dial in January 2000. Prior to the test, nearly half of the people hired for entry-level jobs in the sausage department of the plant had been female. The job is physically demanding, requiring the repetitive lifting of a 35-pound rod of sausages to a height of 65 inches.

Although women had been successfully performing the job for years, Dial argued that the test was necessary to reduce injuries. The judge said the reduction in injuries was likely a result of other safety initiatives implemented by Dial.

The court will now consider appropriate relief for the approximately 50 women who had been rejected at the time of the trial.

While we don't usually report on court case outcomes, this one reinforces the point we have been trying to make for several months about the need for employers to pay attention to the Uniform Guidelines on Employee Selection Procedures in 41 CFR 60-3. It is critical that employers with 15 or more workers on the payroll apply statistical analysis to their employment process to determine if any one of their employment selection tools has a disparate impact on any group of people. Don't be fooled into thinking that you can ignore men or Whites. Under these federal regulations, and guidelines from the EEOC, men and Whites enjoy the same protections as women and minorities.

If you don't know how to do the statistical analysis of your data, call us. We'll do it for you. And, for sure, it will cost you much less than a negative court judgment. We'll gladly discuss the issue with you if you call us at 925-671-0404.

Gentle Readers,

Private and public sector employers are in focus of disabled community in their yearly survey of workers. The Department of Labor has also made some announcements that may be of interest.

Bill Truesdell
Editor

IN THIS REPORT (Report #330, 2/18/2005)
---------- (Sent to over 1,500 subscribers)

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1. OSHA eTOOLS

The U.S. Department of Labor (DOL) is home to the Occupational Safety & Health Administration (OSHA). OSHA is responsible for workplace safety and in some states contracts with similar state agencies to provide investigation and enforcement services.

Employers will find the OSHA web site one of the better government resources on the Internet. For communication of employer obligations, standards for compliance and compliance assistance, few government agencies can compare with OSHA's quality.

If you spend a little time on the site, you will find that there are videos and PowerPoint slide presentations available on a host of safety-related subjects including ammonia refrigeration, asbestos, bloodborne pathogens, crane safety, ergonomics, eye and face protection, logging, maritime safety, needle stick injuries, nursing homes, and many more. (http://www.osha.gov/SLTC/multimedia.html)

You can download files for off-line use on subjects such as battery manufacturing, construction, evacuation plans and procedures, Legionnaires' Disease, lockout/tagout, machine guarding, respiratory protection, and more.
(http://www.osha.gov/dts/osta/oshasoft/index.html)

For nursing home operators, there are several resources available on the OSHA site. Remember, all of this stuff is FREE for the downloading.

According to DOL, nursing homes today employ approximately 1.8 million workers at 21,000 work sites. The nursing home industry injury incident rate is 13.9 injuries and illnesses per 100 full-time workers. That compares to a rate of 6.1 per 100 for all industries together.

eTools for nursing homes include subjects such as bloodborne pathogens, dietary, laundry, maintenance, nurses station, pharmacy and others.

Take a few minutes to look at the OSHA web site and you may be pleasantly
surprised by the quantity of resources you find there that can help you do your job. Remember, safety is our most important responsibility.

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2. NFIB JUMPS ON DOL BANDWAGON

At the end of last week, the U.S. Department of Labor (DOL) announced the addition of the National Federation of Independent Business (NFIB) to its list of partners in compliance assistance.

The partnership represents the latest such agreement under the new Partnerships for Compliance Assistance Program (PCAP). As a partner, NFIB will help DOL educate NFIB members about compliance assistance resources available to assist them in fulfilling their responsibilities under federal employment laws that DOL administers.

Other PCAP partners include:

- Society for Human Resource Management (SHRM)
- Specialty Graphic Imaging Association (SGIA)
- The Associated General Contractors of America (AGC)
- Associated Builders and Contractors, Inc. (ABC)
- Equal Employment Advisory Council (EEAC)
- Mortgage Bankers Association (MBA)
- American Network of Community Options and Resources (ANCOR)

To read more about DOL's partnership with NFIB, go to
http://www.dol.gov/opa/media/press/opa/OPA20050157.htm

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3. RESULTS OF ANNUAL SURVEY FROM CAREERS & THE disABLED

The 14th annual reader survey by "Careers & the disABLED" magazine has been summarized and results printed in the Winter edition of the publication.

Slightly more men than women returned the survey. Over half of the responses came from the Northeast portion of the country. The Midwest and Southeast ranked next in responsiveness with the Southwest and West lagging in distant positions.

Survey respondents were asked to name the employers, both in private and public sectors, for whom they would most like to work for or that they believe would provide a progressive environment for people with disabilities. The top 15 employers in that list were:

1. Microsoft
2. IBM

3. Northrop Grumman
4. Boeing
5. Toyota
6. Disney Company
7. United Parcel Service
8. Wal-Mart Stores
9. AstraZeneca
10. General Motors
11. Motorola
12. Verizon
13. Pfizer
14. Guidant
15. DaimlerChrysler

Of the government agencies readers would most prefer working for, the top ten were:

1. National Aeronautics & Space Administration (NASA)
2. Central Intelligence Agency (CIA)
3. U.S. Postal Service (USPS)
4. Social Security Administration (SSA)
5. U.S. Environmental Protection Agency (EPA)
6. U.S. Department of State
7. National Security Agency (NSA)
8. U.S. Army
9. U.S. Department of Housing & Urban Development (HUD)
10. Department of Veterans Affairs

Although it didn't make the top ten list, the U.S. Department of Labor did achieve a number 12 ranking on this year's list.

"CAREERS & the disABLED" magazine is published by Equal Opportunity Publications, Inc., 445 Broad Hollow Road, Suite 425, Melville, NY 11747. You may also email to info@eop.com .

Gentle Readers,

Discrimination based on genetic information is one of today's HR pitfalls. And, you should check out what the Census Bureau makes available on its web site. Finally, we can't seem to get too far away from questions about overtime requirements.

Bill Truesdell
Editor

IN THIS REPORT (Report #331, 2/25/2005)
---------- (Sent to over 1,500 subscribers)

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1. CONGRESS MOVING ON LAW TO BAN DISCRIMINATION BASED ON GENETICS

On Thursday last week (February 17, 2005), the U.S. Senate passed S.306 and sent it to the House for consideration. That bill is significant because it would provide a prohibition in federal law against employment discrimination based on genetic characteristics.

Known as the "Genetic Information Nondiscrimination Act of 2005," the bill amends the "Employee Retirement Income Security Act of 1974" (ERISA), the "Public Health Service Act," and the Internal Revenue Code to expand the prohibition against discrimination by group health plans and health insurance issuers in the group and individual markets on the basis of genetic information or services.

It would prohibit: (1) enrollment and premium discrimination based on information about a request for or receipt of genetic services; and (2) requiring genetic testing.

It also amends Title XVII (Medicare) of the "Social Security Act" to prohibit issuers of Medicare supplemental policies from discriminating on the basis of genetic information. And, it extends medical privacy and confidentiality rules to the disclosure of genetic information.

S.306 makes it an unlawful employment practice for an employer, employment agency, labor organization, or training program to discriminate against an individual or deprive such individual of employment opportunities because of genetic information. It also prohibits the collection and disclosure of genetic information, with certain exceptions.

Finally, the bill would establish a Genetic Nondiscrimination Study Commission to review the developing science of genetics

and advise Congress on the advisability of providing for a disparate impact cause of action under this Act.

Now the bill will be debated in the House of Representatives. According to the Bureau of National Affairs (BNA), "progress of the bill in the House is likely to be slow." That news agency reports that a genetic nondiscrimination bill is "not a top priority for the Workforce Committee (in the House)."

Most states have taken some sort of action on the issue of genetic nondiscrimination, and some states have banned it all together. Maryland enacted its law banning genetic discrimination in employment in 2001.

Other states that have some form of genetic nondiscrimination or genetic privacy legislation in place include:

- Hawaii
- Rhode Island
- Utah
- New York
- Texas
- Arizona
- California
- Michigan
- New Hampshire
- Washington
- Florida
- Louisiana
- North Carolina
- Illinois
- Virginia
- Oregon
- Oklahoma
- Missouri
- New Jersey
- Wisconsin
- Nebraska
- Connecticut
- Delaware
- Iowa
- Kansas
- Maine
- Massachusetts
- Nevada
- Vermont

All that having been said, HR professionals should be intimately familiar with their own state laws. Be sure you have clearly identified the requirements within the territory in which you operate.

For more on S.306, go to thomas.loc.org and enter the bill number.

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2. OVERTIME QUESTIONS STILL POURING IN

We still receive many questions about overtime requirements, mostly from people in California. Here are some of the things we have been told employers are saying to their workers:

- "We don't have to pay overtime because we are a non-profit organization."
- "Daily overtime requirements don't apply to us."
- "All those rules are for employers outside our industry."
- "Sales people never get overtime."
- "You don't get overtime because you're a supervisor."
- "Overtime isn't in the budget, so you don't get paid."

You may have heard others as well.

As HR professionals, we take overtime rules for granted. They are among the foundations of employment requirements, and we know them so well, we think there should be no issue in the workplace. Unfortunately, supervisors and managers sometimes don't know overtime rules at all. They need our help.

Before your organization has to write a big check for unpaid overtime wages and penalties, schedule a "refresher" training program for your supervisors and managers. You can't just "hang a tie" on someone and proclaim him a manager. You must train him how to be a manager and give him the knowledge necessary. The cost of training is much lower than the cost of penalties or class-action law suits.

Untrained managers are uncomfortable, because they know they don't know. They just don't know how to find out. As HR professionals, we have to help them. If you have any managers or supervisors in your organization who haven't received basic employment law training, you can set up a 2 to 4 hour program quite inexpensively and become the "go to" expert when your students get back on the job.

Try it. It works. If you need help, call us.

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3. CENSUS 2000 EEO DATA TOOL ON WEB

The U.S. Census Bureau has posted on its web site a data tool that allows access to the EEO Special File information used in computing Availability for affirmative action plans.

You will find it at http://www.census.gov/eeo2000/index.html and will discover that you can get virtually any single set of data you wish by using its selection tools on the site.

All tables you can request to be displayed include race/ethnicity and sex data groups. You can even get industry specific information and data about earnings of incumbents within job categories. And, there is "educational attainment" information in one of the tables that can be pulled up for display.

Some of the information goes beyond what is used in affirmative action plan calculations, but it might be handy to identify earnings for a given job category in a specific city or county. When you call up a table of information, you get two displays...one is by raw population number, the other is by percentage.

Even if you don't need this information today, you might want to tuck away the web address for future reference.

Gentle Readers,

Vacation pay policies, rules for employee breakage or cash loss, and the latest EEOC results are all subjects we look at this week.

Bill Truesdell
Editor

IN THIS REPORT (Report #332, 3/4/2005)
---------- (Sent to over 1,500 subscribers)

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1. WHEN DO YOU GIVE VACATION PAY?

The vacation season is fast approaching. One of our readers wrote the following question recently about vacation pay:

"We are small business only 6 employees. What is the proper way to handle when an employee takes 3 or 4 weeks vacation and wants their pay before leaving for the whole vacation? Do you do this or just do direct deposit for them?"

(Since this is a California employer, we will consider California requirements. Be sure you determine what requirements exist in your state(s) of operations.)

In California, when an employee is provided with a check (or direct deposit) for vacation time is a policy question as long as they receive their payment no later than the normal payroll cycle for the time period involved. Many employers allow for vacation checks to be issued at the start of the vacation period (payroll advance). You are not required to do that, however. You can decide what policy will work best for your organization.

California rules require employers to pay at a consistent time each pay period. Vacation pay should be treated as though the employee were working on those days and a check for that period of time should be issued as if the employee were actually on the job. That is, unless you wish to pay early by providing a payroll advance for vacation time.

How many workers are on the payroll is irrelevant. The same requirements apply to all employers, large or small.

There is an advantage to using direct deposit in this situation... You can adopt a policy that says there will be no vacation advances

and the employee can still access their pay on the normal payday without having to pick up a check and take it to the bank. With modern banking services, those funds can be accessed electronically from almost anywhere in the country. They can even be accessed from outside the country in some circumstances.

Whatever you decide is the best policy for your organization, be sure you treat everyone the same way when the issues arises. It is generally bad policy to provide "exceptions to the rule."

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2. CAN YOU RECLAIM DOLLARS FOR EMPLOYEE BREAKAGE OR CASH LOSS?

Here is another question that seems to concern employers quite a lot...

"Is there a law that prohibits the employer from charging the employee any amount for lost or damaged items or property?"

We have to begin with another caution to check your own state requirements.
Legal requirements will vary according to where you are in the country. We'll address the issue from the California viewpoint:

We'll assume the employer is subject to California Industrial Wage Order Number 4, Professional, Technical, Clerical, Mechanical and Similar Occupations. California law requires the appropriate wage order
be posted in your workplace where all employees can have access to it every day.

Paragraph 8 of Wage Order Number 4 says:

"No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee."

Even though the employer may not recover the costs involved, he/she may discipline the employee responsible for the loss. That discipline may go so far as dismissal in some circumstances.

You should look for the Wage Order in your workplace. If you don't find it, we can offer a couple of alternatives for obtaining a copy of the Wage Order you require. (Every California employer, regardless of size, is required to have posted the appropriate Industrial Welfare Commission Wage Order in a location where it can be accessed by employees each day.) A FREE copy is available from the California Labor Commissioner or on the web from our HR Web Store (www.hrwebstore.com) in the "FREE Stuff" department. Each wage order is 20 to 30 pages in length and all pages must be posted for the wage order associated with your industry. If you would rather have the document on one laminated sheet, it is also available that way from the HR Web Store for $29.95 plus S/H & sales tax. Go to http://www.management-

advantage.com/products/posters/CA-iwcorders.htm

If you have other questions you would like to discuss with the Labor Commissioner's office, you will find their telephone number in the Government Pages of your local telephone directory under "State Government Offices" for Industrial Relations Department, Labor Standards Enforcement Division.

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3. EEOC RELEASES 2004 PERFORMANCE RESULTS

The U.S. Equal Employment Opportunity Commission (EEOC) on February 15th, released its fiscal year 2004 enforcement statistics showing that the agency recovered a record $420 million in relief last year for thousands of people filing charges of employment discrimination, while also expanding its mediation program and efforts to proactively prevent discrimination through outreach, education, and technical assistance.

- Outreach - EEOC conducted 5,340 headquarters and field office educational, training and outreach events (a record), reaching more than 350,000 people, and there were 651 no-cost outreach events directed toward small businesses. In addition to agency-enforced laws, national outreach focused on the Freedom to Compete campaign, New Freedom Initiative workshops for small employers, and the launch of the Youth@Work Initiative. The number of visitors to EEOC's public web site in FY 2004 was more than four million (on average, 350,000 visitors per month).

- Charge Filings - EEOC received 79,432 charges of discrimination against private sector employers and state/local government entities. Race, sex and retaliation were the most frequently alleged bases of discrimination. The data show that most types of discrimination held steady as a percentage of EEOC's total caseload. The average charge processing time was 165 days and the pending inventory of charges was 29,966. EEOC resolved 85,259 charges, of which 19.5% were merit resolutions (with favorable outcomes for the charging party).

- Mediation - EEOC achieved a record 8,086 successful resolutions through the agency's voluntary National Mediation Program resulting in $112 million in monetary benefits in addition to non-monetary benefits, such as changes in employer policies and reasonable accommodations for employees. The average resolution time for a charge in mediation was 82 days. EEOC also continued to expand the number of Universal Agreements to Mediate (UAMs) with employers at the national, regional and local levels (including several Fortune 500 companies). During FY 2004, EEOC entered into 637 local UAMs at the district office level, while the number of national UAMs with large employers grew to more than 70.

- Litigation - EEOC filed 378 merits lawsuits (direct suits, interventions and conciliation enforcement actions), including 143 cases involving multiple aggrieved parties or victims of discriminatory policies. The agency resolved 347 merits suits, including 33 cases involving multiple aggrieved parties or victims of discriminatory policies. In addition to monetary benefits, the agency obtained significant injunctive relief including training, policy changes, posting on notices, and other measures.

- Monetary Relief - EEOC recovered more than $251 million through pre-litigation resolutions (conciliation, mediation and other administrative settlements), and $168 million through agency lawsuits filed in federal district court for a combined total of $420 million, the most monetary benefits ever obtained by EEOC in a single year.

More information is available on the EEOC web site at www.eeoc.gov .

Gentle Readers,

News about OFCCP senior management, stories about release of a newly required federal employment poster and a resource for state minimum wage information.

Bill Truesdell
Editor

IN THIS REPORT (Report #333, 3/11/2005)
---------- (Sent to over 1,500 subscribers)

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1. OFCCP REGIONAL DIRECTOR TO RETIRE

This week, Woody Gilliland, Regional Director, of the Pacific Region in the Office of Federal Contract Compliance Programs (OFCCP), announced he will retire after a 33-year career with the federal government. His retirement will become effective on April 30, 2005.

While a search is conducted for his replacement, Deputy Regional Director William Smitherman will take charge as Acting Regional Director for the Pacific Region.

National OFCCP Director, Charles James, has acted quickly in the past to fill Regional Director vacancies and, in some cases, to realign the Agency's senior staff assignments.

Mr. James has announced his intentions to have his Agency intensify its search for "systemic discrimination" among federal contractors. He said recently that he intends to increase the number of "focused" reviews to accomplish that goal. While focused reviews have been permitted since the Clinton Administration wrote them into the regulations, they have not been heavily used as a tool until now. James intends to use the Agency's new statisticians to assist in that effort.

James says enforcement efforts will continue to be strengthened while he focuses the OFCCP on efforts at greater efficiency.

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2. NEW USERRA POSTER REQUIREMENT

For the past two weeks, since the U.S. Department of Labor (DOL) released the draft of its poster required by a new law signed last

year by President Bush, people have been going crazy trying to identify the approved content.

It all started with President Bush signing into law SB 2486, the Veterans' Benefits Improvement Act of 2004. That amended the USERRA Act. That amendment requires all employers, public and private, to provide a written notice of rights, benefits and obligations concerning those who have served, are serving or may serve in the Uniformed Services of the United States.

The law requires this new poster to be displayed in each work location where other employment compliance posters are displayed. It will contain information about:

- Reemployment rights
- Right to be free from discrimination and retaliation
- Health insurance protection
- Enforcement

Around the first of March, the DOL placed a copy of its draft poster on its web site. Then, at the first of this week, DOL removed that poster from its site and replaced it with a notice that the final poster content would be displayed on March 10th.

As it turns out, March 10th is the date on which all employers in the country are supposed to have the new USERRA poster up in the workplace.

Nonetheless, when March 10th arrived, so did the promised DOL poster. You can download it at http://www.dol.gov./vets/programs/userra/poster.pdf

Every employer must post this new poster at every work location.

If you would like a copy that has been printed in 8.5" X 14" color format and laminated to protect the poster from wear, go to www.hrwebstore.com/products/posters/USERRAposter.htm . For only $9.95 we can provide you with a poster that will last and last.

Remember, this new poster is required in addition to the other federal and state posters you might have already mounted on your wall.

Get your copy today and you will be in compliance with this latest federal employment requirement.

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3. MINIMUM WAGE FOR EACH STATE POSTED ON DOL SITE

We often get calls asking if we can provide minimum wage information for various states. Since there has developed such an elevated interest in that information, we thought you might like to know where you can get that data for each state in the Union.

The U.S. Department of Labor has posted each state's minimum wage

requirement on its web site. You will find it at
http://www.dol.gov/esa/minwage/america.htm

You will remember the rule that says, whichever minimum wage (State of Federal) is higher is the one to use in that state.

Federal minimum wage is currently set at $5.15 per hour. That has been the rate since September 1, 1997.

Six states (Alabama, Arizona, Louisiana, Mississippi, South Carolina, and Tennessee) have no minimum wage requirements other than the federal.

Other labor law information about state requirements can be found at http://www.dol.gov/esa/programs/whd/state/state.htm

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Gentle Readers,

The EEOC has opened its national call center, OSHA has sent letters to 14,000 employers and a quick review of leave of absence requirements fill this week's agenda.

Bill Truesdell
Editor

IN THIS REPORT (Report #334, 4/1/2005)
---------- (Sent to over 1,500 subscribers)

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1. EEOC OPENS NATIONAL CONTACT CENTER

On March 21, 2005, the Equal Employment Opportunity Commission (EEOC) opened the agency's National Contact Center (NCC). In a pilot program, designed to enhance customer service, the center is expected to respond to one million calls for the agency each year.

The public can reach the NCC toll free at 800-669-4000. The TTY number for individuals with hearing and speech impairments is 800-669-6820. Customer service representatives will provide access in 150 languages between 8 a.m. and 8 p.m. Eastern Time.

In addition, an automated system will answer frequently asked questions on a 24-hour basis, seven days a week.

EEOC plans to monitor calls for quality assurance and to track demographics, including issues and concerns that will help shape the center's operations and future EEOC policy. This initial pilot program is planned to last for 18 months. At the end of that time, a comprehensive independent analysis will determine whether the NCC should continue.

The NCC is being operated by the Pearson Government Solutions under contract to the EEOC.

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2. OSHA IDENTIFIES 14,000 WORKPLACES WITH HIGH INJURY & ILLNESS RATES

Approximately 14,000 employers have been notified that injury and illness rates at their work sites are higher than average and that assistance is available to help them fix safety and health hazards.

