



## EMPLOYEE HANDBOOK TIPS & PITFALLS

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# Employee Handbook Issues

- Why have a handbook?
- “Must Have” provisions
- Common mistakes
- “New” items to consider



# Employee Handbook Issues

- Why have a handbook?
  - Instruction manual – expectations/guidelines
  - Consistency, structure
  - Provide notice/fairness
- Is it better to NOT have a handbook?
  - A poorly-drafted or largely-ignored handbook can do more harm than good



# Employee Handbooks

- “Must Have” Provisions
  - Anti-harassment and discrimination
    - With reporting procedures!
  - FMLA (if applicable)
  - E-mail and technological resources
  - At-will statement
  - Disclaimers
    - Not a contract
    - Subject to amendment, etc.



# Employee Handbooks

- Common Mistakes - Drafting
  - Disciplinary Section
    - Progressive nature/just cause
    - Make clear list of offenses is not all-inclusive
  - Introductory/Probationary Period
    - “Can terminate without cause during probationary period”
  - Vacation
    - How is it earned/accrued and paid out upon separation?



# Employee Handbooks

- Common Mistakes - Drafting
  - Confidential Information
    - Common statement: “Do not discuss your wages with any other person...”
    - Employees have a right to discuss topics in mutual aid and protection under NLRA
      - Wage and benefits information for example
      - May have right to discuss with both employees and third parties (union representatives or organizers)



# Employee Handbooks

- Common Mistakes - Drafting
  - “Guarantee” language – “will,” “shall,” etc.
  - Detailed health insurance
  - Acknowledgment
    - Poorly phrased
    - No signature line



# Employee Handbooks

- Common Mistakes - Implementing
  - State law language
  - Form language (e.g., from the Internet)
  - Outdated policies/failure to update
  - Big words/legal/technical language
  - “War and Peace” syndrome – too long



# Employee Handbooks

- Common Mistakes - Implementing
  - Proper roll-out of handbook
    - Distribute to all employees
    - Proper replacement/update of policies
    - Dropping it on employees/failing to explain and answer questions
  - Acknowledgments
  - Failure to have legal review of the contents



# Employee Handbooks

- Common Mistakes – Eroding Employment At Will
- What are the exceptions to employment at-will?
  - Termination for illegal reasons (discrimination, retaliation)
  - Termination in violation of a public policy
  - Express or implied contract
- How to inadvertently destroy the at-will nature
  - Discuss “cause”
  - “Permanent” employees



# Employee Handbooks

- Developing “New” Issues to Consider
  - Ensure the handbook provisions comply with the revisions to the ADA law (ADAA effective 1/1/09)
    - Definitions of disability
    - Accommodation responsibilities
    - Related documents/policies – interactive process and leave policies
  - Military leave compliance
    - FMLA provisions



# Employee Handbooks

- Developing Issues to Consider
  - Compliance with Genetic Information Non-Discrimination Act
  - Address employee texting issues
    - Texting while driving on company time
  - Employee use of social media/networking technology
    - Social Networking



# ADA Amendments Act

- Effective date of January 1, 2009
- Makes it easier for employees to bring ADA claims based on revised definitions and extension of coverage
- Makes it likely that more claims will be successful, or at least more difficult to defend



- Definition of “disability”
  - Designed to expand the reach of the law
  - “A broad scope of protection” for employees
  - Courts to apply coverage “to the maximum extent possible”
  - Practical impact
    - More difficult to get claims thrown out of court
    - Work from a heightened presumption of coverage when assessing employment decisions