The letter, sent by Johathan L. Snare, Acting Assistant Secretary of Labor for OSHA, explained that the notification was a proactive step to encourage employers to take steps now to reduce those rates and improve the safety and health environment in their workplaces.

Work sites were identified by OSHA through employer-reported data from a 2004 survey of 80,000 work sites, based on data from calendar year 2003. The workplaces identified had 6.5 or more injuries or illnesses resulting in days away from work, restricted work activity, or job transfer for every 100 full-time workers. The national average during 2003 was 2.6 instances per 100 workers.

Employers receiving the letters were also provided copies of their injury and illness data, along with a list of the most frequently violated OSHA standard for their specific industry. The letters also offered the agency's assistance in helping turn the numbers around. They suggested, among other things, the use of free safety and health consultation services provided by OSHA through the states, state workers' compensation agencies, insurance carriers, or outside safety and health consultants.

The 14,000 sites are listed alphabetically, by state, on OSHA's web site at www.oshalgov/as/opa/foia/hot_11.html .

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3. LEAVES OF ABSENCE

One area of Human Resource Management that is sometimes confusing is that involving leaves of absence. We often hear the question, "What leaves do we have to approve and what leaves can we refuse to approve?"

The answer depends on both federal and state laws and regulations. You should be sure you understand the state requirements in each state where you have employees, because the requirements can be different depending on where your employees are located.

Start with federal requirements. (California employers will find a listing of leave requirements in the "FREE Stuff" department of the HR Web Store at www.hrwebstore.com)

Here are the most common federal requirements:

- Disability and Rehabilitation Leave - Applies to federal employers and employers receiving federal assistance under the Rehabilitation Act and also to employers with 15 or more workers under the Americans with Disabilities Act

- Family and Medical Leave - Applies to employers with 50 or more workers under the Family and Medical Leave Act

- Holiday Leave - Applies to federal contractors providing $2,500 or more in services under 5 U.S.C. Sec 6103

- Jury Duty Leave - Applies to all employers under 28 U.S.C. Sec 1875

- Military Leave - Applies to all employers under the Uniformed Services Employment & Re-employment Rights Act of 1994

- Pregnancy Leave - Applies to employers with 15 or more workers under Title VII of the Civil Rights Act of 1964

- Religious Leave - Applies to employers with 15 or more workers under Title VII of the Civil Rights Act of 1964

- Vacation Leave - Applies to federal contractors with more than $2,000 in construction work or $2,500 in services contracts under 41 U.S.C. Sec 351

You will find that state requirements are many and varied. There can be many, many additional leave demands authorized under state laws. Be sure you understand them all. If you have questions, as always, you should discuss them with your management attorney.

Gentle Readers,

The U.S. Supreme Court has weighed in on the question of disparate impact and its application to the ADEA. We share our experience with a FOIA request to OFCCP and JoAnna Brandi identifies nine ways to keep your employees engaged.

Bill Truesdell
Editor

IN THIS REPORT (Report #335, 4/8/2005)
-------------- (Sent to over 1,500 subscribers)

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1. ADEA IS SUBJECT TO DISPARATE IMPACT CLAIMS

Legal experts have suggested for many years that the Age Discrimination in Employment Act (ADEA) is not subject to claims of disparate impact.

The reasons were many. Now, none of them matter much.

On March 30, 2005, the U.S. Supreme Court ruled in a 5 to 3 decision that the ADEA can be used by employees who claim they were victims of illegal disparate impact. Justice Renquist took no part in the decision of the case. Disparate Impact means, policies and practices that appear to be neutral were in fact illegally penalizing people over 40 years of age. This is the first time since the ADEA was enacted in 1967 that the high court has ruled on the question of its applicability to disparate impact cases.

The case was Smith v. City of Jackson, Mississippi (No. 03-1160). You will find the Court's opinion at http://a257.g.akamaitech.net/7/257/2422/30mar20051200/www.supremecourtus.gov/opinions/04pdf/03-1160.pdf

Justice Stevens wrote the opinion of the Court and concluded "The ADEA authorizes recovery in disparate-impact cases comparable to "Griggs." (Griggs v. Duke Power Co., 401 U.S. 424) Except for the substitution of "age" for "race, color, religion, sex, or national origin," the language of ADEA Section 4(a)(2) and Title VII Section 703(a)(2) is identical. Unlike Title VII, however, ADEA Section 4(f)(1) significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age..."

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2. OUR EXPERIENCE IN FILING A FOIA REQUEST

When the Department of Labor announced its intentions to notify federal contractors who's establishments would likely be audited during the coming year, we filed a Freedom of Information Act (FOIA) request with the Office of Federal Contract Compliance Programs (OFCCP) to obtain a copy of that list.

Known as the Federal Contractor Selection System (FCSS) list of federal contractors who will receive pre-audit notification letters, we wanted to see if any of our clients were on the list.

We were surprised that it took 4 months to process a request that should have been handled within 20 days according to federal regulations. Our request was dated November 3, 2004. First, we received a letter from the OFCCP dated December 14, 2004, saying, "Due to the volume and complexity of the FOIA requests in receipt of this agency, we are unable to process yours as quickly as we would like. Your request will be processed in the order that it was received."

On February 24, 2005, we called the OFCCP's national headquarters to talk with the FOIA Coordinator. We left a voice mail message asking for a call. There was no response. On March 17, 2005, we called again asking for information about when we would be given a response to our request. We were told the request had been handled and we would receive OFCCP's response within a week.

On March 28, 2005, we received the agency's response denying our request.

The lesson...

If you ever feel the need to make a FOIA request, don't count on the OFCCP giving you a response within the required 20 days. Allow at least 4 to 5 times that interval for a reply. If you wish to appeal the decision you receive, you will have 90 days to file your written request for reconsideration. There will be no extensions or waivers of that deadline.

It was an interesting experience.

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3. 9 WAYS TO KEEP EMPLOYEES ENGAGED

Are your employees giving your company 'their all?' Do they believe that what they're doing is important? Do they feel appreciated? Do they show up for work each day with passion and purpose?

According to JoAnna Brandi, customer care expert and publisher of the Customer Care Coach, a 'red flag' should go up if you answered "no" to any of those questions. Why? "Managers who aren't taking care of their employees are missing out on significant cost-savings

and profits," says Brandi.

She rests her case on a growing body of research, "Gallup International reported that businesses in the top 24% of employee engagement had less turnover and remarkably higher percentages of customer loyalty, profitability and revenues. Extensive studies by HayGroup revealed powerful links between employee engagement and productivity, which ultimately impacts the bottom line. Workplace values expert John Izzo has abundant proof that this 'generation' of employees is more conscious of their own needs and of their place in the world. For business leaders in companies of all sizes, the writing is on the wall: You can make and save money by keeping employees engaged."

Coupled with The Sarbanes-Oxley Act, which requires that businesses document internal controls relating to employee and customer satisfaction, Brandi says it's never been more important for business leaders "to stop dismissing internal customer care as 'soft and unimportant.' Employees are not just humans 'doing;' they're human beings. Today's managers must make it a priority to get to know them so that they, in turn, can provide whatever's needed to keep their teams fully engaged in what they do. This creates wins for everyone."

Brandi offers nine management tips for creating and sustaining employee engagement:

1) Let go of any negative opinions you may have about your employees.

2) Make sure employees have everything they need to do their jobs.

3) Clearly communicate what's expected of employees - what the company values and vision are, and how the company defines success.

4) Get to know your employees - especially their goals, their stressors, what excites them and how they each define 'success.'

5) Make sure they are trained - and retrained - in problem solving and conflict resolution skills.

6) Constantly ask how YOU are doing in your employees' eyes.

7) Pay attention to company stories and rituals.

8) Reward & recognize employees in ways that are meaningful to them.

9) Be consistent for the long haul.

For more information, visit http://www.customercarecoach.com

Gentle Readers,

This week we introduce a two-part examination of the OFCCP proposal for compensation analysis procedures. We also let you know about the EEOC push on litigation against employers that have dismissed employees following EEOC complaints. Then, back to OFCCP, we explore their increased interest in litigation against employers with pattern and practice of discrimination.

Bill Truesdell
Editor

IN THIS REPORT (Report #336, 4/15/2005)
---------- (Sent to over 1,500 subscribers)

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1. WHAT IS A SSEG? AFFIRMATIVE ACTION EMPLOYERS NEED TO KNOW

Changes to federal regulations proposed by the U.S. Department of Labor (DOL), Office of Federal Contract Compliance Programs (OFCCP) last year will make significant changes to audit procedures if they are enacted as proposed.

For the first time, the government will have a sanctioned method for analyzing contractor compensation programs to determine if there is any disparate impact (indicator of potential illegal discrimination) against any group. OFCCP believes it will get the biggest return (e.g.: back pay, penalties, etc.) by focusing on "groups" of affected people rather than individual cases. And, they're probably right. As a strategy for law enforcement, it makes sense to go after the largest return on investment just as it does in any other business.

While the regulations are still officially in the "proposal" stage, OFCCP has moved into an implementation of its new compensation analysis system, at least in the Pacific Region.

A key to the success or failure of OFCCP compensation analysis will be use of the term "Similarly Situated Employee Groupings" or "SSEGs."

When talking about law enforcement activities, it is a good idea for everyone to be working with the same understanding of meanings. So far, we have only two known suggestions from the OFCCP about the meaning of SSEG. The first is in its regulatory proposal. (Federal Register, November 16, 2004, Volume 69, Number 220, Pages 67245-67255) "Employees are similarly situated under these

standards if they are similar with respect to the work they perform, their responsibility level, and the skills and qualifications involved in their positions." (Standards for OFCCP Evaluation of Contractors' Compensation Practices, Paragraph 3)

The second comes from Marika Litras, Ph.D., OFCCP Regional Statistician in San Francisco. Dr. Litras spoke recently to the Industry Liaison Group (ILG) in Northern California and said that SSEGs should be constructed in a way that allows for proper statistical analysis. She clarified by saying that SSEGs which are too small (generally less than 30 people) cannot be subjected to statistical significance testing with any accuracy. Therefore, she said, it may be necessary to combine job groups or job titles into SSEGs which will reach the minimum population level for analysis.

There appears to be a conflict between the two instructions. We suggest you consider only placing into a given SSEG those job titles that are similar in content and level of responsibility. That would suggest a first level supervisor and CEO don't belong in the same SSEG. Yet, it would seem difficult to place a CEO into a SSEG with 29 other similarly-situated employees, having similar levels of responsibility, etc.

The content of each SSEG is critical if any analysis of compensation is to be valid. If there is a conflict between the size of the SSEG and the comparability of job content and organizational impact within the group, we suggest you lean in favor of job comparability even if the incumbent count drops below 30. The new regulations will demand that, "The contractor must make a reasonable attempt to produce SSEGs that are large enough for meaningful statistical analysis." Document your efforts and reasonable attempts and avoid "artificial" SSEG configurations that force a minimum incumbent count.

We see danger here for contractors, especially since it is possible for the outcome of analysis to be a charge of illegal discrimination against the employer.

Under the regulations, Job Groups are supposed to be made up from a collection of job titles that have "similar content, wage rates, and opportunities (for advancement)." (41 CFR 60-2.12(b)) In light of that, contractors should think carefully about combining job groups or job titles in order to reach an incumbent population of 30 or more for the purposes of compensation analysis. It's not good practice.

Creating a result with statistical significance mathematics does not necessarily mean that result is valid. It may well be invalid if the factors being analyzed were not sound. We suggest that combining job titles which may not be similar in content and compensation can easily result in non-valid statistical compensation analysis results. And, the problem with that is the contractor may be held liable for "leveling" the compensation of these un-like jobs.

OFCCP has a "rule of thumb" it is applying to the SSEG data. If the average compensation for men is more than 5% away from the average compensation for women, they believe they have reason to delve more deeply by analyzing more data. The same "rule of thumb" test is applied to minorities vs. non-minorities in a SSEG.

Once SSEGs are defined for your enterprise, you will need to consider how to respond to the latest OFCCP data request. In the Pacific Region, some compliance evaluation scheduling letters are followed by an additional verbal request for "12-Factor Data."

According to Dr. Litras, this data is critical to OFCCP's ability to perform a proper regression analysis on the contractor's compensation program. Yet, OFCCP is not authorized to collect this data before it makes an on-site visit to the establishment. OFCCP is asking for the data to be sent in electronic format so it can be analyzed in OFCCP's offices. Contractors will have to give serious consideration to the wisdom of releasing such sensitive information for use outside their facilities, especially considering how OFCCP will use the data to try to "prove" systemic discrimination.

The "12-Factors" include:

o Employee ID	o Salary	o Job Title
o Full Time/Part Time	o Exempt/Non-Ex	o Work Location
o Hire Date	o Job Date	o Grade Level
o Race/Ethnicity	o Gender	o Prior Experience*

*OFCCP has not had much success getting "prior experience" information from contractors. They are considering the use of "age" information as a substitute. They say they would also like to have "performance ratings" on employees if those are available.

It seems that these "pilot" programs for compensation analysis are not being implemented in regions where statisticians have yet to be hired. And, OFCCP has not yet "finalized" its regulatory changes.

(Next time we will continue by looking at the question of contractor self-evaluation in the compensation analysis proposal from OFCCP.)

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2. RETALIATION CHARGES TAKING TOP PRIORITY AT EEOC

Tim Bland, a management attorney with Ford & Harrison LLP in Memphis, TN reports that the Equal Employment Opportunity Commission (EEOC) will begin today making all retaliation charges high priority. "This means there will more likely be on-site investigations of retaliation charges, and we will likely see more retaliation lawsuits brought by the

EEOC. The EEOC will pay particular attention to situations where an EEOC charge has been filed, the parties have agreed to mediate, and then the charging party is discharged. Apparently, this has been happening relatively frequently."

(Mr. Bland can be reached at tbland@fordharrison.com)

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3. NEW OFCCP PURSUIT OF PATTERN AND PRACTICE CASES

Seyfarth Shaw LLP reports in its Management Alert, March 28, 2005, that the Office of Federal Contract Compliance Programs (OFCCP) is planning to increase its search for pattern and practice discrimination among federal contractors.

Mr. Charles James, National Director of OFCCP, has made clear his intentions to point his agency toward systemic discrimination issues. The proposed guidelines for compensation evaluation is one step in that process. Another is the search for contractors who have a pattern and practice of discrimination. Mr. James has indicated the OFCCP will pursue litigation against contractors with systemic discrimination problems.

The question is, "How does one find contractors who have pattern and practice issues involving illegal employment discrimination?" The answer, from OFCCP, is this:

- Consider contractors that have three or more establishments.
- Determine if a given contractor has experienced similar discrimination issues in each of the different establishments.
- Proclaim a prima facie case by showing that discrimination because of race, sex or other protected status was the company's standard operating procedure.

"Companies viewed as 'repeat offenders' are the most likely targets of OFCCP pattern and practice litigation, particularly in hiring cases. OFCCP has confirmed that it is developing a strategy of pursuing cases where there is evidence of a pattern and practice revealed through the audit of three or more facilities of the same company involving essentially the same issues."

(You can reach Seyfarth Shaw LLP at www.seyfarth.com)

Gentle Readers,

We continue (and conclude) our article on OFCCP's proposed regulations for compliance evaluations of compensation programs. And, we offer our subscribers a special HR Web Store SALE next week! Don't miss out.

Bill Truesdell
Editor

IN THIS REPORT (Report #337, 4/22/2005)
---------- (Sent to over 1,500 subscribers)

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1. AAP CONTRACTORS MUST SOON PERFORM COMPENSATION SELF-EVALUATION

Last week we told you about some of the risks associated with designing SSEGs. This week we will look at the proposed requirement for contractors to perform self-evaluation on their compensation programs. As part of the "Proposed Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 with Respect to Systemic Compensation Discrimination," OFCCP would require contractors to follow certain procedures if they wish to meet new standards.

While contractors will not be required to follow OFCCP's methodology in their compensation analysis, "...as an incentive for contractors to implement a compensation self-evaluation system that conforms to the general standards outlined in this Notice, OFCCP will deem a contractor in compliance with Section 60-2.17(b)(3) ... if the contractor's compensation self-evaluation system meets the following general standards."

(You will find a copy of the proposal in the Federal Register, Vol. 69, No. 220, November 16, 2004, Pages 67245 to 67255.)

"On an annual basis, the contractor must perform some type of statistical analysis that evaluates SSEGs and accounts for factors that legitimately affect the compensation of the members of the SSEGs under the contractor's compensation system, such as experience, education, performance, productivity, location, etc.

Last week we told you the Pacific Region is requesting that contractors provide data in what it calls the "12-Factor File."

OFCCP 12-Factor File Contents

o Employee ID	o Salary	o Job Title
o Full Time/Part Time	o Exempt/Non-Ex	o Work Location
o Hire Date	o Job Date	o Grade Level
o Race/Ethnicity	o Gender	o Prior Experience/Age

What type of analysis must be done? According to the new guideline proposal, "For contractors with 250 or more employees, the statistical analysis must be multiple regression analysis." That means you will need to access information such as that contained in the "12-Factor File" for this self-analysis.

While data such as Job Date, Performance Rating, Full-Time/Part-Time, or Exempt/Non-Exempt may or may not reside in the Human Resource Information System, chances are it exists somewhere in the organization, if only in a paper personnel file. Setting up a reporting system that will allow all these fields of data to be tracked and extracted when needed will require contractors to make some considerable investment in time and money. Should you do that now?

The regulations aren't finalized, and they may never be finalized. But, on the other hand, placing yourself in a position to conduct multiple regression analysis of compensation will raise your level of professional sophistication and can offer evidence that your organization is not illegally discriminating through its pay system. And, it gives you the opportunity to correct any anomalies you may discover. Any compensation analysis must necessarily be well documented so as to create a record demonstrating your compliance and good faith efforts. If you don't already have these data fields in your HRIS or payroll computer systems, it could be very expensive to develop a system that could deliver this information. You will want to assess the value to your organization of such expense.

You have some tough choices to make, particularly if you are an employer with over 250 workers on the payroll. You might place the question of compliance on the agenda for your next meeting with your management attorney and Chief Financial Officer.

What if you don't know how to perform a multiple regression analysis?

Don't think that you are alone. Most people in the world don't know how to do such an analysis. Here are some suggestions:

- Talk with your AAP software vendor to see when they will have a product ready for your use.

- Investigate the features in spreadsheet programs such as Microsoft Excel that can perform multiple regressions.

- Hire a consultant to do the analysis for you.

Whatever you decide, be ready for a very different OFCCP in the future.

(A special THANKS to Anna Mae Maly of Maly & Associates for her invaluable help in editing this article. She can be reached at amm@malyconsulting.com)

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2. SPECIAL DISCOUNT AVAILABLE FOR 5 DAYS ONLY - DON'T MISS OUT

From April 25 through April 29 (next week) the HR Web Store is offering a 20% SALE price on all products in the store! This DISCOUNT is being offered to SUBSCRIBERS ONLY! It is our way of saying THANK YOU for your interest in our publications and for the business you have brought to us over the years.

Now, during this ONE WEEK EVENT, we will make it possible for you to do your holiday shopping a little early this year. Get the special gift for your boss or colleague. Add the perfect reference tool to your own library. Whatever your need, this is an outstanding time to purchase the HR management tool you have been wanting.

Choose from our scores of product offerings...software, books, safety and survival, fire service and police professionals, sales and legal professionals. Thinking of making a large purchase such as AAP software, or updates on all your employment posters? Now is the time. Save 20% on anything you order.

Any product
Any value
Any quantity

20% OFF anything your order during this week (April 25 through April 29, 2005).

Don't let the week go by without taking advantage of this remarkable opportunity to save on your HR management purchases.

On checkout...enter COUPON CODE: "April Sale Blowout"
(Do not enter quotation marks.)

Come back as often as you like during the week. You will get this fantastic discount each and every time.

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3. CALIFORNIA EMPLOYEES PROTECTED IN DISCUSSING COMPENSATION

It's been a number of years since the California Court of Appeal ruled that it is against public policy to fire an employee for discussing compensation with co-workers. Yet, recent events have given indication that not all employers have gotten the "word."

Back in August 2002, we suggested that employers review their

employee handbooks and policy manuals to be sure none of their California employees are subject to discipline if they discuss their compensation with fellow workers. The reason? In July 2002, "Grant-Burton v. Covenant Care, Inc." (B151342) brought us the ruling that said an at-will employee may not be terminated for an unlawful reason or one that is against fundamental public policy. And, it is against public policy to discipline employees who discuss compensation.

The California Labor Code, Section 232, says:

"No employer may do any of the following:
"(a) Require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages.
"(b) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages.
"(c) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages."

Further, California Labor Code, Section 923, says it is public policy in the state to allow employees "full freedom of association...to negotiate the terms and conditions of employment."

And, finally, the "National Labor Relations Act" (NLRA) protects concerted employee activity, including participation in a group discussion about the fairness of compensation.

That about says it all. Take another quick look at your handbooks and policy manuals to be sure you don't have a prohibition against discussing compensation that could rise up and bite you at some time in the future.

Naturally, outside California, you must be guided by the laws and labor codes associated with the states in which you operate.

Gentle Readers,

A new EEOC report on 2004 has been released and is available on the Web. And, we will be away for a while. See you again in June.

Bill Truesdell
Editor

IN THIS REPORT (Report #338, 4/29/2005)
---------- (Sent to over 1,500 subscribers)

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1. VACATION ANNOUNCEMENT

We are going to be gone for a few weeks, taking a vacation. When we return in June, we will have more issues of "Special Report for HR Professionals."

Thank you for your subscription and your kind feedback.

We look forward to sharing information with you again when we return.

In the mean time, the HR Web Store will remain open to serve your needs. (www.hrwebstore.com)

Best professional regards,

Bill Truesdell, SPHR
Editor

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2. EEOC RELEASES ANNUAL REPORT ON FEDERAL WORK FORCE FOR 2004

The Equal Employment Opportunity Commission (EEOC) has released its "Annual Report on the Federal Work Force for Fiscal Year 2004." It provides detailed agency-by-agency profiles of discrimination complaint processing and other equal opportunity measures. The report is intended to inform and advise the President and the U.S. Congress on the state of equal employment opportunity throughout the federal work force.

You can get a copy of the report at
http://www.eeoc.gov/federal/fsp2004/index.html

The report contains practical tips and best practices to help agencies improve their EEO performance, including the processing

of discrimination complaints. Data in this edition of the report shows that the federal sector received more than 19,000 discrimination complaints and took nearly 300 days on average to investigate a complaint. Regulations call for complaints to be investigated within 180 days. These complaints resulted in approximately $55 million in settlements.

Reflecting the diversity of the nation, 66.9% of federal employees in 2004 were White, 18.2% were Black, 7.5% were Hispanic, 5.8% were Asian or Pacific Islander, and 1.7% were American Indian or Alaskan Native. Women have made the most gains in securing senior level positions in the federal government.

Gentle Readers,

This week we discuss the care that should be taken in selecting a vendor for employment compliance posters. And, we talk about the relatively new products designed to help people defeat pre-employment drug tests.

Bill Truesdell
Editor

IN THIS REPORT (Report #339, 5/27/2005)
---------- (Sent to over 1,500 subscribers)

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1. HOW TO SELECT A POSTER SUPPLIER

Wanting to purchase employment posters is much like wishing to purchase an automobile There are lots of dealers available, but determining who to give your business to is the problem. And, like automobiles, what you get from some poster companies isn't what you expect or even want.

Employment posters are notices to employees that are required by various federal and state laws and regulations. They deal with safety, wages and working hours, equal opportunity and more.

The Basics

Start with the understanding that ALL employers must post certain information in the workplace. Even if the organization has one employee, posters are required. Which posters you must have and how they are to be displayed is dependent on which state you are in. Employers who have workers in more than one state must comply with each separate state requirement in addition to all federal requirements.

What posters do you need? There are several sources available to help you determine the answer.

- California employers can find a list of federal and state requirements at http://www.management-advantage.com/products/free-post.htm
- Your State Chamber of Commerce
- Your State Labor Commissioners Office
- Your Poster Vendor

Poster Costs?

Almost all posters required by federal and state laws and regulations can be obtained for FREE! In most cases, all you

have to do is go to the source to obtain the documents you need. Then you put them on the wall in your workplace and youre done. (Except that you have to keep them current and post new versions as they are issued by state or federal agencies.)

In California, for example, there are as many as 33 individual posting requirements, depending on the industry and specific workplace activities. That means a California employer would potentially have to go to as many as 33 sources to obtain a free copy of each publication. It takes time to do that. And, you have to be sure you don't miss anything, because the absence of a required poster could bring financial liability to the employer. For example, OSHA posters are required by federal law. If they are not properly displayed, the agency can issue citations costing the violator as much as $7,000. While the penalties are usually lower than that maximum limit, violations can be expensive in any case.

Poster Vendors

There are companies that make a business out of supplying employment posters to organizations across the country. Some of these vendors are reputable and some are not. Its unfortunate that employers have to be wary of suppliers, but that is the case in this instance. Its a good idea to ask some key questions of a poster supplier before purchasing their product.

o Does your product cover all federal and state requirements?

Legitimate vendors will tell you specifically what posters you must have and how their products will meet your needs. Stay away from vendors that say things like, "Don't worry. This will take care of everything."

o Do the posters meet size requirements of federal and state regulations?

Some posters have a specific minimum font size spelled out in regulations. Shrinking the poster beyond that minimum is illegal and will subject the employer using that display to possible financial liability.

o If you purchase posters on one large sheet, what will you get?

Some vendors print federal posters on one sheet and state posters on another sheet. Other vendors print both federal and state posters on one sheet. What you will get is going to determine what you will pay. It may sound good for "All Federal Posters" to be sold for a given price, until you discover that adding the cost of state and miscellaneous posters will raise the cost significantly.

o Why buy posters at all when I can get them for free?

Thats a very good question. If you have the time, or you have no budget for employment posters, calling around to get each agency to send you a copy of their poster may be the proper

course of action. On the other hand, if you don't have time and are willing to spend a few dollars, the convenience of purchasing from a single point of contact may be the best for you. Another benefit is the protective coating some vendors put on their poster sheets. That can increase the life of a paper sheet significantly. You won't have laminated posters if you get them from the agencies directly.

o Doesn't the government certify poster companies?

Unfortunately, there are no qualification criteria for poster vendors. Anyone can start a business selling employment posters. Employers have to be careful they deal with reputable suppliers. Ask, "How long have you been in business?", and "Can I have a list of companies that purchase posters from you?" It takes a bit of due diligence to select a poster vendor the same as it takes care in selecting other suppliers.

o Why do I have to cover a wall with employment posters?

Can't I just hang them on the back of a door in one thick stack of paper?

Posters cannot be "stacked" and nailed to the wall. They must be "posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily visited." Each employer shall take steps to ensure that such notices are not altered, defaced or covered up by other materials. "A posting cannot be covered up by another posting." (Chapter 3.2 California Occupational Safety and Health Regulation, sub-chapter 2, Article 1, paragraph 340)

o Where do I have to place my employment posters?

Employment posters must be placed in plain view in a location that is frequented by employees and to which employees have free access each day. Each employee must have access to all employment posters every day. Some employers place posters in a break room or lunch room. In the case of the federal Interview Room Poster, (required if you have 10 or more people on the payroll) it must be placed in each interview room or in the lobby where job applicants can have free access to it.

o What about my employees working at remote locations?

It's common for employers to have employees working at remote sites. That happens frequently in the construction industry, and in outside sales jobs for all industries. Just because individuals are not working where there is a wall for employment posters doesn't absolve the employer of the obligation to have the information available
to those workers. A simple solution is our Mobile Poster Pak that places all required posters into a single binder that is easily transported with the employee. That way, the employee has access to the information each day. For more information about Mobile Poster Paks go to: http://management-advantage.com/products/MobilePosterPak.htm

o Do I have to change my employment posters every time a new regulation comes out?

Not always. In some cases, changes are made in poster content but re-posting is not required immediately. Unfortunately, some poster companies make it sound as if employers must buy new copies right away when that is, in fact, not required. There are even instances where similar posters are required by different agencies, but each agency specifies different content. That is the case with the Equal Employment Opportunity (EEO) poster required by the Equal Employment Opportunity Commission (EEOC) and the one required by the U.S. Department of Labors Office of Federal Contract Compliance Programs (OFCCP). In those situations, most often, each agency will accept the others poster as valid. Be sure you clarify with the poster vendor that immediate replacements are absolutely necessary if they push you to buy new editions right away.

Let Them Catch Me - I'm Not Going to Put Up Posters

A dangerous decision, but one that many managers and business owners make. It escalates any penalties to the level of "willful disregard" for the legal requirements. Fines will jump to the maximum levels and can reach as much as $7,000. A better decision is to look upon employment posters as a part of doing business, regardless of the business you are in. A more subtle problem is the absence of posters in workplaces that are considered "annexes" or adjacent properties.

Remember, every employee must have access to your employment posters every day.

For cost effectiveness, order your free copies from each agency. For convenience and neatness, select a vendor who sells single-sheet laminated posters that will last over time and meet all requirements.

One good way to tell you are working with competent and caring vendors is to look for the Better Business Bureau (BBB) seal. Members of the BBB are committed to solving customer complaints through a mediation process governed by the Bureau.

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2. FOOLING DRUG TESTS IS A HOT NICHE MARKET

It's a small but increasingly sophisticated cottage industry -- folks bent on helping job applicants, criminals and professional athletes beat the urine tests that check for drugs. As HR professionals, we need to be aware of these types of activities.

In all but about a dozen states, it is perfectly legal to create and sell products that will defeat drug test results.

"There's a lot of really good chemists out there, and some of them are working on the dark side," said Jennifer Collins, Lab

Director at Medtox Laboratories in New Brighton, one of the largest drug testing centers in the nation.

Chemists have created synthetic urine, freeze-dried urine, pills, additives, effervescent tablets, drinks and other concoctions designed to flush out or mask drug residue. And, where's the best place to buy them? On the Internet, of course.

"Most of the products don't work very well," Collins said. "We think we catch most of them in testing. But the developers are getting more sophisticated, and as soon as we figure out how to catch one product, they're coming out with another one." Her firm conducts several hundred drug tests a day on specimens taken at collection sites around the country for businesses and criminal justice agencies.

About one percent of samples test positive for drugs -- about half of them marijuana. Another one percent or so are diluted samples where the donor intentionally drank lots of fluid to lower the drug-residue concentration. Even synthetic urine is used to calibrate testing devices usually can be detected because it often contains other chemicals, Collins said.

Nationally, about 60 percent of employers screen job applicants, and those who test positive likely won't get the job. But, for people already on the job, adulterating urine can be worse than failing the test. "Some places they'll fire you for faking it, but they'll give you treatment if you test positive."

Federal rules require drug testing for truckers, airline pilots, railroad workers and some other professionals. But there's no federal law that prohibits trying to fool the drug testers. The House of Representatives is currently holding hearings on the subject and may consider taking action to create such legislation in the future.

(Source: Warren Wolfe, Star Tribune Staff Writer, Minneapolis Star Tribune, Thursday, May 12, 2005.)

Gentle Readers,

The EEOC has delayed a vote on its proposed reorganization, and there are a couple of interesting new legislative proposals you may wish to hear about.

Bill Truesdell
Editor

IN THIS REPORT (Report #340, 6/3/2005)
---------- (Sent to over 1,500 subscribers)

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1. BREASTFEEDING PROMOTION ACT

On May 5, 2005, HR 2122 was introduced in the U.S. House of Representatives. If passed, it would modify the Pregnancy Discrimination Act and, in turn, the Civil Rights Act of 1964.

The bill was introduced by Representative Carolyn Maloney (D-NY) and currently has 19 co-sponsors.

The legislation is designed to prevent employment discrimination against breastfeeding mothers. It provides that women cannot be fired or subjected to workplace discrimination for breastfeeding or expressing milk during lunch periods or breaks. Also included are tax breaks for employers that set up private lactation areas in the workplace.

The bill will also establish performance standards for breast pumps and directs the Secretary of Health and Human Services to issue a "Compliance Policy Guide" which will "assure that women who want to breastfeed a child are given full and complete information respecting breast pumps."

HR 2122 will also modify the Internal Revenue Code to include breast pumps and other breastfeeding equipment to be classified as medical equipment for the purposes of tax deductions.

For more information go to http://thomas.loc.gov/ and enter the bill number for a search of the legislative data base.

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2. EEOC PUTS OFF REORGANIZATION VOTE

With only one week between the first release of its plans for reorganization and the scheduled vote by Commissioners, the Equal Employment Opportunity Commission (EEOC) has put off that agenda item.

The reorganization proposal would have reduced the current number of EEOC field district offices from 23 to 15, converting them to area offices that would have fewer management personnel. The plan was to save budget dollars by eliminating some District Director and Regional Attorney jobs.

The EEOC is not planning to hold any public hearings on the proposal. According to the Bureau of National Affairs (BNA Employment Discrimination Report, 5-18-05) Lea Guarraia, the Commission's chief operating officer, there has been criticism of the proposed actions from the union representing EEOC employees, members of Congress, and others.

Restructuring the EEOC has been on the Commission's agenda since the February 2003 report by the National Academy of Public Administration called for major changes in the EEOC's organization. The report from this independent research organization called for a reduction in the number of field offices, reorganized headquarters, provision for electronic filing of complaints, and the establishment of a national call center.

EEOC Chair Cari M. Dominguez has been moving forward to implement all of the Academy's recommendations.

It is expected that a vote on the restructuring will come in the next few weeks.

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3. WHISTLEBLOWERS HAVING TROUBLE AND WAITING NEW LEGISLATION

We had no idea that there were enough whistleblowers that an organization has formed called the National Security Whistleblowers Coalition. The Coalition recently issued a statement claiming the Whistleblower Protection Act is nearly "defunct" due to a series of hostile judicial rulings by the Federal Circuit appeals court that has exclusive review of whistleblower cases.

A new report released by the Project on Government Oversight says the government is failing to protect employees who come forward and voice concerns about national and homeland security weaknesses and has made it easier to retaliate against them. The report notes that just one of 96 cases in the past ten years has received a ruling in favor of the whistleblower.

Now, Edward J. Markey, (D-MA) has announced plans to introduce legislation that would give any federal employee, federal contractor or subcontractor, or a corporate employee protection from retaliation when reporting a concern about national or homeland security, threat to public health and safety, or fraud, waste or mismanagement to their employer, GAO, a government agency

or Congress, according to a statement from his office.

Under the proposed legislation, if the Department of Labor failed to act on a case within six months, whistleblowers could take it to civil court and seek compensatory and punitive damages, and acts of retaliation in these matters would become punishable by up to 10 years in jail.

It would also ensure that if the government invoked the states secrets privilege, preventing the merits of a case from being heard, the whistleblower would automatically win the case.

"Homeland and National Security Whistleblower Protections: The Unfinished Agenda," is available here: http://www.pogo.org/p/government/ga-050403-whistleblower.html

(Source: Federal Manager's Daily Report, May 26, 2005. Contact: fmdr@fedweek.com)

Gentle Readers,

We share some comments from California's new DFEH Director this week and relate the latest fiscal year results recently published by EEOC.

Bill Truesdell
Editor

IN THIS REPORT (Report #341, 6/10/2005)
-------------- (Sent to over 1,500 subscribers)

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1. SYSTEMIC DISCRIMINATION IS TARGETED BY ENFORCEMENT AGENCIES

The Bureau of National Affairs (BNA) reports in its Affirmative Action Compliance Manual (April 29, 2005) that the Office of Federal Contract Compliance Programs (OFCCP) is just one of several agencies that are focusing their efforts on identification of systemic discrimination.

The Civil Rights Division of the Department of Justice (DOJ), and the Equal Employment Opportunity Commission (EEOC) have joined the OFCCP in that effort.

At EEOC, a new, commissioner-led task force will examine the issue, according to Vice-Chair Naomi Earp. At the Justice Department, the Civil Rights Division is making an "aggressive pursuit" of those cases in the public sector. All three agencies laid out their programs in presentations to the American Bar Association's (ABA) Equal Employment Opportunity Committee meeting in Naples, FL. The committee is part of ABA's Labor and Employment Section.

One way OFCCP is stepping up to the challenge is to handle investigations
more quickly. To do that and allow enforcement officials to sift through evidence at a more efficient pace, OFCCP has hired several statisticians and testing experts. They are being called upon to help complaint case investigators identify systemic problems at employer organizations where complaints are lodged. They are also supporting Compliance Officers in conducting compliance audits of federal contractors.

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2. EEOC RELEASES ITS 2004 REPORT ON FEDERAL WORKFORCE

The Equal Employment Opportunity Commission (EEOC) has published its 2004 report on enforcement activities within the federal workforce. Over 19,000 complaints of discrimination were filed against federal agencies. Most complaints (7,782) were for retaliation. Next came age complaints (5,449), race complaints (5,021), and sex discrimination complaints (5,613).

The EEOC took an average of 300 days to process complaints during the year, which is a 6 percent decrease over the previous year. Federal agencies are supposed to complete their investigations in 180 days.

Complaints during 2004 were mostly caused by harassment, promotion or non-selection, and terms and conditions of employment. Overall, the Commission completed 11,876 investigations and recovered $55 million in total benefits for complainants.

The use of alternate dispute resolution in the form of the EEOC mediation program increased during 2004. More than 42,400 counseling sessions resulted in nearly half settling prior to formal charges were filed.

You can get more information at the EEOC web site: www.eeoc.gov

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3. DFEH DIRECTOR COMMENTS

California Governor Arnold Schwarzenegger appointed Suzanne M. Ambrose to the job of Director of the Department of Fair Employment and Housing in August 2004. Since that time, Ms. Ambrose has been making adjustments in the way the Department (DFEH) interacts with employers in the state.

Asked recently about employment complaint issues, Ms. Ambrose said, "The top three problem areas are the failure by employers to grant a 'reasonable accommodation' to a disabled employee, sexual harassment, and retaliation."

"Most of the cases we see regarding 'reasonable accommodation' aren't about a willful refusal by the employer to accommodate an employee with a physical or mental disability, but about the process. Employers get into trouble when there is a failure to engage interactively with the employee, as required by law. Employers need to work with employees and their medical providers with the goal of determining what would be the best way to accommodate an employee with a disability. The employer can't just arbitrarily make the determination without that input."

"In sexual harassment cases, the problem often is the failure of the employer to have an effective policy and training program in place; that is, one that includes a 'zero tolerance' statement. The policy also should incorporate an effective investigation and resolution process and remedies. Employers

often don't understand that, without such policies, they can be held liable for the harassing acts of their employees."

"We also receive many retaliation complaints. These occur in situations where an employee may have filed a complaint internally, or with the Department, or both, and was subsequently transferred to another location or job, or subjected to some other materially adverse employment action. It's important for employers to understand that when an employee complains about unlawful discrimination or harassment, that is, in and of itself, a protected activity."

"Employers also are prohibited from retaliating against other employees who oppose violations, even if they are not the victim of the discrimination. Employees who testify, or even just express concern about a violation, are protected."

One major change in the new administration's views is the support it is expressing for revitalizing employer liaison groups called California Employment Round Tables. The Northern California group has been inactive for several years and is now being reconstituted.

The Round Table is looking for members who are senior HR professionals in their organizations. If you would like to participate in a forum of peers to converse with the DFEH over issues of employment discrimination and enforcement, send your name and contact information to Barbara Thomson at barbarajthomson@comcast.net .

The DFEH has recently published its first newsletter, which is available in PDF format on the Department's web site at www.dfeh.ca.gov .

Gentle Readers,

This week we focus on the EEOC and its operations. You'll want to make a note of the web location of the agency's newly updated Litigation Manual.

Bill Truesdell
Editor

IN THIS REPORT (Report #342, 6/17/2005)
---------- (Sent to over 1,500 subscribers)

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1. SOME KEY ITEMS OF INTEREST FROM AN EEOC DISTRICT DIRECTOR

On June 7, 2005, Joan Ehrlich, District Director of the Equal Employment Opportunity Commission (EEOC) office in San Francisco, addressed the Northern California Industry Liaison Group (ILG). She reported that employment discrimination charges are down 7 percent nationwide. The most frequently filed charges are Title VII, age and disability.

In the San Francisco District Office, there is a 1,500 case inventory and it takes an average of 136 days to process each case. In the most recent fiscal year, ended June 30, 2004, her office recovered over $7 million for complainants. An additional $3 million was recovered for people in the Federal sector.

Ms. Ehrlich announced a new EEOC Internet initiative called "Youth at Work." It is an expansion of the basic EEOC web site, focused on the teenage worker and the special issues young people face in the world of employment. "There are over 9 million summer teen workers and more than 2 to 4 million teens working after school and on weekends," said Ms. Ehrlich. The largest employment issue with teens has been sexual harassment. The new web site is designed to address that issue with the younger audience. You can visit it at www.youth.eeoc.gov .

The Commission's new volunteer mediation program is going well. About 27% of employers and 80% of charging parties want to mediate. Of the employers who participate in the program, over 90% would do it again. "It is an inexpensive and quick way to resolve these issues," said Ms. Ehrlich. She encouraged all employers to give serious consideration

to using the mediation program when faced with an EEOC charge.

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2. 9 MISTAKES EMPLOYERS MAKE WHEN DEALING WITH EEOC

Large, sophisticated employer organizations have had rather extensive experience in dealing with charges of discrimination filed with the Equal Employment Opportunity Commission (EEOC). Often, these employers have dedicated staff members to handle complaint investigations and interactions with EEOC staff.

The smaller employer, however, is often left with a token Human Resource Management staff that is expected to do everything, including complaint investigations and preparation of responses to EEOC charges.

Ms. Joan Ehrlich, EEOC District Director in San Francisco, told the Northern California Industry Liaison Group meeting recently that there are nine key mistakes employers make in dealing with the EEOC. They are:

1. Not Being Pro-Active
   "HR has the power to create atmosphere. HR people should work to uncover problems before they become charges. That requires getting out from behind the desk and talking to people where they do their work."

2. Not Responding Appropriately
   "When a complaint is voiced, give it an honest hearing. And, do what is right."

3. Undermine Credibility with EEOC
   Not responding thoroughly to the written charge.

4. Engaging in Delaying Tactics

5. Not Taking Advantage of Mediation Services

6. Not Participating in Settlement Discussions
   "Going to a settlement conference does not concede that the employer admits guilt. It simply shows good faith in the effort to find a resolution."