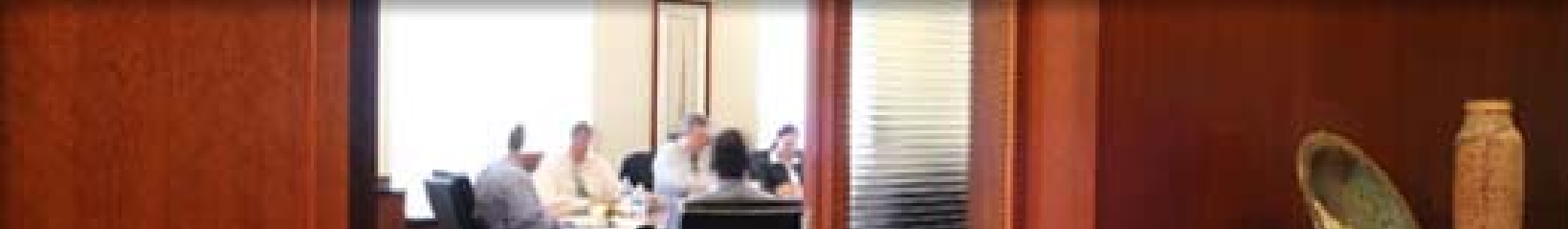


- “Mitigating Measures” to be Excluded
  - Courts must now ignore any and all mitigating measures
    - Medications
    - Prosthetics
    - Hearing aids
    - Mobility devices
    - HOWEVER, eyeglasses and contact lenses still qualify as mitigating measures
  - Practical impact
    - Interactive process/communication with health care providers need to exclude mitigating measure consideration
    - Adapt interactive process questionnaires, if necessary

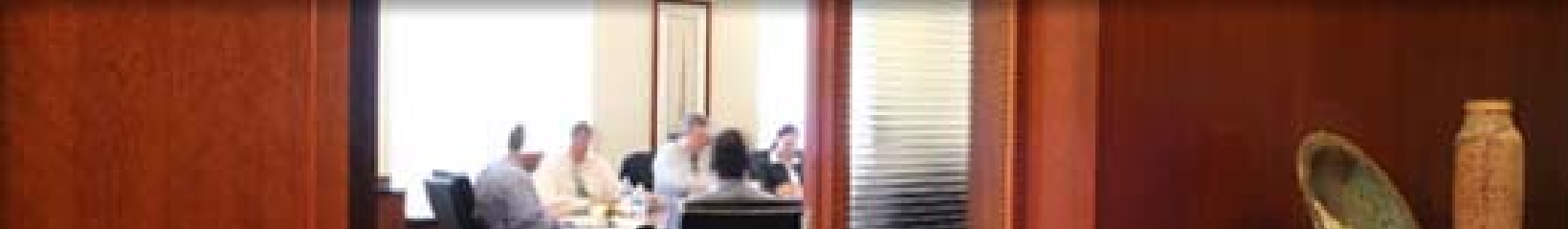


- **What is a “major life activity”?**

- No mention previously but EEOC had suggested certain activities as “major”
- ADAAA now lists
  - Caring for oneself, manual tasks, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, reading, concentrating, thinking, communicating, interacting with others and working
  - Operation of any bodily function – all the prior “traditional” functions, as well as cell growth, endocrine, digestive, reproductive, neurological and brain functions
- Practical impact
  - Ensures that more employees will be covered
  - Adds more “internal” and non-visible functions – more difficult to assess and address



- New definition of “substantially limits” proposed by EEOC (still proposed not final)
- An impairment is a disability within the meaning of this section if it “substantially limits” the ability of an individual to perform a major life activity as compared to most people in the general population.
- An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.



- New definition of “substantially limits” cont’d
  - An individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with a disability.
  - An impairment that “substantially limits” one major life activity need not limit other major life activities in order to be considered a disability.



Under additional proposed EEOC regulations, the following would consistently meet the definition of a disability

- Blindness
- Deafness
- Intellectual disabilities
- Partially or completely missing limbs
- Mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral palsy



Under additional proposed EEOC regulations, the following would consistently meet the definition of a disability

- Diabetes
- Epilepsy
- HIV/AIDS
- Multiple sclerosis
- Muscular dystrophy
- Major depression
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive-compulsive disorder
- Schizophrenia



- **“Regarded as” to Extend Further**

- Prior: plaintiffs needed to prove employer mistakenly believed employee was substantially limited in MLA
- ADAAA Standard
  - Need only demonstrate employer perceived them as having an impairment”
- Practical impact
  - Much, much lower standard
  - Will permit almost open access to the courtroom on perception cases
    - Except no impairments of less than 6 months or “minor”
  - Do not need to reasonably accommodate