7. Retaliation
   "This represents 1/3 of all the work done in the San Francisco EEOC office."

8. Assuming EEOC Won't Litigate

9. Not Communicating with EEOC About Charges

William Tamayo, Regional Attorney for the EEOC added that 25% of the court cases filed by EEOC against employers involve sex discrimination. Of those, half are for problems of harassment.

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3. EEOC ISSUES MANUAL FOR REGIONAL ATTORNEYS

The EEOC has issued a revision of its Regional Attorneys' Manual, containing procedures and guidance about litigation procedures. This replaces the last issue dated 1992.

The new edition of this manual is available on the agency's web site at http://www.eeoc.gov/litigation/manual/index.html

This would be especially interesting to legal professionals, and even HR professionals, involved in EEOC litigation.

Gentle Readers,

Job candidates are turning the tables on employers by doing background checks on hiring companies. And, we rethink the question of how best to distribute revisions to policies. And, EEOC is criticized for disclosing trade secrets it has in its files. And, as you may know, the new I-9 Form is finally here. Employers will have until December 31, 2005 to begin using the revised version.

Bill Truesdell
Editor

IN THIS REPORT (Report #343, 7/1/2005)
---------- (Sent to over 1,500 subscribers)

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1. GET A WRITTEN RECEIPT FOR POLICY CHANGES

Employers don't change policies every day. When they do, however, they want everyone to understand and abide by the new rules, whatever they may be.

As it turns out, how those policy changes are distributed and acknowledged makes a big difference when it comes to enforcing their provisions.

In a case known as Campbell v. General Dynamics Gov't Sys. Corp. (1st Cir., No 04-1828, 5/23/05), the First Circuit Court of Appeals has held that the company's policy changes were not properly distributed and acknowledged by each employee. It all started when the company wanted to alter its dispute resolution policy. After writing the new procedures the company president signed an email to all employees announcing the changes. That email contained a link to the new policy on the company's Intranet site.

Later, the company was sued by an employee it had dismissed (Campbell) and was denied a motion to compel the employee to arbitrate as required by the new policy. The U.S. District Court for the District of Massachusetts said, "a mass email message, without more, fails to constitute the minimal level of notice required." Therefore, the court said, no binding agreement to arbitrate was achieved by the announcement. When Campbell said he had not read the new policy, the company had no way to counter that contention.

One of the key problems pointed out by the court was that employees were not required to notify the company that they had actually read the email announcement or the changed policy. There was no signed response required from each employee that would constitute an acknowledgement that employees had received and read the new policy.

This is just another reminder that HOW we distribute policy changes is equally important as WHAT those changes may be. Be sure you follow these simple guidelines in your efforts to alter and implement policies:

1. Review revised (or new) policies with senior management and legal counsel.
2. Create an announcement letter from senior management to all employees that contains a copy of the new policy. Don't rely on Intranet links and expect employees to use them.
3. Enclose a form for employees to sign and return acknowledging receipt of the policy and that they have read the policy.
4. Retain the signed acknowledgement form in each employee's personnel file for the life of that person's employment.
5. Audit the process to be sure all employees have completed and returned the acknowledgement forms.

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2. CANDIDATES ARE BEING ENCOURAGED TO CHECK EMPLOYER BACKGROUND

For years we have been checking background of leading job candidates. Or, at least, we've done background checks on those to whom we have made job offers. Negligent Hiring cases have taught us that such checks are critical to surviving employment liability charges.

Well, job candidates are now being encouraged to check into the background of employers before accepting job offers.

H. J. Cummins, Work & Life columnist for the Minneapolis Star Tribune says, "It's crucial that you know the whole company, not just the department or location where you might work." She continues, "The best detective work combines the newest resources on the Internet and the oldest strategy in job searches -- reaching out to your network of friends, family, colleagues and maybe your fellow altos in the church choir."

"For the factual part of the search, start with the employer's web site. Look past the self-promotion and you can learn a lot about a company... Most have information about job openings, products and services, customers and even government filings -- under shareholder services."

The Internet is a valuable vehicle for doing such research. "Search for any recent articles on the company in the general and the business press... It might just have found the cure for cancer or been sued for sex discrimination." One good search site is www.hoovers.com. Another is the nearest college library.

Sometimes colleges maintain lists of alumni and the organizations they work for. Such a list can sometimes get researchers a contact inside

the prospective company. Doing the research to answer basic questions like these can be very helpful:

- Could you describe the corporate culture?
- What have you found rewarding there?
- Where do you see the company going?
- What is the single biggest problem with the company that you see?
- What is the company's greatest feature?
- How would you describe the management of the company?
- What is it like to work for this organization?

As this is written, it appears that the job market may be opening up a bit. If that is the case, job candidates may be presented with more than one opportunity. It would be beneficial, assuming you really want someone in particular, if that person found positive answers to those background investigation questions. If you are having problems attracting new workers to fill job vacancies, throw this issue into the analysis you do to discover why.

(H. J. Cummins can be reached at workandlife@startribune.com)

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3. EEOC IS CHARGED WITH DISCLOSING TRADE SECRETS

The Equal Employment Opportunity Commission (EEOC) came under fire for failing to consistently describe its policy on disclosure of information received from employers during its investigations. (Venetian Casino Resort v. EEOC, D.C. Cir., No 04-5098, 5/27/05)

The Appellate Court found that "because EEOC failed to consistently describe its current policy on disclosure of confidential information, the Commission could not argue that the judicial review of the Las Vegas casino's trade secrets claim was premature and that there was no reason to believe that the employer would be hurt if EEOC policy permitted disclosure." (Bureau of National Affairs, Employment Discrimination Report, 6/8/05)

"On remand, the District Court's first task will be to ascertain the contours of the precise policy at issue," wrote Judge Harry T. Edwards.

The Venetian went so far as to request an injunction against EEOC to restrain the release of confidential information until the agency established a lawful disclosure policy. In District court, EEOC's lawyers said that under the Commission's current disclosure rule it did not owe the Venetian notice that it was going to disclose documents. On appeal, the EEOC lawyers said just the opposite.

Judge Edwards went on to say, "Venetian has illuminated the consequences of the dispute by alleging that long standing agency policy authorizes EEOC to disclose documents that Venetian has designated as confidential and proprietary to charging parties and their representatives absent prior notice to Venetian. The only factual development left is disclosure of Venetian's confidential materials without notice to Venetian, which of course, is precisely what Venetian is seeking to avoid."

Obviously, disclosure consideration is something employers will be keeping in mind when preparing responses to EEOC charges of illegal discrimination.

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4. FORM I-9 HAS FINALLY BEEN REVISED AND IS NOW AVAILABLE ON WEB

Every employer is responsible for completing and maintaining a Form I-9 (Employment Eligibility Verification) on every employee hired since November 6, 1986, under requirements of the Immigration and Reform Control Act (IRCA).

Well, the U.S. Citizenship and Immigration Service (USCIS) has finalized the revisions and issued an updated form. You can get a copy in the HR Web Store.com "FREE Stuff" department. Use the menu at the left of the page when making your selection. www.hrwebstore.com

Be sure you are retaining the I-9 Forms on all employees, and for 3 years following separation of the employee. And, be sure you are relying ONLY on the documents now listed on the back of the form. Those listed on the original form have changed and some are no longer acceptable. Check out our information in the HR Web Store to bring yourself up to date.

Remember, it's the employer's responsibility to meet all of these requirements.

Gentle Readers,

More about the I-9 Form. And, SHRM releases its 2005 Benefits Survey Results to members.

Bill Truesdell
Editor

IN THIS REPORT (Report #344, 7/8/2005)
---------- (Sent to over 1,500 subscribers)

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1. 2005 SHRM BENEFITS SURVEY RESULTS AVAILABLE TO MEMBERS

To sum it up in a few words, "There were no surprises." That's how we would describe the results of this year's SHRM Benefits Survey report.

"The most commonly offered benefits were paid holidays, prescription drub plans, direct deposit, payroll deductions and dental insurance. Additionally, almost all organizations offered some type of health insurance plan."

"Benefits that help employees balance their work and personal lives remained popular, particularly flexible scheduling options such as flextime and telecommuting. Organizations also offered a number of benefits that helped keep their workforce competitive, such as professional development opportunities and educational assistance."

Employers also recognized that employees value financial benefits by "offering a variety of retirement and financial planning services along with different types of bonuses."

"...the average percentage of salary reflecting the cost of mandatory benefits was 19% and voluntary benefits -- 21%." In most situations, these percentages hadn't changed much over the previous year.

The complete survey is available to members of the Society for Human Resource Management (SHRM). You can get a copy by going to the organization's web site at www.shrm.org .

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2. EMPLOYERS MAY NOT STORE I-9 FORMS ELECTRONICALLY

Since a new law (Public Law 108-390) went into effect on April 29, 2005, employers have had authorization to electronically store federal employment authorization forms. These are commonly known as "I-9Forms." The same law makes scanned electronic signatures legal.

For a long time, employers have been asking for permission to store scanned copies of the completed forms rather than having to retain paper copies.

The U.S. Immigration and Customs Enforcement Service has posted a set of guidelines for employers who wish to convert their I-9 records to electronic storage. You will find them at http://www.ice.gov/graphics/news/factsheets/i-9employment.htm

Most federal enforcement agencies have been charged with the task of inspecting I-9 Forms when visiting an employer's place of business. To make those inspections possible, these new guidelines suggest that any electronic storage system be able to index the I-9 Forms and produce hard copies that are legible and readable.

As you know, I-9 Forms must be retained by employers on all workers hired after November 6, 1986, (Immigration Reform and Control Act) for the duration of employment plus three years. And, you should have the ability to retrieve one or many of the forms with search features of your storage system, just as if they were still in paper format.

Last week we told you about the new I-9 Form. Several readers asked why some of the documents the government says are no longer acceptable for employment authorization are still shown on the back of the I-9 Form as acceptable. We can't answer that question. The U.S. Citizenship and Immigration Service (USCIS) says it hopes to have the list updated and another edition of the I-9 Form available to employers by the end of this year. We'll just have to wait and see. For more information, visit the government's web site at http://uscis.gov/graphics/index.htm

What will happen to employers who accept documents still listed on the I-9 Form but deemed no longer acceptable? We can't answer that question either. We believe a good argument could be made that documents listed on the I-9 Form as acceptable can be accepted by employers in good faith until they no longer appear on the I-9 Form. That's not legal advice, folks. You have to consult with your legal advisor for advice about legal ramifications.

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3. EEOC VIDEO ABOUT MEDIATION AVAILABLE ON WEB

The Equal Employment Opportunity Commission (EEOC) has created a short three minute video about its mediation service entitled, "10 Reasons to Mediate."

The new video is available on its web site at
http://www.eeoc.gov/mediate/10reasons/index.html

You might take a look at the testimonials from several employers that are in the video. Mediation offers a less expensive resolution process for employment discrimination complaints than litigation, or even full investigation by the agency. The amount of time employers have to spend supporting an EEOC investigation is often underestimated.

If you ever have a complaint of employment discrimination filed against your organization, consider working it out through the EEOC's mediation program.

Gentle Readers,

Is your organization among the 50 best small and medium size employers in the country? The list is out. We also take a look this week at the first year results of California's paid family leave program.

Bill Truesdell
Editor

IN THIS REPORT (Report #345, 7/22/2005)
---------- (Sent to over 1,500 subscribers)

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1. PAID FAMILY LEAVE IN CALIFORNIA AFTER ONE YEAR

In the first twelve months of availability, over 176,000 Californians filed claims for Paid Family Leave (PFL) benefits. The program began on July 1, 2004 and is administered by the states Employment Development Department (EDD).

Paid Family Leave was created by the states Legislature to provide partial wage replacement benefits to covered employees who take time off to provide care for a seriously ill child, parent, spouse, registered domestic partner, or to bond with a new child. The program provides up to six weeks of benefits during a one-year period.

Of all the claims filed during the first year, slightly more than 88 percent were for bonding with a new child. Claims for caregivers have consistently run at just under 12 percent.

Of the 176,000 claims, nearly 138,000 have been paid to date. Some claims are disqualified. For example, 13,000 were not approved because they didnt meet basic requirements and another 17,000 were duplicates or incomplete claims. There is an inventory of 4,000 claims currently being processed.

This program is part of the State Disability Insurance (SDI) program. Approximately 13 million workers are covered by SDI and are also covered for this benefit. Workers began contributing toward PFL in January 2004 with increased payroll deductions. Participation is involuntary.

This program does not provide job protection or return rights. Even

so, some workers may have their jobs protected under the federal Family Medical Leave Act or the California Family Rights Act.

More information about PFL is available at www.edd.ca.gov or by calling toll-free 1-877-BE-THERE.

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2. CALIFORNIA MEAL AND REST PERIOD REGULATIONS

For some time now, California has been attempting to rewrite its rules about meal and rest period requirements.

The California Division of Labor Standards Enforcement (DLSE) is in its third public comment period regarding these modification proposals. Comments must be submitted by July 25, 2005.

New language in this third proposal reads, "Any amount paid or owed by an employer to an employee under Labor Code section 226.7, subdivision (b), for failing to provide the employee a meal period or rest period where applicable is a penalty payable to the employee, without abatement or reduction, and not a wage."

This new language is important because of a ruling on May 11, 2005, in the case of Hartwig v. Orchard Commercial Inc. (Case No. 12-56901RB)
Following that case, the Labor Commissioner issued a memorandum to DLSE to clarify the issue of "authority available to the [DLSE] on the issue of meal and rest breaks..."

The Hearing Officer in Hartwig determined that the amount owed to the employee for the missed meal period was a penalty not a wage. The difference is important because under state law a penalty carries a one year statute of limitations and a wage carries a three year statute of limitations.

For the complete text proposal go to www.dir.ca.gov/dlse/MRPRegs.htm .

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3. 50 BEST SMALL & MEDIUM SIZE PLACES TO WORK

HR Magazine, in its July 2005 issue, has published its list of the 50 best small and medium places to work in this country. Actually, it is two lists of 25 entries each.

The number one small company to work for? Analytical Graphics, Inc. of Exton, PA, a software publisher. It boasts 236 workers in the U.S., up 39% from last year. And, 69 of those folks have 6 or more years of service. The company provides an average of 40 hours of training each year for each employee. Cost of the training amounts to $1,250 per person. It pays 100% of the health care premium for its employees and 98% of the premium for dependent coverage.

Employee development is a major criterion in selection of employers to be represented on these lists. Yet, Analytical Graphics was not the biggest spender for employee training. There are other issues

involved in becoming the number one small employer in the country.

The company provides 40 hours of management training to its managers each year. It is also possible for workers to create their own development opportunities. Besides good pay and well-trained managers, the company offers people a chance to grow and expand into their own level of competence.

Among medium size companies, Genencor International Inc. of Palo Alto, CA tops the list. In the biotechnology industry, the company has 643 U.S. workers, 337 of whom have 6 or more years of service. There are 43 maximum days of paid leave and 40 hours of training each year for every employee.

The company offers internal Ph.D. programs, on-site training and workshops, specialized off-site courses, and education assistance. Scientists published articles are bronzed and given prominent placement in the office.

Check out the rest of the list entries. Maybe your company is among them.

Gentle Readers,

The EEOC has approved its reorganization plan, and issued new guidelines on complaint timeliness. And, California's Supreme Court has weighed in on the question of third party harassment when a supervisor has sex with subordinates that then get special favors.

Bill Truesdell
Editor

IN THIS REPORT (Report #346, 7/29/2005)
---------- (Sent to over 1,500 subscribers)

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1. EEOC APPROVES "REPOSITIONING PLAN"

The Equal Employment Opportunity Commission (EEOC) has approved its reorganization plan. The action took place at its July 8, 2005 meeting.

Under the plan, no jobs will be lost and all current EEOC offices will remain open. Recognizing demographic and workload shifts, additional offices will be opened in Las Vegas, Nevada, and Mobile, Alabama.

The plan also calls for expanding jurisdictional areas of district offices, which will take from 23 to 15 the number of offices headed by district directors and regional attorneys. The Commission is expanding its number of field offices from one to nine. It will also have 15 area offices and 14 local offices, including the two new locations. The number of managers and administrators will be reduced and front-line staff increased so conduct of investigations will be enhanced. High priorities within the new plan are the Commission's mediation program, litigation and providing outreach educational services to the community.

Establishment of the National Contact Center, on a pilot basis, was also part of this reorganization program.

The full announcement can be seen at
http://www.eeoc.gov/abouteeoc.reposition/plan.html

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2. EEOC REVISES GUIDANCE ON FILING TIMELINESS

Rules continue to evolve. One such example is the definition of timeliness in filing a charge of illegal discrimination with the Equal Employment Opportunity Commission (EEOC). Regulations have said for many years that charges must be filed within one year of the event that precipitated the charge. If they are not, they are not considered timely and cannot be accepted by the EEOC for investigation and remedy.

Well, back in 2002, the U.S. Supreme Court issued a ruling in a case called "National Railroad Passenger Corp. v. Morgan" (536 U.S. 101, 2002) which said that timeliness of an employment discrimination charge depends upon whether it involves a discrete act or a hostile work environment claim. A discrete act, such as failure to hire or termination, is only independently actionable if it occurred within the filing period. In contrast, all of the incidents that make up the same hostile work environment claim are actionable as long as at least one incident occurred within the filing period.

Now there are new EEOC Compliance Manual revisions that reflect these changes in interpretation. Titled, "Threshold Issues," the new section addresses these time limitations on filing charges. There are also questions and answers that focus on the changes being made. You can find the new Compliance Manual information at www.eeoc.gov/policy/compliance.html .

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3. CALIFORNIA BROADENS SEXUAL HARASSMENT LIABILITY

Last week, the California Supreme Court ruled in a 6-0 decision, that employers can be sued for sexual harassment when a manager's consensual sexual relationship with co-workers creates a hostile work environment for other employees. It is not necessary for the other employees to have been harassed directly.

The case was "Miller v. Dept. of Corrections" (Calif. Supreme Court No. S114097, 2005) You will find a PDF version of the opinion at http://www.courtinfo.ca.gov/opinions/documents/S114097.PDF

The Court said, "...although an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management."

Special treatment for those subordinates involved in a sexual relationship with the supervisor can now be claimed as sexual harassment by co-workers of the subordinate. You might want to

update your sexual harassment prevention training program for supervisors and managers if you have workers in California.

Gentle Readers,

The OFCCP has finalized its "housekeeping" regulations, bringing into consistency the requirements of Disabled, and Veterans AAPs with those required for Minorities and Women AAPs. Then we learn about reading as a major life activity and take a listen to the federal government's discussion about using temporary workers.

Bill Truesdell
Editor

IN THIS REPORT (Report #347, 8/5/2005)
---------- (Sent to over 1,500 subscribers)

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1. READING IS RULED TO BE A MAJOR LIFE ACTIVITY

Just a month ago, the Ninth Circuit Court of Appeals ruled that reading is a major life activity as it might apply to the Americans with Disabilities Act of 1990. The case was Head v. Glacier Northwest, Inc. (9th Cir., No. 03-35567, July 6, 2005)

It wasn't that Head, a former employee of Glacier, couldn't read. He could. It was rather that he said he "basically did not read for more than three to five minutes at a time." He explained that if he looked at written material for too long he got confused. The court said this was enough to establish a genuine issue of material fact that he was substantially impaired in reading.

This was in addition to his battle with Bi-Polar Disorder and his inability to sleep more than a few hours each night because of the medication he was taking for his disorder. His condition was such that he didn't leave his house for weeks at a time.

Head claimed he was impaired in sleeping, interacting with other people, thinking and reading. The court accepted that claim as sufficient to create issues of material fact.

If someone in your workforce claims they have difficulty reading, process that as a request for accommodation and make an assessment about the need for some specific accommodation. There may be none necessary, but at least you will have been able to document your appropriate response.

For more about the ruling go to
http://caselaw.lp.findlaw.com/data2/circs/9th/0335567p.pdf

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2. OFCCP ISSUES FINAL RULE FOR HOUSEKEEPING ITEMS IN REGS

It may be called housekeeping, perhaps. The regulatory updates published in the Federal Register on June 22, 2005, "cleaned up" several issues of inconsistency for the Office of Federal Contract Compliance Programs (OFCCP).

OFCCP has authority to enforce federal laws such as the Civil Rights Act of 1964 and its successors, the presidential Executive Order 11246, the Rehabilitation Act of 1973 and the Veterans' Readjustment Assistance Act (VEVRAA). That enforcement is focused on federal contractors (organizations selling goods and/or services to the federal government) under certain conditions. The agency's ultimate authority is to prevent contractors from participating in future contracts, in essence preventing them from getting revenue from the federal government.

While that ultimate penalty happens infrequently, agency evaluations of contractor compliance with regulatory requirements occurs much more frequently. And, those evaluations can commandeer untold numbers of contractor hours. There are expenses associated with being federal contractors.

So, the new regulations were proposed on October 12, 2000, when OFCCP published a Notice of Proposed Rulemaking (NPRM). Only two organizations responded with comments about the proposals. And, now, the rule proposals as they have been amended, are being made final.

Here are the changes:

- Minorities and Women AAP (41 CFR 60-1)
  - In a Compliance Check the contractor may decide whether to provide documents on-site or off-site.
  - OFCCP practice is to resist release of documents provided by contractors where the contractor is still in business and indicates (and OFCCP agrees) that certain data are confidential and sensitive.
  - Renumbers section 60-1.33

- Veterans AAP (41 CFR 60-250)
  - Adds "Compliance Evaluation" to the definitions.
  - In a Compliance Check the contractor may decide whether to provide documents on-site or off-site.
  - Cosmetically updates the section about conciliation agreements.
  - Permits conciliation agreements as a settlement tool.

- Disabled AAP (41 CFR 60-741)
  - Adds "Compliance Evaluation" to the definitions.
  - Requires contractors to assist OFCCP with

compliance evaluations and other activities. Gives OFCCP permission to conduct compliance evaluations.
- Permits OFCCP to review data off-site.
- Permits conciliation agreements as a settlement tool.
- Permits OFCCP to forward cases to Solicitor of Labor for enforcement.
- Allows OFCCP to collect additional contractor information when contractor requests to be reinstated following a period of ineligibility for government contracts. (OFCCP can conduct another compliance evaluation.)
- Changes "compliance review" to "compliance evaluation."

For the most part, these changes are cosmetic and clerical. For a copy of the Federal Register posting, go to www.gpoaccess.gov/fr/advanced.html and then select or enter the following:

- 2005 FR, Vol. 70
- Final Rules and Regulations
- Specific Date: 06/22/2005
- Search: "Department of Labor"

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3. REPORT ADVOCATES RELYING MORE ON TEMP WORKERS FOR FED AGENCIES

According to the Federal Manager's Daily Report for July 29, 2005, the nearly exclusive use of full-time, full-year federal employees impedes managerial flexibility when dealing with budget cuts or increases in demand. So says a new report from the IBM Center for the Business of Government advocating the use of a "core-ring" personnel model.

The model consists of a core of permanent staff surrounded by a ring of "less permanent" employees working under non-standard arrangements brought in through a staffing agency -- a model currently used by the Office of Naval Research-Naval Research Laboratory, according to the report.

It said "ring" workers could be let go without much disruption to the agency's core workforce if need be, something private sector firms have found helps keep down the cost of labor and benefits and can serve as a way to retain a pool of potential full-timers.

You can subscribe to this daily report at www.fedweek.com. The newsletters are free.

Gentle Readers,

The White House has proposed that federal agencies should evaluate the job performance of workers and base future pay increases on that performance. OFCCP sends final rules to OMB on the issues of Internet job applicants and recordkeeping. And, finally, the EEOC issues new guidance for working with employees diagnosed with cancer.

Bill Truesdell
Editor

IN THIS REPORT (Report #348, 8/12/2005)
---------- (Sent to over 1,500 subscribers)

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1. WHITE HOUSE PROPOSAL FOR FEDERAL PERFORMANCE MANAGEMENT SYSTEM

The Office of Management and Budget's recently released draft of its government-wide personnel reform bill -- the so-called Working for America Act of 2005 -- details a performance management system roughly based on those being put in place in the Departments of Defense and Homeland Security.

According to subchapter II -- "performance appraisal for the general workforce" -- performance would be rated generally once each year, and supervisors and managers would be held accountable for effectively managing the performance of employees under their supervision.

Supervisors and managers would be held accountable for clearly communicating expectations and holding employees accountable, making meaningful distinctions among employees, fostering and rewarding excellent performance, addressing poor performance, and assuring that employees are rated.

The White House proposal is just draft legislation that hasn't even been introduced yet, and its chances of being passed at all, let alone this year, are questionable. Civil service leaders on Capitol Hill have been non-committal in their reactions. However, hearings are expected in the fall.

Under the administration's plan, appraisal systems would include an unacceptable performance rating, a fully

successful rating and at least one level above that for employees other than those in entry level of developmental bands.

Pay determinations would be based on this "rating of record," as would awards, eligibility for promotion, additional service credit in a reduction in force, or other actions -- but agencies would not be allowed to place a quota or cap on summary rating levels.

The draft specifies that performance expectations corresponding to agency missions, strategic goals, etc., be put in writing at the beginning of the appraisal period.

Performance measures for supervisors and managers would include planning, assessing, monitoring, developing, correcting, rating, and rewarding subordinate employees' performance.

However, some performance expectations would not need to be in writing and could be "amplified through particular work assignments or other instructions."

According to the draft, supervisors would have to involve employees in the development of performance expectations as far as practicable, though management would have the final say over that.

If a supervisor found an employee's performance unacceptable he or she could assign remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, or an adverse action.

Employees could still appeal adverse actions based on unacceptable performance to the Merit Systems Protection Board. The draft can be found at www.results.gov.

(SOURCE: Federal Manager's Daily Report, August 1, 2005, www.fedweek.com)

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2. OFCCP NEARS FINAL RULE ON INTERNET APPLICANT DEFINITION

The Office of Federal Contract Compliance Programs (OFCCP) has completed the final edits on its rule governing recordkeeping requirements for federal contractors who accept job applications over the Internet. OFCCP is part of the U.S. Department of Labor and is charged with enforcing equal employment opportunity laws in the federal contractor community.

On July 5, 2005, OFCCP shipped its final proposal to the Office of Management and Budget (OMB), in the White House. There it will undergo a 90-day review. Following OMB approval, it will be published again in the Federal Register. Look for that to

happen sometime around August 22.

These new rules will contain the agency's final definition of "Internet Applicant," something which has caused a political rift among OFCCP, the EEOC and the Department of Justice.

When finalized, this new rule will read:

For an individual to be considered an "Internet applicant four criteria must be met: the individual must have submitted an expression of interest in employment through the Internet or related technologies; the employer must have considered the job seeker for employment in a particular open position; the job seeker's expression of interest must have indicated that he or she possesses the advertised, basic qualifications for the position; and the job seeker did not subsequently indicate no longer having an interest in employment in the position. "Advertised basic qualifications" may not involve comparing the qualifications of one person to another, but must be job related, and must be objective. "A third party, unfamiliar with the employer's decision process, would be able to evaluate whether the job seeker possesses the qualifications without more information about the employer's judgment."

All records related to either the submission of candidacy or the selection process must be retained for up to two years under federal regulations. This new rule will include records of Internet submission as part of the requirement for retention.

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3. EEOC ISSUES GUIDANCE ON CANCER AS A DISABILITY

The Equal Employment Opportunity Commission (EEOC) recently issued new guidance on employment rights of people with cancer under the Americans with Disabilities Act of 1990. You can access this new document at http://www.eeoc.gov/facts/cancer.html

EEOC Chair Cari M. Dominguez noted, "Because of the significant advances in detection and treatment, cancer no longer is the 'death sentence' it was a century ago. Yet people recently diagnosed with cancer and those with a history of cancer still experience discrimination at work based on old stereotypes and unfounded fears. Simple accommodations, like leave or a flexible schedule to allow for treatment, make it possible for many people with cancer to continue to be valuable contributors in the workplace."

This new guidance addresses such topics as:

- When cancer is a disability under the ADA
- When an employer may ask an applicant or employee questions about cancer and how it should treat voluntary

disclosures
- What types of reasonable accommodations employees with cancer may need

The Commission has classified this new publication as part of its effort to advance the goals of the New Freedom Initiative, President Bush's comprehensive strategy for the full integration of people with disabilities into all aspects of American life.

Gentle Readers,

A new NLRB ruling may cancel common policies against employees discussing their pay. Circuit Court rulings prevent employers from a timeliness defense if they don't have EEOC poster in the workplace. And, the California Supreme Court strengthens benefits for domestic partners.

Bill Truesdell
Editor

IN THIS REPORT (Report #349, 8/19/2005)
---------- (Sent to over 1,500 subscribers)

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1. NEW RULING THAT WORKERS MAY NOT BE BARRED FROM DISCUSSING THEIR COMPENSATION

Thanks to a tip from Linda Grossman, EEO/AA consultant (PLANAAP@aol.com)
we bring you information about a new National Labor Relations Board (NLRB) ruling that wipes out many employer policies across the country.

With one broad brush, the NLRB decided it is no longer right for employers to prohibit workers from discussing their pay with one another. Up until now, it has been common for employers to have policies that provide disciplinary action, sometimes including dismissal,
for any worker who discusses their pay with another worker.

Well, except in California, of course. Since AB 2895 was passed in 2002 creating California Labor Code Section 232, no employer in California has been able to legally maintain that sort of policy. Specifically, that Labor Code section says, "No employer...may... require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages." It goes on to add, that no employer may "require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages." And, no employer may "discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages."

In the new NLRB action, the Board adopted the administrative law judge's finding that Cintas Corp. violated the National Labor Relations Act by maintaining the following confidentiality rule

in its partner reference guide:

> "We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters."

The Board agreed with the judge that the rule's unqualified prohibitions of the release of "any information" regarding "its partners" could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with their union. Therefore, it found the rule is unlawful.

For a complete copy of the NLRB ruling to go
http://www.nlrb.gov/nlrb/shared_files/decisions/344/344-118.htm
The case is "Cintas Corporation and Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE)." (Cases 13-CA-40821, 13-CA-40885, 13-CA-41030, 28-CA-18488, 29-CA-25421, and 29-CA-25498, June 30, 2005)

It is now quite clear that excessively broad policies will not be supported when challenged. As the guardian of your organization's policies, you must now begin the process of determining if any of your policies must be modified in light of this new ruling. Be sure you talk with your legal advisor in the process.

Does this ruling apply to employers who have no union represented workers? A good question. We'll have to see. If you are in doubt, discuss the question with your attorney.

Any time you make a policy change, you should give advance warning to employees before the change is implemented. And, be sure you get a signed acknowledgement that each employee has received and read the new policy statement.

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2. DISCRIMINATION COMPLAINT DEADLINE SUBJECT TO EQUITABLE TOLLING

If an employee or former employee wishes to file a complaint of illegal discrimination with the Equal Employment Opportunity Commission (EEOC) it must be done within 180 days, or within 300 days in deferral states. The EEOC has enforcement authority over Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA).

Deferral states are those with their own civil rights enforcement agency that is prepared to accept and process complaints of illegal employment discrimination. About half of the states have such agencies.

According to at least two Appellate Court rulings, employers who fail to post the required EEOC notice (or its equivalent under state law) subject themselves to an inability to use timeliness as a defense in challenges to their policies or actions.

You will find more information about these cases at:
http://www.management-advantage.com/products/courtcases.htm

So, if you don't yet have current employment posters in each of your work places, we can help. Simply go to http://www.hrwebstore.com/products/posters.htm Once there you will be able to select the posters you need and order them on the spot. Don't delay. You don't want to be an employer who can't defend against a discrimination charge, just because you failed to post the required materials.

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3. CALIFORNIA SUPREME COURT EXPANDS BENEFITS FOR DOMESTIC PARTNERS

California's "Domestic Partner Rights and Responsibilities Act" (DPRRA) went into effect on January 1st of this year. It was written to assure domestic partners received the same rights, duties, benefits and responsibilities that spouses enjoy under that state's laws.

In its first test, the California Supreme Court has proclaimed that DPRRA creates broad responsibilities for businesses to extend to registered domestic partners the same benefits as are offered to spouses.

The case was Koebke v. Bernardo Heights Country Club (Calif. Supreme Court No. S124179, 2005). You can get a copy of the decision at http://www.courtinfo.ca.gov/opinions/documents/S124179.PDF

In its opinion, the Court wrote, "Domestic partners registered under the California Domestic Partner Rights and Responsibilities Act of 2003 (the Domestic Partner Act)...are equivalent of spouses for the purposes of the Unruh Act and a business that extends benefits to spouses it denies to registered domestic partners engages in impermissible marital status discrimination."

Further, the Court said, "...distinctions drawn by businesses between married couples and such unmarried couples and individuals that are supported by legitimate business reasons do not constitute impermissible marital status discrimination under the Act."

Does this mean employers must offer employment benefits to registered domestic partners if they offer benefits to married employees? We think it does, but you should discuss the question with your legal advisor to be sure you place this ruling in proper context with your organization's policies. Obviously, the ruling will only have impact on employers within the state of California. But, ... if you are a firm headquartered outside California with people working in California, put this on your agenda. And, if you have one policy about benefit eligibility for employees in California, you might also discuss whether or not to have the same policy for all employees.

Gentle Readers,

Simple accommodation can prevent serious religious discrimination complaints, and save employers large amounts of money. H-1B visas are again in the news, and California has moved forward with a new employer training requirement regarding heat-related illness. Finally, OFCCP has announced it will begin enforcing requirements for the Beck poster.

Bill Truesdell
Editor

IN THIS REPORT (Report #350, 8/26/2005)
---------- (Sent to over 1,500 subscribers)

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1. EMERGENCY REGULATIONS REQUIRE CALIFORNIA EMPLOYERS TO TRAIN

On August 12, 2005, the California Occupational Safety and Health Standards Board voted to adopt emergency regulations for heat illness prevention. The emergency regulations focus on actions that can be taken immediately by employers and employees to prevent further heat stress illnesses or fatalities.

The new regulations will require:

- Education of employees and supervisors likely to be exposed to heat stress on how to prevent heat illness and what to do should it occur

- Re-state existing law requiring water to be available at all times and ensure workers understand the importance of frequent consumption of water

- Require that access to a shaded area is available to any worker suffering from heat illness or needing shade to prevent the onset of illness.

The new regulations have been sent to the Office of Administrative Law (OAL) which has 10 days to approve them. Once approved, the new regulations will be in effect for 120 days. During that time Cal/OSHA will hold hearings to assess the value of making these regulations permanent.

Guidance is available on the Internet at
http://www.dir.ca.gov/dosh/dosh%5Fpublications/aship%2Dheatstress.pdf

For more information about the new emergency regulations go to
http://www.dir.ca.gov/dirnews/2005/ir2005%2D33.html

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2. CAP ON H-1B VISAS ALREADY REACHED FOR 2006

The U.S. Citizenship and Immigration Services (USCIS) has announced that, as of August 10, 2005, all of the 58,200 H-1B visas allocated to Fiscal Year 2006 had been issued or had applications pending. FY 2006 will begin on October 1, 2005.

Although 65,000 H-1B visas are allocated to each fiscal year, 6,800 are reserved for nationals of Singapore and Chile. An as yet unknown number of unused Singapore/Chile H-1B visas from Fiscal Year 2005 will be returned to the general pool of H-1B visas for Fiscal Year 2006.

All applications for H-1B visas received after August 10th will be returned. Unless Congress takes action to increase the cap, the next time employers will be able to submit H-1B visa applications will be on April 1, 2006. Those applications would, if approved, allow workers to start on October 1, 2006.

More information is available on the USCIS web site at
www.uscis.gov .

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3. SIMPLE DRESS CODE ACCOMMODATION COULD HAVE PREVENTED RELIGIOUS ACCOMMODATION COMPLAINT

It took a court case and a consent decree to resolve an issue of one employee's religious beliefs versus a national dress code policy. While the employer, Blockbuster Inc., made no admission of liability, they agreed to pay $50,000 to an employee who was fired after refusing to remove his yarmulke when he was working at a Phoenix, AZ video store.

(EEOC v. Blockbuster Inc., D. Ariz., No. CIV-04-2007, consent decree approved 6/7/05)

The consent decree will last for two years. The EEOC reports a 60% rise in religious discrimination cases in the last ten years. The company said its national policy has been changed to allow requests for religious accommodation to be handled at each store on a case-by-case basis.

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4. OFCCP ANNOUNCES IT WILL ENFORCE REQUIREMENT FOR BECK POSTER

The Office of Contract Compliance Programs (OFCCP) has announced

it will begin enforcing compliance with Executive Order 13201, Notice Employee Rights Concerning Payment of Union Dues. That notice requires federal contractors to post a poster called the "Beck" notice which informs workers that they have certain federal rights related to union membership and the use of their union dues and fees.

In addition the Beck notice clause must be included in contracts and purchase orders. Exemptions to these requirements include:

- Employers with fewer than 15 employees
- Contracts of less than $100,000
- Contracts or contract modifications based on solicitations issued before April 18, 2001
- Non-union workplaces
- Employers in right-to-work states
- Extra-territorial work

OFCCP will begin its enforcement activities during compliance reviews, most likely on-site visits.

Non-compliant contractors are subject to sanctions, including termination of government contracts and debarment.

For more information about the Beck notice requirements go to www.dol.gov/esa/regs/compliance/olms/EO13201_CA.htm

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Gentle Readers,

This week there are new national guidelines from the EEOC about dealing with cancer in the employment arena, and a new set of rules for California employers that are supposed to help prevent heat-related illness in the workplace. And, you might want to know that the final vacancy on the EEOC is about to be filled, if the U.S. Senate approves.

Bill Truesdell
Editor

IN THIS REPORT (Report #351, 9/2/2005)
---------- (Sent to over 1,500 subscribers)

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1. EEOC ISSUES GUIDELINES FOR CANCER UNDER ADA

On July 26, 2005, the Equal Employment Opportunity Commission (EEOC) released its latest set of guidelines for employers who must comply with requirements of the Americans with Disabilities Act (ADA). This time the subject is accommodation requirements for people with cancer.

It was exactly 15 years ago, on July 26, 1990, that President George H. W. Bush signed the landmark legislation banning discrimination in employment on the basis of disability. ADA offers other protections as well.

The EEOC says that approximately 40 percent of the more than 1 million Americans diagnosed each year with some form of cancer are working-age adults. An additional 10 million people have a history of cancer.

The new question-and-answer document is the fourth in a series of publications on the ADA's application to specific disabilities. It addresses such topics as:

- When cancer is a disability under the ADA.
- When an employer may ask an applicant or employee questions about cancer and how it should treat voluntary disclosures.
- What types of reasonable accommodations employees with cancer may need.

You can get a copy of this new guidance at

www.eeoc.gov/facts/cancer.html .

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2. LAST EEOC VACANCY FILLED BY PRESIDENTIAL APPOINTMENT

On July 28, 2005, President Bush announced that Christine M. Griffin would be appointed to fill the vacant Democratic commissioner's position on the Equal Employment Opportunity Commission (EEOC). The following day he announced that he would nominate EEOC Vice Chair Naomi Earp, a Republican, to a second term at the Commission.

Ms. Griffin is currently director of the Disability Law Center of Massachusetts. She will fill the remainder of a five-year term held by former commissioner Paul Steven Miller who left the position a year ago. His term, now her term, will expire on July 1, 2009.

Ms. Griffin was previously an Attorney Advisor to the former EEOC Vice Chairman Paul Igasaki.

Senate confirmation is required.

(Source: BNA Employment Discrimination Report, 8-3-05.)

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3. CALIFORNIA APPROVES EMERGENCY HEAT STRESS REGULATIONS

On August 12, 2005, the Cal/OSHA Standards Board unanimously approved emergency rules that will help prevent heat stress illness in California workplaces. The rules had to be approved by the State Office of Administrative Law (OAL). That happened last week and the new rules are now in effect for 120 days.

During this initial 120-day period, Cal/OSHA and the Labor and Workforce Development Agency will work to create and adopt permanent regulations.

When it announced adoption of these new emergency regulations, Cal/OSHA said they "apply equally to all who work outdoors in conditions that induce heat stress -- from farm worker to the roofer to the laborer paving the highway.

According to the California Chamber of Commerce, definitions in the regulations are unclear and will pose a problem for employer compliance. They suggest that employers call the Cal/OSHA Consultation Unit for specific answers on how to apply the emergency regulations in their workplaces. The unit can be reached by calling 800-963-9424 or by email at InfoCons@dir.ca.gov.

To get a PDF copy of the 3-page emergency rules, to go www.dir.ca.gov/dosh/Heatillnessregtext-8-22-05.pdf

If you have any employees in California who work out-of-doors you may find yourself subject to these new rules. We suggest you print a copy and add them to your safety materials. And, be sure you discuss the subject with your management team that supervise those outside workers.

Gentle Readers,

We add our prayers for the victims of Hurricane Katrina. We encourage you to assist your own employees who may wish to organize contribution efforts in your organization. Go to http://www.give.org/ for guidance from the Better Business Bureau about organizations that are legitimately going to use your money in the proper way...to help storm victims.

Bill Truesdell
Editor

IN THIS REPORT (Report #352, 9/9/2005)
---------- (Sent to over 1,500 subscribers)

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1. DO YOU HAVE A POLICY ABOUT EMPLOYEE BLOGS?

BLOGGING, maintaining a diary or other commentary on a web site, became popular in the early years of this decade. Now, half way through that time period we find that employers are being forced into managing employee behavior on line.

Richard J. Dalton, Jr., Staff Writer for the Hartford Courant, analyzed the situation employees place themselves in when they write and post nasty things about their employers or bosses. In recent years, many of them have been terminated or disciplined just short of termination.

Employers have a duty to take action when an employee makes threatening remarks towards co-workers or bosses, whether those remarks are made orally or in writing posted in a BLOG. Employees sometimes think they are writing things that will be read only by their friends or close associates. As it turns out, according to Dalton, employees are discovering that someone reads the postings, sends copies via email to executives at the employee's company, and then the company takes action.

Such "episodes point to a need for companies to develop policies on blogging..." "Only 23 percent of companies surveyed by the American Management Association reported having written policies about blogging, compared with 84 percent that have established e-mail policies."

If you don't yet have a policy about employee blogging, you

should place discussion about that on your agenda. Consider such things as:

- Use of company time to create or update the blog.
- Use of company computer systems to create or update the blog.
- Definition of "criticism" to be applied to determine if something on an employee blog is unacceptable.
- Exploration of discipline to be used if an employee gets into trouble because of blogging.
- The role Human Resources should play in working with employees on the issue of personal blogging.