- New definition of “substantially limits” cont’d
  - Combining new definitions of “major life activity” and “substantially limits” means that, for certain health conditions, diagnosis = disability
  - EEOC examples:
    - Diabetes (whether controlled or not) substantially limits the endocrine system and thus constitutes a disability
    - Cancer (whether in remission or not) substantially limits normal cell growth and thus constitutes a disability
    - Epilepsy (whether controlled by medication or not) substantially limits functions of the brain and seeing, hearing, speaking, walking or thinking during a seizure and thus is a disability



## ADAAA

### • What Do You Need to Do?

- ADAAA makes it even more important for HR to assess and address potential issues early and accurately
- Need to consider the broader reach of definitions when assessing potential impairments
  - May need to revise not only handbook policies but interactive process questionnaires and related employment information

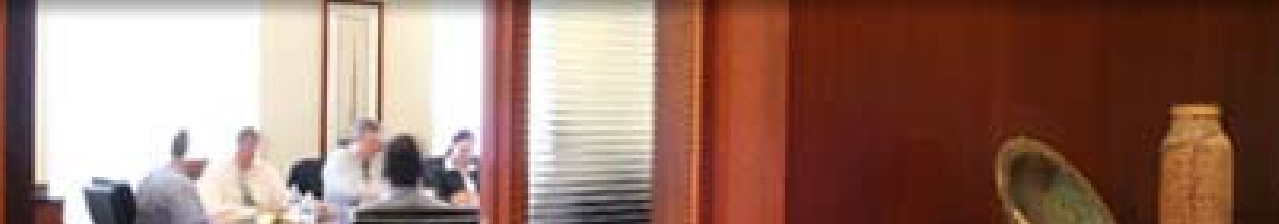


- Other Miscellaneous Revisions

- “Episodic or in remission” impairment can satisfy coverage if, “when active,” they substantially limit MLA

- Difficult for employers to know whether episodic or remission impairment may actually limit – too many unknowns

- ADA prohibits “reverse discrimination”



# *National Defense Authorization Act*

## *Expands Military-related FMLA Leave*

- October 28, 2009 - President Obama signed into law the fiscal year 2010 National Defense Authorization Act (“NDAA”) which expands the rights under the FMLA of military service members and their families

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# FMLA Military Leave Law

- Amendments took effect October 2009
  - Prior amendments to FMLA to include military leave in 2008
    - 26 work weeks to care for injured family member
    - 12 work weeks to address “qualifying exigency”
- Now:
  - Allows family member of injured veteran to take leave for medical treatment within 5 years of service
  - Extends SHC to include aggravation of pre-existing conditions
  - Extends qualifying exigency to active military



# FMLA Military Leave

- Previous FMLA provided up to 12 weeks of job protected leave necessary by any “qualifying exigency” arising out of the fact that an employee’s spouse, child or parent is on active duty or has been called to active duty “in support of a contingency operation”
- Amendment removes requirement that military duty be in support of contingency operation



# FMLA Military Leave

- Replaces the phrase “active duty” with “covered active duty”
- “Covered active duty” is defined to include deployment of any active Armed Service member to a foreign country and any deployment of an Armed Service reservist to a foreign country under a call or order to active duty.
- Before under Military Leave provisions, such “exigency leave” was available only to family members of National Guard members and military reservists.



# FMLA Military Leave

- Legislation extends the coverage of “Servicemember caregiver leave” to include caring for child, spouse, parent or next of kin who is a **veteran** undergoing medical treatment, recuperation or therapy for a serious illness or injury and who was a member of the Armed Forces (including National Guard or Reserves) at any time during the **five years preceding** the date on which the veteran undergoes treatment



# FMLA Military Leave

- Treatment of the veteran must be related to a “serious illness or injury suffered” while in the line of duty or which existed before the beginning of the veteran’s military service and was aggravated by service in the line of duty
- Military leave is also expanded to include care for a servicemember who **aggravates** prior injury or illness during the course of military service. Previously aggravation was not covered
- Unclear when the DOL will begin to enforce these new provisions of the FMLA




# FMLA Military Leave

- Extension of the law to veterans not effective until the Secretary of Labor defines “qualifying injury or illness” for a veteran
- Employers who are covered by the FMLA should immediately revise their policies to reflect & implement these changes



# FMLA Military Leave

- NEW FORMS
  - Notice of Rights and Responsibilities
  - Notice of Eligibility
  - Designation Notice
  - Certification for Employee's Services  
Health Condition
  - Certification for Family Member's Services
  - Certification for Qualifying Exigency
  - Certification of Covered Servicemember
  
- NEW POSTER



# **Genetic Information Non-Discrimination Act (GINA)**



# GINA

- Effective November 21, 2009
- Applies to employers with 15 or more employees
- Prohibits discrimination against employee based upon genetic information indicating a predisposition to chronic diseases
- Also prohibits retaliation against employees who claim discrimination based upon genetic information



# GINA

- What is genetic information?
  - Information gained from an individual's genetic tests
  - Information gained from genetic tests of family members; and
  - Information gained from an individual's family medical history



# GINA

- What are the exceptions?
  - The information is required to comply with medical certification requirements of state or federal family and medical leave laws;
  - The information is required to be used to monitor the adverse effects of hazardous workplace exposures; and
  - The employer conducts DNA analysis for law enforcement purposes as a forensic laboratory.



- What are employer's obligations/prohibitions under the law?
  - Prohibits genetic discrimination, without regard to how the information is derived by the employer, in hiring, termination, compensation, and other personnel actions such as promotions, classifications and assignments
  - GINA makes it unlawful, with some limited and clearly defined exceptions, for employers to request, require, or purchase genetic information about an employee
  - GINA also provides for genetic information received by the employer to be maintained confidentially and disclosed to the employee only



# GINA

- Other prohibitions

- The law also makes it illegal for insurance carriers (including self-insured employers) to discriminate against persons based upon genetic information that indicates predisposition to chronic diseases
- GINA prohibits health insurers from requesting or requiring an individual to take a genetic test
- Health insurers may not raise premiums or deny coverage based on genetic information



- Exceptions to Disclosure Prohibitions

- The law also prohibits disclosure of genetic information, except:
  - 1) upon the employee's request;
  - 2) to an occupational or other health researcher;
  - 3) pursuant to court order;
  - 4) to a government official investigating compliance with this law;
  - 5) in connection with the employee's compliance with the Family and Medical Leave Act or state family and medical leave laws; and
  - 6) to a public health agency.



- What are the remedies/enforcement mechanisms?

- Same as those under Title VII of the 1964 Civil Rights Act
- Except that “disparate impact” claims are not allowed under GINA
- The EEOC will enforce the employment provisions of GINA
- The Department of Labor will enforce the provisions relating to health insurance
- Both departments intend to publish implementing regulations before November 21, 2009



# Developing Issues to Consider

## Employee Texting

- “Textual” harassment
  - 4.1 billion text messages are sent each day in the U.S. (not all of them are nice)
  - 46 states have enacted laws against cyberstalking
    - Ohio’s criminal statute - R.C. 2917.21



# Developing Issues to Consider – In Greater Detail

## Employee Texting

- The law regarding what constitutes sexual harassment or other unlawful discriminatory conduct has not changed.
- The methods for making such inappropriate communications (texting, social networking sites) have changed.



## Employee Texting

- Strategies for dealing with “textual” harassment
  - Employers must implement clear written policies that limit employee texting to matters of business necessity.
    - Some employers have chosen to ban texting.
  - Employers must institute procedures that enable the storage and retention of text messages from company-provided phones
    - In cases of sexual harassment, such messages constitute “electronic messages” that are considered evidence in harassment cases, and must be retained by the employer — to support or refute the charge.



## Employee Texting

- Employees need to understand that inappropriate text messages are no different from inappropriate face-to-face comments.
  - Texting has the immediacy of a casual, spoken word but the permanency of an indelible document.
  - Employees understand the first. They don't understand the second
- The permanency of text messages make textual harassment cases much easier to prove than cases based upon conversations or conduct.



# Employee Texting

- Texting while driving
  - Ohio does not yet ban texting while driving but Cleveland and other municipalities do
  - A statewide ban is likely to occur (22 states currently restrict, to some degree, cell phone and texting while driving)
  - Employers must amend written policies to explicitly ban work-related texting while driving.
    - Otherwise, employers may face liability if an employee causes an accident while engaging in work-related texting (already the law in California).