As with other issues, if you give some thought to these things before they come up you will be in a much better position when you do have to respond to real events.

And, as we have always cautioned, be sure you include your management attorney in the discussions about policy changes in your organization.

(Source: "When Bosses & Blogs Collide," Richard J. Dalton, Jr., Hartford Courant, courant.com)

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2. EMPLOYERS HELPING WITH HURRICANE KATRINA DISASTER

While we see images of misbehavior on TV news reports, there are many stories of heroism and support in the midst of America's worst natural disaster. Employers with workers in cities affected by Hurricane Katrina are scrambling to provide assistance.

Company managers are renting U-Hauls to deliver generators to employees, and workers are making home-cooked meals for colleagues who were forced from their homes by the storm. The outreach is coming from employees taking their own initiative, as well as company support.

Some examples from the numerous actions employers are taking:

- BellSouth is setting up mobile tents in Louisiana and Mississippi. Employees can rest in the sleeping tent, get three meals a day for themselves and their families, do their laundry, shower, get water and ice and use air mattresses. The company has provided employee assistance counselors, toll-free numbers and email so employees can stay in touch with one another.

- Comcase, headquartered in Philadelphia has affected employees in Mobile, Alabama, and southern Mississippi. Some managers are renting U-Hauls to bring supplies such as tarps, generators, medicine, flashlights, water, ice and gloves to employees. Others are making meals for co-workers.

- Oakwood Worldwide, a provider of temporary corporate housing for travelers, has employees in Alabama,

Mississippi and Louisiana working remotely from their homes. The company has provided phone counseling and group therapy for affected employees. It is also working to find temporary housing for client's employees who were in cities feeling the storm's impact.

(Source: USAToday.com, 8/31/2005)

SIDEBAR

But, what about employer obligations and choices to be made regarding policies immediately following such a disaster as Katrina? Littler Mendelson has published some guidance for employers that deals with subjects ranging from continuing compensation to helping affected employees find new housing to issues of disability accommodation. It is well worth the read and you might want to tuck a copy away for future reference, assuming you are not one of the employers who can use its suggestions immediately. There will always be a "next time." You will find this excellent resource at http://www.littler.com/nwsltr/ASAP_WakeofHurricaneKatrina_9_05.htm

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3. NEW MINNESOTA LAW ALLOWS EMPLOYERS TO PAY WORKERS USING PAYROLL CARD ACCOUNTS

Minnesota law now allows employers to pay employee wages via payroll card accounts. Employers are not required to use payroll card accounts, however, even if requested by employees.

With a payroll card account, employers electronically transfer an employee's net wages to the employee's account each payday. Upon transfer, the wages are owned by the employee. The employee must be allowed to access the account via a free transaction, typically with a debit, ATM or similar card. The employer will still need to supply the employee a written statement of earnings and deductions made.

Switching to the new system must be approved by the state Department of Labor in advance of implementation. There are many forms to be completed and employee announcements to be made before starting the new pay process.

Use of a payroll card account cannot be a condition of hire or of continued employment, and employers may use the accounts only for those employees who voluntarily consent in writing on a disclosure form. There may not be any fees charged by the employer for workers who elect to use the new system.

For more information, visit Fredrikson & Byron, P.A. at www.fredlaw.com/articles/employment/empl_0509_mmk.html

(Source: www.fredlaw.com , Mary M. Krakow, Employment and Labor Group, mkrakow@fredlaw.com)

Gentle Readers,

The I-9 Form rules have been suspended for victims of Hurricane Katrina. And, OFCCP has suspended AAP requirements for all Hurricane Katrina-related contracts. The EEOC is moving quickly to establish an electronic submission capability for EEO-4 data and DOL releases a new resource for employers about federal employment laws.

Bill Truesdell
Editor

IN THIS REPORT (Report #353, 9/16/2005)
---------- (Sent to over 1,500 subscribers)

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1. DOL RELEASES NEW EMPLOYMENT LAW GUIDE FOR EMPLOYERS

The U.S. Department of Labor (DOL) announced the availability of an updated version of the Employment Law Guide. Located at www.dol.gov/compliance/guide , this publication helps the regulated community, particularly small businesses, understand their rights and responsibilities under the major federal employment laws administered by the Department.

Updated to reflect recent regulatory and statutory changes, the new Employment Law Guide summarizes coverage, basic requirements, employee rights, compliance assistance available and penalties for non-compliance for each of DOLs most widely applicable laws. Written in plain language - not legalese - it is geared toward employers needing introductory information to develop wage, benefit, safety and health, and nondiscrimination policies for their businesses.

The Guide will be available in print, for free, in October. To order a copy, call DOLs Toll-Free Help Line at 1-866-4-USA-DOL. The Spanish version will be available online at www.dol.gov/compliance/guide/ and in print later this fall.

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2. OFCCP EXEMPTS KATRINA-RELATED CONTRACTS FROM AAP REQUIREMENTS

Deputy Assistant Secretary of Labor, Charles E. James, Sr., on September 9, 2005, issued a "Memorandum to All Contracting Agencies of the Federal Government." In it he cites Hurricane Katrina as the event that required exemption of affirmative action requirements in contracts enacted for relief of storm damage. He also specifies contract clauses to be added to these Katrina-related contracts that will allow the exemption from audit of contractors' affirmative action efforts.

James also points out that all Equal Employment Opportunity (EEO) laws and regulations will remain in effect and those requirements are not waived for any federal contract.

If you are involved in contracting for Hurricane Katrina-related recovery efforts you will want a copy of this memorandum for your files.

Get your copy by going to the HR Web Store, "What's New" department. www.hrwebstore.com/products/whatsnew.htm While there you might take a quick look around at the books and other products we have added recently. Things are always changing. It pays to visit often so you won't miss out on the tools you need for your job.

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3. I-9 REQUIREMENTS SUSPENDED FOR HURRICANE VICTIMS

On September 6, 2005, the U.S. Department of Homeland Security (DHS) announced that it will not sanction employers for hiring victims of Hurricane Katrina who are unable to provide documentation required to complete the I-9 Form.

All U.S. employers are responsible for completing and retaining Employment Eligibility Verification (I-9) Forms for individuals they hire. This form requires employers to verify employment eligibility and establish identity through original documents presented by the employee. For victims of Hurricane Katrina, many individuals lack these documents as a result of being evacuated from their homes, loss or damage to personal items and records, and ongoing displacement in shelters and temporary housing. Additionally as a result of the widespread damage and destruction to government facilities in the area affected by the hurricane it can be expected that many victims will be unable to apply and receive new documents in the period of time required by the employment verification rules.

Therefore, the DHS has suspended normal I-9 requirements in this instance for 45 days. After that time, DHS will reassess the situation and determine if it is necessary to extend the suspension for a longer period. If you have employees in this affected category, you will want to track this situation closely.

For more information go to
http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0735.xml

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4. EEOC WORKING ON SYSTEM FOR ELECTRONIC FILING OF EEO-4

On July 18, 2005, the Equal Employment Opportunity Commission (EEOC) approved a plan to develop a system that would allow public employers to file their EEO-4 survey responses electronically.

The EEO-4 survey is one of the series of Standard Form 100 documents designed to collect demographic information about America's workforce. While the EEO-1 form is used for private employers, the EEO-4 form is used for state and local governments. EEO-1 forms must be filed each year. The public sector form is required only every other year.

This is one of the years governments will have to complete EEO-4 documents. In the past, forms were mailed to the Joint Committee on Reporting in Virginia. While that is expected to remain an option, the EEOC says it wants to move to electronic submission because it will save money for the agency. If the government does not have to enter data sent in on paper documents, they can eliminate a step in the data analysis process.

The Commission objective is to have the new system ready to capture this year's data which is due by September 30th. Government entities should expect to receive more information with their EEO-4 instructions.

Gentle Readers,

FMLA is back in the news along with an increase in mileage rates by the IRS and some new EEOC statistics.

Bill Truesdell
Editor

IN THIS REPORT (Report #354, 9/30/2005)
---------- (Sent to over 1,500 subscribers)

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1. FOURTH CIRCUIT FORBIDS PRIVATE RELEASES OF FMLA CLAIMS

Most Human Resource professionals have been involved with employee claims of one kind or another. Working with either internal or external legal advisors, HR experts routinely ask employees to sign general releases of potential claims in exchange for severance packages or to resolve employment-related disputes.

Recently, the Fourth Circuit Court of Appeals, with jurisdiction over North and South Carolina, ruled that such releases involving Family and Medical Leave Act (FMLA) were not valid unless approved in advance by the U.S. Department of Labor or a court. While only binding on employers in those two states, it does point out to others that such considerations should be taken into account. You may want to discuss the subject with your own attorney. (Taylor v. Progress Energy, Inc., No. 04-1525, July 20, 2005)

The Court ruled that 29 CFR Section 825.220(d) prohibits ALL private (non-DOL or court-approved) releases of FMLA claims, whether the releases are prospective, or, like Taylor's, retrospective (i.e., for claims that pre-date the release). According to the Fourth Circuit, the DOL concluded that Congress intended for the FMLA's enforcement scheme to parallel that of the Fair Labor Standards Act, which states that rights guaranteed by that statute can only be waived under DOL or court supervision.

(Source: Nexsen Pruet Adams Kleemeier, www.nexenpruet.com/assets/attachments/241.pdf)

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2. IRS RAISES STANDARD MILEAGE RATE

Just in case you haven't heard, the Internal Revenue Service (IRS) has increased the standard mileage rate to $.485 per mile. That is an eight cent increase from the last approved level.

This increase took effect on September 1, 2005.

The agency says it will review the rate as this year comes closer to closing and may set a new rate for 2006 depending on that review.

For more information go to http://www.irs.gov/newsroom/article/0,,id=147423,00.html .

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3. EEOC COMPLAINTS FALL SIGNIFICANTLY

The number of discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) during the past nine months dropped by about 6 percent from a year earlier, according to the Bureau of National Affairs "Employment Discrimination Report (9-14-05).

In the period from October 1, 2004, through June 30, 2005, the Commission received some 56,300 charges of discrimination. That is down from a little over 60,000 during the same time period a year earlier.

Age discrimination charges fell by 12.5% during that period. At the same time, the number of sex discrimination charges was about the same, although pregnancy discrimination charges were higher than last year. Religious discrimination charges have been edging up over the past few years and increased 3% during this time.

For statistics on charges during the past few years go to http://www.eeoc.gov/stats/charges.html

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Gentle Readers,

We have a final rule on the OFCCP definition of "job applicant." It has been many years in the coming. And, it conflicts with the EEOC definition, but we'll take it. It's good for contractors AND for enforcement.

Bill Truesdell
Editor

IN THIS REPORT (Report #355, 10/14/2005)
---------- (Sent to over 1,500 subscribers)

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1. OFCCP DEFINITION OF APPLICANT FINALIZED

Last Friday, October 7, 2005, the U.S. Department of Labor (DOL) Office of Federal Contract Compliance Programs (OFCCP) finalized its rule concerning the definition of "job applicant" when people apply for jobs over the Internet or related technologies.

Internet applicants are those who meet four criteria:

1) The individual submits an expression of interest in employment through the Internet or related electronic data technologies;

2) The contractor considers the individual for employment in a particular position;

3) The individual's expression of interest indicates the individual possesses the basic objective qualifications for the position; and

4) The individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

Federal contractors will have to provide race, ethnicity and gender information for those individuals who the contractor considers for a particular position and who possess basic qualifications. The rule also requires contractors to retain all expressions of interest by individuals considered and specifies records to be maintained about searches of internal and external databases. OFCCP retains the ability to assess whether selection criteria used by federal contractors are

discriminatory.

http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=97614027614+0+0+0&WAISaction=retrieve

This rule conflicts with the Equal Employment Opportunity Commission (EEOC) additions to the Question and Answer section of the Guidelines on Employee Selection Process that were issued a year ago. EEOC's definition does not include "qualified" as part of the context in which applicant data testing is performed.

On a practical level, the OFCCP says applicant vs. new hire data can be analyzed statistically at any stage in the employment process PRIOR TO the interview stage. It is universally agreed in the enforcement community that an "applicant" is created some time before a decision is made about which people to interview.

If you are an affirmative action employer (with contracts for goods and/or services with the federal government) you may need to have a written affirmative action plan. We can help. Call us to discuss your needs (888-671-0404).

If you are any employer with 15 or more people on the payroll and you are involved in interstate commerce (ship goods across state lines), you are obligated to abide by 41 CFR 60-3, the Uniform Guidelines on Employee Selection Procedures. That involves validating any written employment test and performing statistical testing on data associated with each step of your employment selection process. The purpose is to determine if there is any unintended disparate impact against any protected group. If you need help with this testing process, call us. We can help you with that also.

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2. SOCIAL SECURITY NUMBER VERIFICATION SERVICE ON WEB

The Social Security Number Verification Service (SSNVS) allows employers to use the Internet to match their record of employee names and Social Security numbers with Social Security records before preparing and submitting W-2 Forms. Making sure there is a match between names and Social Security numbers is important to employers because mis-matches can cost employers additional processing time and expense.

Employers can verify the names and Social Security numbers of employees only after they are hired. This service cannot be used as part of the pre-hiring process.

You may register for a PIN and password at Business Services Online at www.socialsecurity.gov/bso/bsowelcome.htm Once registered, you will receive an activation code in the mail. This usually takes about two weeks.

When you have your activation completed, you may verify SSNs

in one of two ways:

1) Directly key in up to 10 names and SSNs in to the web site for immediate results.

2) Upload a file with up to 250,000 names and SSNs and receive your results on the next business day.

You will receive a response for all SSN/name combinations that do not match Social Security's records. If there is a mismatch, be sure you do not take punitive action against the employee. A mismatch does not, in and of itself, mean the employee did anything wrong.

If you get a mismatch:

- Make sure you did not make a typographical error.
- Ask to see the employee's Social Security card to ensure you have all the correct information.
- If you can't resolve the error, ask the employee to contact the Social Security office.
- Treat all employees exactly the same way.

For more information, beyond that available on the web site, contact the Employer Reporting Service Center at 800-772-6270.

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3. BE SURE YOU DON'T THROW OLD EMPLOYEE RECORDS INTO TRASH

According to Rhonda Wilcox, an associate with Fisher & Phellips LLP in Atlanta, employers who dispose of certain employment records now have to do more than toss them in the recycling bin or hit "delete" on the computer.

"The Fair and Accurate Credit Transactions Act (FACTA), first enacted in 2003, has a new Records Disposal Rule aimed at reducing the possibilities for identity theft. The Rule, which went into effect this past June, requires employers to 'properly dispose of ' consumer reports."

Businesses that violate the Rule can be sued by their employees for actual damages, as well as face federal fines of up to $2,500 per violation and state fines of up to $1,000 per violation.

Not all employment records are covered by the Rule. Employers who regularly deal with the Fair Credit Reporting Act will recall that a "consumer report" is information provided by a "consumer reporting agency." The information involves an individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.

Many employers engage third parties to collect this kind of information, particularly for employees whose jobs involve

financial transactions, responsibility for children, or work of a similarly sensitive nature. The Rule does not require employers to dispose of this information. But if they do, they must "take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal."

Unlike many statutes, the new FACTA rule isn't limited to employers of a certain size or in a certain industry. Even a family that employs one nanny, and seeks a consumer report on applicants is covered by the rule just as much as large employers who routinely seek such reports for employees in sensitive positions.

Some states also have statutes that govern the destruction of personal information. In Washington, for example, businesses must "take all reasonable steps" to destroy "personal financial and health information and personal identification numbers" when disposing of records.

For more specific information about how you should design a disposal system that meets these federal rules and state requirements in your locations, have a long talk with your management attorney. It could save you trouble later on.

(SOURCE: Fisher & Phillips LLP Labor Letter, October 2005, editor email: mmitchell@laborlawyers.com)

Gentle Readers,

FY2006 notices are being sent to federal contractors as an indication that there could be OFCCP audits before next September. EEOC has published some new guidance on protection for people who are known associates of folks with disabilities. And, a new study compares federal workers with those in the private sector.

Bill Truesdell
Editor

IN THIS REPORT (Report #356, 10/21/2005)
---------- (Sent to over 1,500 subscribers)

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1. 2006 AUDIT NOTICES BEING SENT TO FEDERAL CONTRACTORS

Beginning October 7, 2005, the Office of Federal Contract Compliance Programs (OFCCP) in the U.S. Department of Labor (DOL) began mailing notices to federal contractors that they may be audited in one or more of their establishments during this fiscal year.

Over 220 multi-establishment contractors will receive notices. All notices from OFCCP are addressed to the "CEO" or "President." So, it is a good idea to alert your CEO's office staff that HR needs to receive such mailings on the day they arrive. OFCCP allows only 30 days for a contractor to send all AAP materials. Unfortunately, it's not uncommon for scheduling letters to languish for two or three weeks before written materials are due to be delivered to OFCCP. That cuts response time dangerously thin.

This mailing is simply a preliminary notification to contractors that they are on the list of audit prospects. While it does not guarantee an audit will occur in every establishment, it behooves contractors who receive the notice to conduct their own internal audit to be sure they are prepared for the enforcement officials. (If you need help with that internal analysis, give us a call. It's what we do best. 1-888-671-0404)

Multi-establishment contractors are not supposed to receive more than 25 audits in any given year.

Also mailed last week were 600 scheduling letters for single-establishment organizations. This is the first group of notices that contractors must respond to within 30 days. More

are expected to be mailed in the future.

If you do not receive one of the preliminary notifications during October, don't think you are necessarily "off the hook," as they say. For the first time, OFCCP plans this year to audit additional organizations that do not appear on the preliminary notification list. These will be chosen at random by agency officials using the new Federal Contractor Selection System (FCSS). So, being prepared with your affirmative action plan implementation activities would be a good thing. You don't want to be caught by surprise.

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2. EEOC ISSUES Q&A ON THOSE WHO ASSOCIATE WITH DISABLED

On October 17, 2005, the Equal Employment Opportunity Commission (EEOC) issued a new set of Questions and Answers on the subject of protections accruing to those people who associate with people having disabilities. According to the EEOC, the Americans with Disabilities Act (ADA) protects applicants and employees from discrimination based on their association with people having disabilities.

This is the first of several documents on the subject of ADA compliance the Commission plans to issue this month as part of National Disability Employment Awareness Month.

The "association" provision of the ADA prohibits an employer from discriminating against an applicant or employee who has a known association with an individual with a disability. This prohibition covers hiring, firing, and other terms, conditions, and privileges of employment. For example, an employer may not refuse to hire someone because of an unfounded fear that the individual will be excessively absent or unproductive because of the need to care for a child with a disability.

EEOC Chair Cari M. Dominguez said, "Family members, friends, and care givers of people with disabilities should know that they are protected from employment discrimination based on those relationships."

Specifically cited as examples of illegal discrimination were:

- Refusing to provide health insurance for an employee's family member with a disability when the employer generally provides health insurance for employee dependents

- Providing a lower level of benefits to people because of their relationship with someone having a disability

- Discriminating against someone who provides volunteer services for people with HIV/AIDS or psychiatric disabilities is also prohibited.

For more information, visit the EEOC's web site at www.eeoc.gov .

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3. HOW FEDERAL & PRIVATE SECTOR EMPLOYEE ATTITUDES COMPARE

In a recent study of both private sector and federal government sector employees, Sirota Survey Intelligence discovered that there were some similarities, but some rather significant differences, too.

Federal employees are more likely than private sector workers to believe that they have opportunities to improve their skills, that they receive adequate support from their supervisors in balancing work and family obligations, and that they have enough information to do their jobs well.

On the other side of the coin, federal employees are less satisfied with the recognition they receive from their employers than private sector workers. They are also less satisfied with their supervisors, and less likely to feel encouraged to come up with new and better ways of doing things than their private sector counterparts.

(Source: "Federal Manager's Daily Report," October 18, 2005 www.fedweek.com)

Gentle Readers,

OFCCP is now focusing on pre-employment screening validation. And, you are invited to learn more about the California Department of Fair Employment and Housing (DFEH) and its liaison group with employers in Northern California.

Bill Truesdell
Editor

IN THIS REPORT (Report #357, 10/28/2005)
---------- (Sent to over 1,500 subscribers)

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1. OFCCP FOCUSING ON PRE-EMPLOYMENT TEST VALIDATION

When the Office of Federal Contract Compliance Programs (OFCCP) began hiring Ph.D. statisticians it was for the declared purpose of analyzing contractor compensation programs. The agency expected to find one blatant case of systemic pay discrimination after another.

In the past year or so, the few statisticians now on OFCCP payroll have apparently concluded that analyzing compensation is not as easy a task as first thought. The least-common denominator in the effort has turned out to be regression analysis. As a tool, it measures up to the task. Yet, it is not easily applied and can be exceptionally expensive if done properly.

Regression analysis determines the relationships, or correlations, between events and certain variables. The more variables in the analysis, the more data required and the more complex the analysis. For example, one could begin with the premise that employee compensation involves various amounts of education, experience, on-the-job training, current and past job performance, attendance and punctuality, as well as other issues. With only ten people in a given job title, the analysis might seem simple. But what if there are a thousand people in the job title, as is the case with some employers? That makes any data base of variable information quite large. Gathering and processing all that data can take a lot of time, and therefore can be expensive. While OFCCP continues to say it is pushing regression analysis for its audits, we have heard about some high stacks of backlogged audit files on desks of statisticians at the agency.

To add fuel to the fire, OFCCP has proposed regulations that would require contractors to perform annual regression analysis of their compensation systems. Since regression analysis in its most

thorough and complex form is reserved for law suits today, we doubt that many employers will be spending the money required to do what OFCCP is suggesting. (Some people are hinting that OFCCP will never actually finalize that regulatory requirement. It may just go away.)

So, back to the question of pre-employment testing. If you interview job candidates, or you give job seekers paper and pencil tests or ask them to demonstrate skills that will be required on the job, you are likely going to have to "prove" that your tests do not illegally discriminate against applicants. To do that, we fall back on the statistical analysis methods known as statistical significance testing and probability testing.

Every employer in the country with 15 or more people on the payroll, which is engaged in interstate commerce (shipping goods or services across state lines), is subject to the Civil Rights Act of 1964 and therefore also subject to 41 CFR 60-3, the Uniform Guidelines on Employee Selection Procedures. These regulations require all subject employers to prove they are not discriminating against any group of people that enjoys protection under the law.

Basically, statistical significance testing involves comparison of selection rates for a "base group" and a "test group." Usually the most favorably treated group is the base group and other groups are test groups. If we are analyzing new hires or promotions, such positive employment decisions mean the most favorably treated group is the one with the highest selection rate. If we are analyzing termination data, the most favorably treated group is the one with the lowest rate. A simple 80% test will tell us there is or is not a likelihood of discrimination. That is to say, if the protected group selection rate is not at least 80% or more compared to the selection rate of the most favored group, there might be discrimination. It is important to eliminate the opportunity that such conclusions could have been reached simply by chance. So, additional mathematics help us remove chance from the picture. When we say we have exceeded 2 standard deviations or have more than a 1/2 percent probability, we are saying we have eliminated chance from the realm of possibility and still have indicators of discriminatory results.

Every year, employers must perform these tests on their employment data. Of course, if problems are found, they must be fixed. If no problems are found, the analysis reports should be retained to demonstrate the employer's good faith actions in performing the required analysis.

If you wish to have help analyzing your employment data, please give us a call at 925-671-0404.

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2. NEW 2005 CALIFORNIA EMPLOYMENT-RELATED LEGISLATION

The 2005 legislative season has come to a close. In California legislators are returning to their homes and preparing for a new session which will begin in January.

This year, the legislature passed many pieces of new law only to have most of them vetoed by the Governor. This is the first year in recent memory that only three new laws were approved by the state's governor. Recent years have seen dozens of new legal requirements for employers. Not so in 2005.

If you are a California employer and would like to see what is new go to http://www.management-advantage.com/products/legislation.htm

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3. CALIFORNIA DFEH CELEBRATES ITS 25TH ANNIVERSARY

The California Department of Fair Employment and Housing (DFEH) has almost always been the state's smallest agency. At its peak it counted fewer than 250 employees. In 2003, DFEH cut fully one-third of its staff from the payroll, closing three offices in the process. Yet, the agency continues to drive through its inventory of complaint cases. In 2003/2004 DFEH processed over 28,000 employment discrimination complaints.

Many California employees choose to process their complaints through DFEH rather than the Equal Employment Opportunity Commission (EEOC) because in state court there is the opportunity for unlimited damage awards, while federal law has had a cap on punitive damages since the Civil Rights Act of 1991 was signed into law.

DFEH celebrated its 25th anniversary on October 18th with an open house at its Elk Grove headquarters office.

DFEH Director, Suzanne M. Ambrose, has made a commitment to work with the employer community to increase education about the state's prohibitions of employment discrimination. To do that, she has pledged to support the re-activation of the Northern California Employment Round Table (NCERT). If you are an employer who would like to be a part of this liaison group between the Department and Northern California employers, please send your contact information to the editor at: NCERT Mailing List, info@management-advantage.com . Be sure to include your name, title, company, street address, city, state, zip, telephone number and your email address. All notifications will be sent by email for future events.

In the mean time, if you would like to receive DFEH's free email newsletter, you can subscribe by sending an email message to fairtimes@dfeh.ca.gov with "Subscribe" in the subject line. It's that easy.

Gentle Readers,

We've come to the end of another legislative year and many states have changed their poster content requirements. If that has happened in your work location(s), be sure you get your new All-On-One posters ordered early to remain in compliance.

Bill Truesdell
Editor

IN THIS REPORT (Report #358, 11/4/2005)
---------- (Sent to over 1,500 subscribers)

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1. EEOC ISSUES Q & A ABOUT ACCOMMODATIONS FOR THE BLIND

The Equal Employment Opportunity Commission (EEOC) has issued some guidelines about accommodating blind applicants and employees. They come to us in the form of Questions & Answers about how employers can meet requirements of the Americans with Disabilities Act of 1990 (ADA). EEOC is charged with enforcing that law.

This is the fifth in a series of fact sheets issued by the EEOC for persons with disabilities, and/or focusing on the ADA and specific disability issues.

Among the issues the new Q&A document addresses are:

- When a vision impairment is a "disability" within the meaning of the ADA.
- What questions employers may ask job applicants or employees about their vision impairments and when employers may conduct medical examinations that test vision.
- What accommodations people who are blind or visually disabled may need to apply for a job, to perform a job's essential functions, or to enjoy equal benefits and privileges of employment, such as the ability to take advantage of training and other opportunities for advancement.
- How employers should handle safety concerns they may have about applicants or employees with vision impairments.

Cari M. Dominguez, Chair of the EEOC, said, "As with prior ADA fact sheets, our goal is twofold: first, to make clear that all people with disabilities are protected from workplace

discrimination and, second, to educate employers and promote access and inclusion."

The new publication is available on EEOC's web site at www.eeoc.gov/facts/blindness.html .

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2. WORKPLACE BULLIES

The days for workplace bullies may be numbered. At least in some states, legislation is being considered that would hold employers liable if they knowingly allow bullying behavior.

Daniel Yamada teaches at the Suffolk University Law School in Boston. He also leads a movement to outlaw bullying at work. He has authored what is known as the Healthy Workplace Act. It targets people who intimidate or threaten others in workplaces within the state jurisdiction. So far, lawmakers in California, Hawaii, Oregon and Oklahoma have begun discussions about adopting Yamada's idea.

Mr. Yamada says, "In essence, I believe that employers should face liability for severe bullying that mirrors their liability for sexual harassment."

Bullies would rather dominate than cooperate. They impose their will through threats and intimidation. They always give the "evil eye" to co-workers and they're known for throwing hissy fits.

Suffolk University offers more information if you wish to explore the issue. Go to http://www.law.suffolk.edu/about/news/pressarticle.cfm?Id=166

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3. 2006 EMPLOYMENT POSTER UPDATES - ORDER NOW

Several states have passed legislation this year that make it necessary for employers to update their employment labor law posters. Even in the situation where changes were also made in 2005, employers must be sure their posters meet current requirements. Any state official visiting the workplace for any reason will be inspecting the posters to be sure they are in compliance with all requirements.

We can help save you the trouble of checking every poster on your wall. Our All-On-One posters offer current compliance information. Be sure you take advantage of that service to remain current. Go to http://www.management-advantage.com/products/posters.htm

Here are some changes made recently:

o Arkansas: Minimum Wage: The text sections of the Wage & Hour Posting has been revised with the signing into law of

HB1839. Mandatory revisions were made to the "Child Labor" section in regards to number of hours in a 24 hour period. The limitations for children 16 to 17 for the hours from 6 to 11 p.m. on non-school nights do not apply if the occupations are deemed sufficiently safe for their employment by the Arkansas DOL. Also added Sports Referees, to the occupations unacceptable for children under 14. New poster date 8/2005.

o California: 1) "Discrimination and Harassment Are Prohibited By Law", Assembly bill AB1669 passed in 2005 revising text in reference to "time to file complaints" laws 2) Cal/OSHA revises Safety and Health Protection on the Job due to relocation of the Headquarters office and clarifications of Regional and District Offices. The new 2006 posters will be available the end of December 2005 and may be pre-ordered at any time. New poster date 1/2006.

o Connecticut: Minimum Wage passed under House bill 6228 in 2005 increasing the minimum wage progressively to $7.45 per hour January 1, 2006 and $7.65 per hour effective January 1, 2007. The new 2006 posters will be available the end of December 2005 and may be pre-ordered at any time. New poster date 1/2006.

o District of Columbia: Minimum Wage increases to $7.00 per hour effective 1/1/2006 under DC Council Bill 15-0888. New poster date 1/2006.

o Florida: The Minimum Wage will increase from $6.15 per hour to $6.40 per hour effective January 1, 2006. The new 2006 posters will be available the end of December 2005 and may be pre-ordered at any time. The wage rate for Florida is adjusted to an inflation index every January 1. As of May 2, 2005, all Florida employers must comply with the new State wage increase. The increase is due to new legislation and Florida Constitutional amendments. New poster date is 1/2006.

o Georgia: Workers' Compensation "Bill of Rights" posting WC-BOR revised amount per week to read: 1a) "you are entitled to received two thirds, but not more than $450 for job-related injuries, and 1b) Compensation amount per week revised to read: "When you are able to return to work, but can only get a lower paying job as a result of your injury, you are entitled to a weekly benefit of not more than $300 per week not to exceed 350 weeks. 2) Other changes include web site change and phone #. Added actual "Statute" numbers in 2 areas as a reference and that the employer will furnish a form for reporting accidents. Postings have specific regulations in color and size. New poster date is 8/2005.

o Hawaii: 1) Minimum Wage passed under House Bill 1134 in 2005 increasing the minimum wage progressively to $6.75 per hour January 1, 2006 and $7.25 per hour in January 1, 2007. The new 2006 posters will be available the end of December 2005 and may be pre-ordered at any time. New poster date 1/2006.

o Louisiana: 1) Earned Income Credit posting, mandatory to post per Louisiana Act 322 of 2005 amending Title 23, Part XIII or Chapter 9 signed into law by the Governor of Louisiana. New poster date 8/2005.

o Maine: 1) Minimum Wage revised under "Exempt from Minimum Wage and Overtime section: Executive, Administrative or Professional employees with a salary of at least $366.35 now has been changed to $455.00 (instead of $375 which was the original plan starting October 1,2005). 2) Whistleblower revised minor text 3) Regulation of Employment added a new section titled Leave of Family Care. New poster date 10/2005.

o Minnesota: On May 11, 2005, Governor Pawlenty signed Senate Bill SF03 raising Minnesota's minimum wage for the first time since 1997! The law increases the minimum wage for "large employers" to $6.15 per hour and for "small employers" to $5.25 per hour effective on August 1, 2005. The bill also revises the definition of "large employers" and "small employers". A "large employer" has been changed to read "enterprises with annual gross sales of $625,000 annually". A "small employer" will be modified to be those enterprises with annual gross sales less than $625,000 annually. The revised poster includes details for large and small employers. New poster date 8/2005.

o Missouri: 1): Workers' Compensation: Governor Matt Blunt signed SB1 & SB130 into law revising text. One of the sections revised was section 287.128 regarding penalties for employer non-compliance for failure to insure his liability. Other revisions include: 2) Two Discrimination postings revised text 3) Unemployment Benefits revised text. New poster date is 8/2005.

o Nevada: Assembly Bill 44 passed which amends the "overtime pay" section of the Nevada Statutes. Text on posting "Rules to be Observed by Employers" (Nevada's Minimum Wage posting section 7) is being revised. New poster date uncertain at this time.

o New Jersey: 1) New Jersey's acting Governor, Richard J. Codey, signed SB2065 into law on April 12, 2005 increasing the Minimum Wage in New Jersey to $6.15 per hour effective October 1, 2005 and increasing to $7.15 per hour on October 1, 2006. 2) New Jersey's Civil Rights Division has also revised the Mandatory Discrimination and 3) Family Leave Act Notice, The "Protected classes" now include Domestic Partnerships. 4) The Family Leave Act revised text and states that it applies to employers with 50 or more employees. 5) Unemployment Compensation posting has been revised with new text under "Financing of Programs". New poster date 8/2005.

o Nebraska: 1) The Nebraska Legislature passed LB10 requiring a mandatory revision to the Discrimination in Employment, Housing, Public Accommodations posting. The revision is under the Equal Pay Act of Nebraska. It covers employers with 15 or more employee's. New poster date is 8/2005.

o New Mexico: 1) Minimum Wage posting revised due to passage of Senate Bill 250 in 2005 amending New Mexico Statute 50.

New Mexico legislative changes text under 50-4-22. This Statute requires the posting of the summary (text) of the law by all employers. New poster date is 10/2005.

o Oklahoma: 1) Oklahoma's Workers' Compensation Court has revised the "Workers' Compensation Notice and Instructions to Employers and Employees Form 1-A in regards to time limits on claims filed after termination of employment. The change is based on statute effective July 1 2005. 2) Withheld Union dues revised text and 3) Minimum Wage made a layout correction. Due to the Mandatory Worker's Comp new poster date will be 8/2005.

o Oregon: The Minimum Wage will increase from $7.25 per hour to $7.50 effective January 1, 2006. The new 2006 posters will be available the end of December 2005 and may be pre-ordered at any time. The wage rate for Oregon is adjusted to an inflation index every January 1. New poster date 1/2006.

o Vermont: 1) Effective 1/1/2006 minimum wage increases to $7.00 and 1/1/2007 increases to $7.25 progressively on poster. 2) other posting changes include: a) Child Labor, b) Parental Leave, Family Leave, and Short term Family Leave, c) Employers Liability and Workers' Compensation, d) Health Care Whistleblowers' Protection Act, and e) Sexual Harassment is Illegal. Due to the recent merger between the Department of Labor and Industry and the Employment & Training Department a new Logo was created and added to Vermont posters. Also "Equal Opportunity is the Law" text has been added to each Vermont poster. New poster date 9/2005.

o Washington: 1) The Minimum Wage will increase from $7.35 per hour to $7.63 effective January 1, 2006. The new 2006 posters will be available the end of December 2005 and may be pre-ordered at any time. The wage rate for Washington is adjusted to an inflation index every January 1. 2) Legislation passed in 2005 for possible revision to "Your Rights as a Non-Agricultural Worker. New poster date 1/2006.

Be sure you get your posters ordered now so you can be in compliance when the changes are effective in January.

Gentle Readers,

We offer a few reflections on Veterans' Day and visit the question, "How are contractors selected for audit by the OFCCP?" And, you can learn about a new piece of guidance offered by the EEOC.

Bill Truesdell
Editor

IN THIS REPORT (Report #359, 11/11/2005)
---------- (Sent to over 1,500 subscribers)

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1. EEOC ISSUES BEST PRACTICES REPORT ON DISABILITIES

The Equal Employment Opportunity Commission (EEOC) has released its final report on "Best Practices for the Employment of People with Disabilities in State Government." It has singled out nine states for applause related to their accommodation programs.

Governors in these nine states voluntarily allowed EEOC to review a wide range of best practices affecting individuals with disabilities who are state government employees or applicants for state employment. Examined as part of the study were:

- the recruitment and hiring of people with disabilities for state jobs;
- the provision of reasonable accommodations for applicants and employees with disabilities;
- the retention and advancement of individuals with disabilities within state government; and
- the employment of people with disabilities more generally, in both public and private sector jobs.

The report's conclusion notes several positive trends. Applicants for state employment are frequently given information about the availability of reasonable accommodations for the application process, and job announcements and position descriptions do not appear to be drafted in ways that would discourage people with disabilities from applying for state jobs. Some states have undertaken targeted outreach to and recruitment of individuals with disabilities.

The nine states involved were:

- Florida
- Kansas
- Maryland
- Missouri
- New Hampshire
- New Mexico
- Utah
- Vermont
- Washington

For a copy of the full report, go to http://www.eeoc.gov/initiatives/nfi/final_states_best_practices_report.html

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2. HOW CAN YOU BE PICKED FOR AN OFCCP COMPLIANCE REVIEW?

Federal contractors are companies that sell goods or services to the federal government, receiving revenue in return. Those companies that receive $50,000 or more in revenue in a year and have 50 or more people on the payroll are required to have written affirmative action plans for minorities and women, veterans and disabled. And, they are subject to all of the federal regulations concerning affirmative action in employment that can be found at 41 CFR 60. (CFR means "Code of Federal Regulations")

These contractors are subject to review by the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP). Compliance with regulatory requirements is needed to remain a federal contractor.

Government is required to have a system for selecting employers for review that is non-biased and fair. It must be able to select review targets randomly without regard to factors such as politics or administrative pressures. To better accomplish this, OFCCP has recently created a new selection system called FCSS or Federal Contractor Selection System. Here's how it works.

Step 1: A data base is created of all employers filing EEO-1 reports by September 30th each year. On that form is a box to be checked if the employer is a federal contractor. If the box is checked, the employer is flagged for the FCSS data base. (OFCCP is about to initiate an audit program to identify employers who are federal contractors but who haven't checked the EEO-1 box to indicate that status. No word yet on what will happen when they find a company that hasn't declared its accurate status.)

Step 2: OFCCP screens FCSS data base entries to remove companies (or company work locations if there is more than one) that

- have completed a compliance review within the past two years
- are currently involved in an open compliance review
- have an approved Functional Affirmative Action Plan (FAAP)
- submitted a completed Equal Opportunity (EO) Survey within the past 12 months.

Step 3: This is a mystery step. OFCCP will not tell anyone how this is done. The agency uses FCSS to rank contractor establishments based on their estimated likelihood of a systemic discrimination finding.

Step 4: OFCCP prints a list of 1,500 establishments of the top-ranked establishments for possible compliance evaluations in the first release. Since it hopes to complete twice that number of audits, another release of selections is possible. Any establishment selected that belongs to an employer that already has 25 locations on the selection list will be dropped from list.

Step 5: OFCCP notifies contractors with establishments on the FCSS list that it may have compliance reviews in those specific establishments during the year. This notification process is new. OFCCP Director Charles James initiated the practice since coming to his job. When the agency is ready to proceed with the actual audit, it will send the establishment a scheduling letter asking for information and notifying the contractor it will be audited.

For more information about the OFCCP's FCSS, go to http://www.dol.gov/esa/regs/compliance/ofccp/faqs/fcssfaqs.htm

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3. VETERANS DAY - THE ENDING OF WORLD WAR I

These days, Veterans Day doesn't carry the same amount of interest as it once did. Are we getting complacent? Are we taking things for granted? What are employers doing to help keep freedom and liberty alive in the minds of Americans? Is it just another day off? (Many employers don't even honor the day as a holiday any longer.)

Originally called Armistice Day, the intent was for Americans to celebrate the ending of World War I at the eleventh hour on November 11, 1918.

In 1919, President Woodrow Wilson issued his Armistice Day proclamation to honor the Americans who had fought and died during World War I, the "War to End All Wars." In 1927 Congress issued a resolution requesting President Calvin Coolidge to issue a proclamation calling for officials to display the Flag of the United States on all government buildings on November 11, and inviting people to observe the day in schools and churches. But, it was not until 1938 that Congress passed a bill that each November 11 "shall be dedicated to the cause of world peace and... hereafter celebrated and known as Armistice Day."

That same year, 1938, President Franklin D. Roosevelt signed a bill making the day a legal holiday in the District of Columbia. At 11:00 a.m. all traffic stopped, in tribute to the dead, then volleys were fired and taps sounded.

The name of this day was changed to Veterans' Day by Act of Congress on May 24, 1954. President Eisenhower called on all citizens to observe the day by remembering the sacrifices of all those who fought so gallantly, and through rededication to the task of promoting an enduring peace.

We here at The Management Advantage, Inc., and the HR Web Store, wish each of you a peaceful day filled with gratitude to those who have given their lives for our freedoms. Peace, liberty and freedom have never come inexpensively. We pray they will last because of these sacrifices others have made, and continue to make, for our sakes.

May you enjoy this Veterans' Day.

1918 Special to The New York Times By Philip Gibbs

WITH THE BRITISH ARMIES IN FRANCE, Nov. 11 -- Last night, for the first time since August in the first year of the war, there was no light of gunfire in the sky no sudden stabs of flame through darkness, no spreading glow above black trees where for four years of nights human beings were smashed to death. The Fires of Hell had been put out.

Gentle Readers,

Some new regulations are being proposed by the OFCCP, additional regulations and rules are relaxed or suspended for the Gulf Coast, and the OPM opens a new web resource for Federal Managers.

Bill Truesdell
Editor

IN THIS REPORT (Report #360, 11/18/2005)
---------- (Sent to over 1,500 subscribers)

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1. OFCCP SEEKING TO RAISE CONTRACTOR THRESHOLD

For some time, Office of Federal Contractor Compliance Programs (OFCCP) Director, Charles James, has been saying he would like to raise the qualification limits for federal contractor compliance eligibility. Now, a proposal for just that has been sent to the Office of Management and Budget (OMB) in the White House.

On September 12, 2005, OFCCP sent OMB its proposed regulations for implementing the Jobs for Veterans Act. It would raise the threshold that captures employers as federal contractors for the purpose of veterans affirmative action. The proposed threshold would be raised to $100,000. In addition the new regulations would provide protection to veterans who served on active duty during military operations for which an Armed Forces Service Medal was awarded and also revise the definitions of "recently separated veterans" and "special disabled veterans" as they are used in current references. The threshold for preparing written affirmative action plans would increase from $50,000 to $100,000 under the proposal. OMB has not said when it will complete its review of this request.