## Employee Texting

- Do employees have a right to privacy in the content of text messages from a company-provided phone?
  - No. Unless a supervisor verbally informs employees that a written policy permitting auditing of messages will not be enforced. *Quon v. Arch Wireless Operating Co.*, 529 F.3d. 892 (9th Cir. 2008).



# Developing Issues to Consider – In Greater Detail

## Social Networking

- About 25% of employees ADMIT visiting during work hours
- About 10% of employers have terminated an employee for the content of their postings to a social networking site
- About 50% of employers now block Facebook, MySpace and Twitter




# Developing Issues to Consider – In Greater Detail

- Notable Facebook happenings
  - From a Philadelphia Eagles employee:  
*"Dan is f\*\*\*\*g devastated about Dawkins signing with Denver...Dam Eagles are Retarded."*
  - Va. art teacher terminated for YouTube video showing him painting canvas with his buttocks
  - City of Bozeman, MT required applicants to turn over social networking passwords



## **Recent happenings on Twitter:**

- "Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work."
- Larry Johnson – “tweeted” with slurs against sexual orientation and criticizing his coach



# Posting to the Web: Public Employer Concerns

- First Amendment
  - Free speech, expression, association
    - Discipline for speech/content
    - Responsible for posting of others?
  - Public forum/limited public forum issues
    - How to regulate postings on employer-sponsored blog?
- Public Records and Open Meetings



# Policies to Address Employee Posting to the Web

- Current AUPs are likely out of date
- Tie-in with all other company policies
- Keep it personal
  - No employer-related information/sponsorship (no logos, company email, etc.)
  - Disclaimers as to personal viewpoint
- Confidential information is to be protected (Company and employee information)
- Can be viewed by others, including employer
- Discipline may result



# **Proposed Legislation Affecting the Workplace**



# Proposed Federal Legislation

- **FMLA**-extend to include employers with 25 or more employees and expand reasons for taking leave (educational or extra curricular activities and caring for elderly relatives)



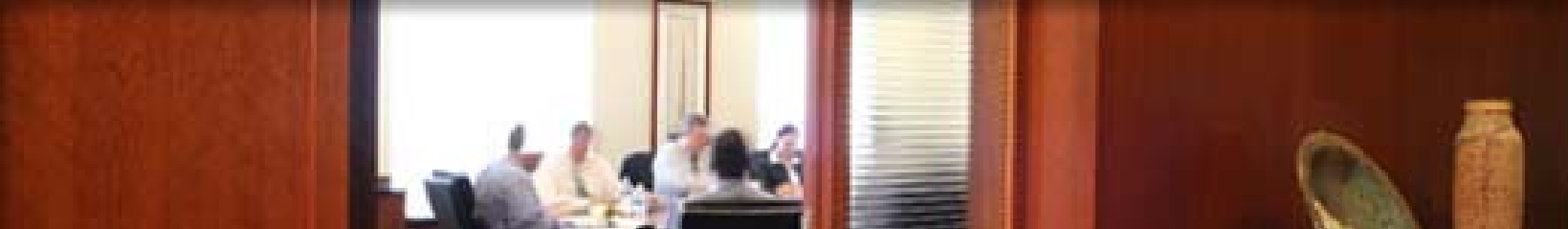
# Proposed Federal Legislation

- **Healthy Families Act** - applies to employers with 15 or more employees who work 20 or more hours/week
- Earn one hour of paid sick leave for every 30 hours worked (56 max) and carry over from year to year with cap at 56
- Use for employees illness, injury, medical conditions or related care, care for child, parent, spouse who has one of the conditions, care for any other individual related by blood or affinity...including absences for domestic violence, sexual assault or stalking



# Proposed Federal Legislation

- **Employment Non-Discrimination Act (ENDA)** - prohibits employment discrimination based on perceived or actual sexual orientation or gender identity
  - Already applied to federal agencies along with extension to domestic partners of federal employees



# **QUESTION AND ANSWER SESSION**