(Source: Bureau of National Affairs, Affirmative Action Compliance Manual, 9/30/05)

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2. OPM OFFERS NEW RESOURCES FOR FEDERAL MANAGERS

The Office of Personnel Management (OPM) has published a new human capital resources center website for federal managers and supervisors as broad personnel reforms begin to take hold throughout the federal government.

The new Human Capital Assessment and Accountability Framework Resource Center provides guidance on the systems defined in the HCAAF, and links it to merit system compliance.

Five sections correspond to human capital systems and their expected results with links to merit system compliance. They are Strategic Alignment; Leadership and Knowledge; Management; Results-Oriented Performance Culture; Talent Management; and Accountability.

OPM said the center fulfills its mandate under the Chief Human Capital Officers Act of 2002 to design systems and set standards, including appropriate metrics, for assessing the management of human capital by federal agencies.

The site can be accessed at
http://www.opm.gov/hcaaf_resource_center/index.asp

(Source: Federal Manager's Daily Report, 11/8/2005, fmdr@fedweek.com)

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3. SOME MORE REGULATIONS WAIVED AFTER HURRICANES

As the Gulf Coast and the nation deal with the aftermath of Hurricanes Rita and Katrina, numerous rules and regulations affecting both employers and employees have been temporarily suspended or modified. Employment-related waivers and dispensations recently authorized by government agencies, as well as links to obtain additional information are sumarized in a report by Ogletree, Deakins, Nash, Smoak & Stewart, P.C. You can get a copy at
http://www.ogletreedeakins.com/uploads/publications/Employment%20Law%20Authority%20--%20Oct-Nov%2005.pdf

Some of the regulations impacted by these waivers include:

- Unemployment Insurance
- Disaster Unemployment Assistance
- The Flexibility for Displaced Workers Act
- The Katrina Recovery Job Connection
- Workforce Investment Act waivers
- High Growth Job Training Initiative grants
- Davis-Bacon Act prevailing wage requirements suspended
- Written affirmative action requirements waived
- I-9 documentation standards and sanctions have been relaxed
- Emergency exemption of the Outer Continental Shelf Land Act
- Procurement thresholds and competitive bidding requirements
- And, more

(Source: Employment Practices, October/November 2005, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.)

Gentle Readers,

California's specifications for how mandated sexual harassment training for supervisors will be conducted are now available. And, the federal Department of Defense is getting closer to listing offenses that will cause automatic dismissal from the payroll. It's all part of a new personnel management system. And, be sure to check out item #4 this week. A final proposal for changing the EEO-1 form has been sent to OMB for approval. Changes will be implemented in 2007. (This week's Special Report for HR Professionals is being sent early due to the Thanksgiving holiday. We wish you a joyous celebration with your loved ones.)

Bill Truesdell
Editor

IN THIS REPORT (Report #361, 11/25/2005)
---------- (Sent to over 1,500 subscribers)

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1. DRAFT REGULATIONS FOR CALIFORNIA'S SEXUAL HARASSMENT TRAINING

Well, we are nearly at the end of 2005, the deadline for all organizations with 50 or more employees to have completed their supervisory training on the subject of sexual harassment. And, although they were not widely publicized, the Fair Employment and Housing Commission issued draft regulations concerning the training requirements at its September 13, 2005, meeting.

For most of this year there has been controversy about what form the training had to take, whether computer-based training would be permitted, and what qualifications were required to act in the role of training instructor.

As with many other such government requirements, consultants and attorneys flocked to this as a new revenue source. And, as with so many other situations, employers have sometimes fallen victim to unscrupulous vendors.

There is no requirement for trainers to be "certified" by any source. If someone tells you their trainers are "certified" be highly suspect. Even if those instructors are licensed attorneys in California. Such claims are irresponsible. There is no state requirement that instructors be "certified." Further,

if someone tells you your supervisors will be "certified" to deal with sexual harassment properly, walk away fast. No one can become an expert in sexual harassment issues in just two hours.

The new regulations spell out what is required of an instructor: "Trainers or educators...include California licensed attorneys, human resource professionals, psychologists or others provided they have legal education or practical experience in harassment training and knowledge of California laws prohibiting unlawful harassment..."

The regulations also cite specific training content requirements if the harassment training is to meet state standards. e-Training and Webinars are specifically permitted under the new regs. They must meet the same content requirements as classroom programs. And, there are specific provisions for minimum training segments in each type of delivery format.

Find out what those are and get a copy of the four-page draft by going to the HR Web Store What's New Department at www.hrwebstore.com/products/whatsnew.htm (16.78 KB in PDF format)

While you won't find the regulations on its web site, you may wish to visit the Department of Fair Employment and Housing (DFEH) at http://www.dfeh.ca.gov/ to get current issues of news releases processed by the Commission and the Department.

Just don't get burned by hiring the wrong consultant or lawyer. It's always best to work through referrals so you know you'll be talking with someone your colleagues have found to be both professional and helpful.

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2. EQUAL PAY COMPLAINT STRUCK DOWN AT FAA

The U.S. Court of Federal Claims has ruled in favor of the Federal Aviation Administration after three high-level female managers sought the difference between their earnings and those of their male colleagues for equal work.

The court assumed that the plaintiffs could establish that FAA paid them less than their male colleagues for work that requires the same skill, effort and responsibility, and that is performed under similar circumstances.

The burden then shifted to the FAA to show that the differential was justified according to one of the Act's four exceptions, the decision said.

In this case the agency moved for summary judgment under the affirmative defense that any pay disparities were due to a "factor other than sex," according to federal claims case No. 00-222C. The agency had to prove that gender-based pay differences are "business related," rather than merely a pretext for discrimination--in essence, that the

gender-neutral factor it identified caused the wage difference.

In determining that, court asked if the pay plan and policies placing the plaintiffs in it constituted "factors other than sex," whether the pay plan and policies had a rational basis, and if the pay plan and policies were applied in a discriminatory manner.

It concluded that FAA's pay plan -- in this case for certain air traffic controllers -- is gender-neutral on their face, and are rationally related to legitimate government interests.

It said no evidence had been identified that would prove that exceptions to the plan and rules based on gender were the cause of any pay disparities suffered by plaintiffs.

Further, it said no evidence supported the plaintiffs' claims of Equal Pay Act violations, and concluded that the difference in wages was caused by a "factor other than sex," and ruled in favor of the government.

(Source: FEDERAL MANAGER'S DAILY REPORT ISSUE, Thursday, November 10, 2005, www.fedweek.com)

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3. DEFENSE DEPARTMENT CLOSE TO DEFINING MANDATORY DISMISSAL TRIGGERS

The Defense Department (DoD) has provided relatively few details--but some hints--as to what types of employee misconduct would warrant being deemed a "mandatory removal offense" (MRO) under its new National Security Personnel System (NSPS).

Creation of such automatic firing offenses--which among other things essentially take decisions on discipline out of the hands of managers and supervisors who normally exercise some discretion in such matters--was among the more controversial provisions during the comment period after the rules came out in proposed form earlier this year. Unions and others complained that the department had failed to specify what types of offenses would fall under the policy and expressed concerns that employees could commit such offenses without knowing it.

In response, DoD promised to communicate the offenses that would fall under the policy, including through an announcement in the Federal Register and other communications with employees. However, the specific offenses will not be defined until implementing guidance on NSPS is issued. DoD said that in general, though, these types of offenses would be likely candidates:

Purchasing, using, or transporting weapons or materials for the purpose of committing, attempting to commit, or aiding

and abetting terrorism.

Committing, attempting to commit, or aiding and abetting an act of sabotage against the Department of Defense that resulted or could have resulted in loss of life, significant financial loss or adverse impact on military readiness.

Soliciting or intentionally accepting a bribe or other unauthorized personal benefit in return for an act that compromises or could compromise national security.

Employees involved in the Personnel Reliability Program (PRP) failing to safeguard the assets for which they are directly responsible and such failure results in loss, theft, sabotage, unauthorized use, destruction, detonation, or damage.

Intentionally engaging in activities that compromise or could compromise the information or financial infrastructure, including major procurement fraud, of the Department of Defense, when the employee knew or reasonably should have known of the compromise or potential compromise.

Despite DoD's moves to better define MROs, that authority remains a sticking point between the department and unions representing employees. The MRO provision is one of the topics being challenged in a union lawsuit against the NSPS rules.

(Source: FEDERAL MANAGER'S DAILY REPORT ISSUE, Thursday, November 14, 2005, www.fedweek.com)

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4. EEOC SENDS FINAL EEO-1 CHANGES TO OMB FOR APPROVAL

The Equal Employment Opportunity Commission (EEOC) has been working for several years to update its Standard Form 100 survey form for private sector employers. On November 16, 2005, the Commission approved its final version and sent it to the Office of Management and Budget (OMB) for approval. If OMB gives its blessing as expected, the changes will be effective for survey reports filed two years from now on September 30, 2007. Regardless of what happens, next year's 2006 filing will remain on the current survey form.

What changes are there? Several. Here's a summary.

Major changes to race and ethnic categories:

- Asian or Pacific Islander has been split into two categories: "Asians" and "Pacific Islanders"
- A new category has been added: "Two or more races not Hispanic or Latino"
- A new category has been added: "Native Hawaiian or Other Pacific Islander not Hispanic or Latino"

Major changes to the occupational categories:

- Category 1, "Officials and Managers" has been split. New Category 1.1 will be "Executive/Senior Level Executives and Managers" and Category 1.2 will be "First/Mid-Level Officials and Managers"
- Changing the definitions to require non-managerial business and financial occupations to be included in "Professionals" rather than "Officials and Managers"

So, the count of occupational categories will increase from 9 to 10 by splitting Category 1. Definitions will change only slightly to allow for inclusion of a separate "Hawaiian" ethnic group. The only other major change would require employers in Hawaii who submit EEO-1 forms to break their data down by race and ethnicity. Currently, they only submit gender data by occupational category.

Some other updates will be made. For example, race categories will be altered: "Black" will become "Black or African American" and "Hispanic" will become "Hispanic or Latino." The other key update will be endorsement by EEOC of the self-identification process rather than requesting employers use visual observation as the best means for identifying race/sex status of employees and job applicants. The new form will have instructions suggesting the best method for identification of this information is by asking people to provide it themselves. As we have been saying for years, people sometimes identify themselves as being part of a race/ethnic group that their appearance might not reveal.

For a Q & A on these revisions to the EEO-1 survey, go to www.eeoc.gov/eeo1/qanda.html

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Gentle Readers,

We hear from the U.S. Supreme Court on the limits of a workday, get some more input from the 9th Circuit Court of Appeals on the issue of sexual harassment in the workplace, and hear from the new Department of Homeland Security that employers should be getting themselves ready to deal with disaster situations.

Bill Truesdell
Editor

IN THIS REPORT (Report #362, 12/2/2005)
---------- (Sent to over 1,500 subscribers)

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1. SUPREME COURT EXPANDS WORKDAY DEFINITION

On November 8, 2005, the U.S. Supreme Court issued its ruling in IBP v. Alvarez (03-1238, 11/8/2005), clarifying the definition of workday under the Fair Labor Standards Act (FLSA). They said, in essence, once it starts, the workday is continuous and compensable.

At issue was the time workers spent putting on protective clothing before they went into the employer's chicken processing factory. Workers were production employees at one of IBP's plants in Pasco, WA. All production workers must wear outer garments, hard hats, hair nets, earplugs, gloves, sleeves, aprons, leggings and boots. Employees who use knives must also wear protective equipment for their hands, arms, torsos and legs.

The Court's opinion said, "The time [employees] ... spend walking between changing and production areas is compensable under the FLSA."

IBP claimed that, "because donning is not the 'principal activity' that starts the workday, walking occurring immediately after donning and immediately before doffing is not compensable." In response, the Court said, the Portal-to-Portal Act "does not remove activities that are 'integral and indispensable' to 'principal activities' from FLSA coverage precisely because such activities are themselves 'principal activities.'"

The opinion clarified that time spent "waiting to don the first piece of gear that marks the beginning of the continuous workday" is not compensable under FLSA. "Such waiting - which is two steps removed from the productive activity on the assembly line - comfortably qualifies as a 'preliminary' activity."

So...it is now incumbent upon employers to re-examine their work activities to determine if employees perform actions that are integral and indispensable in preparing them for or relieving them from doing other principal activities of their jobs.

This case represents the culmination of a major thrust by the U.S. Department of Labor into the chicken processing industry. The result? Expect the cost of chicken to go up at your local super market.

You can find a copy of the Court's opinion at www.supremecourtus.gov/opinions/05pdf/03-1238.pdf

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2. FEDS URGE EMPLOYERS TO BE PREPARED FOR EMERGENCIES

No less an authority than the Federal Government has determined that employers have some responsibility for emergency preparedness.

The Department of Homeland Security, in partnership with the Advertising Council, has launched a campaign to educate small and mid-sized employers about engaging in emergency preparedness efforts to protect their employees, business operations, and assets. The program includes a website, http://www.ready.gov, with extensive information on emergency planning, including a sample emergency plan, emergency supplies checklist, and more.

Additional Resource:

Emergency supplies for base work locations and automobiles: http://www.management-advantage.com/products/safetyresources.htm

Don't do it only because the government has said it is important. Do it because your own life may depend on it. Once the disaster has struck, hindsight won't be of much value.

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3. COURT SWINGS BACK TOWARD FAIRNESS IN HARASSMENT CHARGES

At the beginning of November, the U.S. Ninth Circuit Court of Appeals ruled on a case where an employee charged the employer with failing to solve a harassment problem, but prevented the employer from taking action.

How many times have you heard someone say, "I want to ask you about something, but I can't give you all the details and I don't want you to do anything about it?" More often than you would like, I'm sure. HR managers are thrust into no-win situations when those conditions are applied by employees.

Now, an appellate court ruling in Hardage v CBS Broadcasting, Inc. (U.S. 9th Cir., 03-35906, 11/1/2005) has held that the employer may not be held liable if the employee won't release information about what happened and who was involved. In this

case, the employee charged harassment but refused to give the HR manager any of the "gory details."

The court said, "...an employer's response to a harassment complaint may be deemed reasonable as a matter of law even though the employer conducted no investigation and took no action to address the harassing behavior." In a minority opinion the court wrote, "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified."

Obviously, there are still mixed opinions about liability in these circumstances. The safest approach seems to be one where the employer opens an investigation, even if it knows or suspects in advance that there won't be enough information with which to conduct a thorough investigation. Making such a determination formally requires an investigation be opened.

Want to read the court's opinion? Here it is ...
http://caselaw.lp.findlaw.com/data2/circs/9th/0335906p.pdf

Gentle Readers,

This is our final edition of Special Reports for HR Professionals for this year. We will take a holiday break for a few weeks and return to your mailbox after the new year has begun. We wish each of you a wonderful celebration of the season, and of life, at this special time of year. Our best to you all. Why not suggest to your colleagues that they subscribe at http://www.management-advantage.com/newsletr/newsletr.html

Bill Truesdell
Editor

IN THIS REPORT (Report #363, 12/9/2005)
---------- (Sent to over 1,500 subscribers)

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1. GAO SNIPES AT EEOC REORGANIZATION...COMMISSION FIRES BACK

The Government Accountability Office (GAO) released a report on October 28, 2005, accusing the Equal Employment Opportunity Commission (EEOC) of failing to fully implement changes recommended two years ago by an advisory panel.

"...EEOC has no organized approach..." the GAO report says. While more than 60 recommendations were made by the advisory panel only one key provision has been partially implemented, that being the national call center. Yet, GAO says, EEOC has failed to fully utilize its potential because call center workers do not actually accept complaints of discrimination over the telephone. People must still visit an EEOC field office to file a complaint.

Plans to restructure the organization of its field office structure were also criticized as unable to deliver cost savings until 2010.

EEOC has strongly disagreed with the GAO report claiming that the accounting oversight group failed to understand the Commission's strategy for management of its change implementation process.

Since October 21, 2005, the EEOC has been at full strength with the Senate confirmations of Christine Griffin and Naomi Earp.

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2. EXPANSION OF "HOSTILE ENVIRONMENT" IN 9th CIRCUIT?

Employers in the 9th U.S. Circuit Court of Appeals received a jolt on September 2, 2005, when the appellate body published its ruling in the case of *EEOC v. National Education Association*.

Circuit Judge Alfred T. Goodwin wrote in the Court's opinion, "This appeal presents the question whether harassing conduct directed at female employees may violate Title VII in the absence of direct evidence that the harassing conduct or the intent that produced it was because of sex. We hold that offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees."

There was no demand for sexual favors. There were no sex-related jokes. There were no photos or drawings of a sexual nature in the workplace. But, the impact of this supervisor's abusive behavior was terrifying to the female employees while the male employees pretty much ignored it. Even though the supervisor was a jerk and abusive to everyone, both men and women, Judge Goodwin said it was the impact that mattered. The Court said there is a difference in impact on the women, therefore the impact of the abusive behavior is sex related. And, that is illegal discrimination based on sex, a violation of Title VII of the Civil Rights Act of 1964.

Judge Goodwin concludes, "There was sufficient evidence for a rational trier of fact to conclude that the alleged harassment by [the boss] was both because of sex and sufficiently severe to support a hostile work environment claim under Title VII."

For a PDF copy of the 13-page opinion go to http://www.management-advantage.com/media/EEOCvNationalEducationAssociation9-2-05.pdf

(The 9th Circuit covers Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Oregon & Washington.)

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3. EMPLOYERS MAY NOT ALWAYS BE ALLOWED TO BAN FIRE ARMS

According to a report by Ford & Harrison, LLP, employers may not always be allowed to ban guns and other weapons from their parking lots. So far, it seems, all states allow employers to prohibit guns inside work areas. To do so requires a specific policy that the employer shares with employees in some way that allows an audit trail on policy distribution.

Here is how things stand in these states:

- Kentucky - Kentucky's concealed weapons law (Ken. Rev. Stat. 237.110(14)) precludes employers from prohibiting employees who have a valid license or permit to carry concealed

weapons from having weapons in the employees' own vehicle in the employer's parking lot.

- Oklahoma - Oklahoma prohibits employers from establishing any policy that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle in the employer's parking lot. (21 Okl. Stat. Ann Sec. 1289.7a; 1290.22(b))

- Minnesota - Minnesota's law provides, in part, that "an employer may not prohibit the lawful carry or possession of firearms in a parking facility or parking area." (Minn. Stat. Ann. Sec 624.714(18)(c))

- Proposed Legislation -
  - Utah - proposal would prohibit employers from baring employees' guns in their parking lots.
  - Texas - would allow guns in employer parking lots.
  - Florida - proposing felony punishment for employers who establish policies prohibiting employees from having firearms in the employer's parking lot.

Obviously, there is potential for impact on policies of employers who operate in these states. And, it should go without saying that any policy change, whether newly developed or revised, should be reviewed by your legal counsel before it is released to employees.

(Source: www.fordharrison.com/fh/news/articles/20051205weapons.asp)

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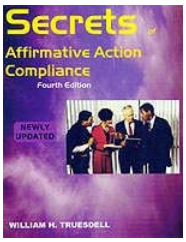

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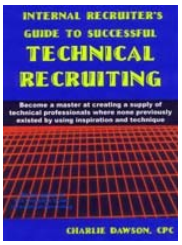

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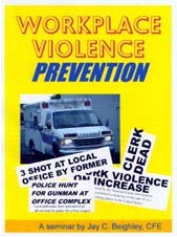

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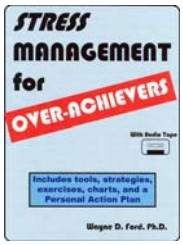

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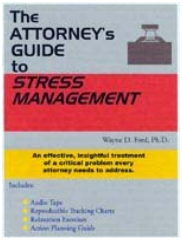

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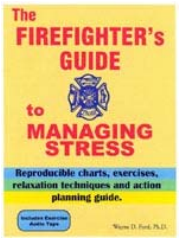

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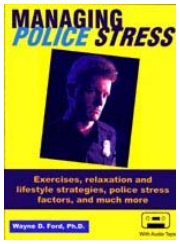

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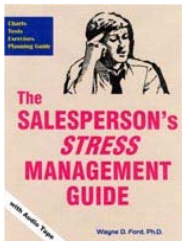

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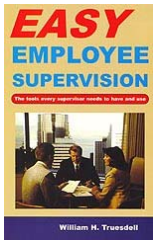

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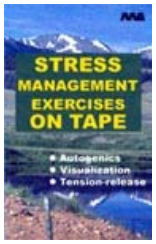

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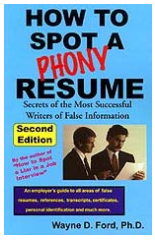

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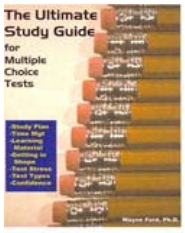

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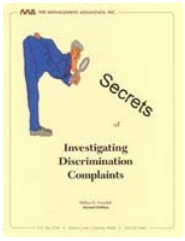

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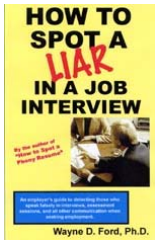

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