University System of Georgia

Human Resources Manual

2010

UNIVERSITY SYSTEM OF GEORGIA
HUMAN RESOURCES MANUAL

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CHAPTER 1

EMPLOYMENT GENERALLY

I. JOB DESCRIPTIONS

Having accurate and well-written job descriptions can assist an employer in defending against a variety of claims, especially those alleging legal violations related to discrimination (particularly disability discrimination) and minimum wage exemptions. Job descriptions should focus on the essential functions of the job and performance standards of the job.

The EEOC provides guidance on how to determine the essential functions, i.e., basic job duties that an employee must be able to perform, with or without reasonable accommodation. Each institution should carefully tailor and carefully examine each job to determine which functions or tasks are essential to performance. This is particularly important before taking an employment action such as recruiting, advertising, hiring, promoting or firing. *See* http://www.eeoc.gov/facts/ada17.html.

The factors suggested by the EEOC to consider in determining if a function is essential include:

1. Whether the reason the position exists is to perform that function.

2. The number of other employees available to perform the function or among whom the performance of the function can be distributed.

3. The degree of expertise or skill required to perform the function.

4. The actual work experience of present or past employees in the job.

5. The time spent performing a function.

6. The consequences of not requiring that an employee perform a function.

7. The terms of a collective bargaining agreement (if any).

In addition to the items factors suggested by the EEOC to determine the essential functions of the job, job descriptions also provide evidence of performance standards for each job. In preparing job descriptions, the institution should carefully analyze:

1. Skills and training essential to performing the job (e.g., language proficiency, education, experience).

2. Physical abilities and requirements (if any) essential to performing the job.

3. Expectations or requirements for satisfactory performance, output, and conduct.

4. Special scheduling requirements, such as the need to be on call, work shifts or weekends, and work overtime.

5. Any other special or unique conditions or circumstances related to the job.

When creating a description for a particular job, an institution should solicit input from the people who perform the job as well as from their directors and supervisors. If possible, it also is a good idea to use ergonomic, vocational, and safety experts to create accurate, measurable, and objective job descriptions.

Institutions should update job descriptions periodically, especially when there is a change in the requirements or expectations for a particular job. Over time, technology or other changes may alter a job, and human resources personnel (and sometimes managers) may be unaware of those changes. Job descriptions should not include qualifications or tasks that are no longer required, nor should they include tasks or duties that are not routinely performed. Employers should rely on job descriptions during recruitment, refer to and provide them to candidates during the interview process, and provide them to employees whenever they are updated.

Job descriptions at University System of Georgia (USG) institutions should be integrated with the Personnel Classification System. **For more information, please refer to the Human Resources Administrative Process and Procedure Manual titled Classification, Compensation and Payroll Policies and Policies titled Employee Categories and Position Classifications.**

II. RECRUITING AND HIRING

A. Recruiting

Georgia law prohibits advertisements for public employment that indicate a preference for non-disabled applicants or a preference based on race, color, religion, national origin, sex, or age, except where such characteristics constitute a bona fide qualification for employment in a particular position. *See* O.C.G.A. § 45-19-31. Institutions should not assume that any of these characteristics constitutes a bona fide occupational qualification, and they should consult Legal Affairs at the institutional or system level before reaching such a conclusion.

All job openings should be advertised in accordance with the institution's affirmative action plan. **Please see Chapter 18 of this reference manual for additional information on affirmative action.**

A candidate applying for a classified position or a faculty position at a University System of Georgia ("USG") institution must complete an application form. **See Sections 8.1 and 8.3 of the Policy Manual and the Human Resources Administrative Process and Procedures Manual Policies titled Employment Applications and General Criteria for Employment.**

B. Interviewing

Hiring units frequently have questions about what they can and cannot ask during an interview. Generally, interviewers should ask questions that relate to the candidate's qualifications and ability to perform the job for which he or she is interviewing. This includes asking about the candidate's job history, work experiences, training, etc.

Interviewers should avoid questions that focus on extraneous issues (e.g., marital status, parental status, sexual orientation) and should avoid making or expressing any assumptions or generalizations with respect to such matters. It is a violation of federal law to discriminate in hiring based on race, color, sex, age, religion, disability, or national origin.

Prior to the interviews, the interviewer or selection committee should develop a list of standard interview questions to be asked of all candidates. The questions should be open-ended (i.e., who, what, when, how, why, describe, explain) allowing the candidate an opportunity to tell the interviewer about his/her qualifications and to develop thoughts fully. Each standard question should relate to either the essential functions of the job or a general characteristic applicable to the employment setting (i.e., "tell me about a time you had a conflict with a co-worker and how you resolved it.")

It also is a violation of federal law to discriminate based on an applicant's citizenship. Accordingly, a candidate for employment should never be asked about citizenship or visa status. There are only two questions that can be asked with regard to an applicant's authorization to work at the institution:

1. Are you legally authorized to work in the United States?

2. If you are offered a job, will you now or in the future need the institution to sponsor you for a work visa?

Although it is illegal to discriminate based on national origin, it is legal to "non-select" a candidate who is not currently authorized to work at the hiring institution. Thus, it is perfectly legal to select a minimally qualified U.S. citizen over a more qualified foreign worker who is not currently authorized to work at the institution, but it is illegal to hire a minimally qualified U.S. citizen over a more qualified non-U.S. citizen with permanent residency (green card) status.

Please refer to Chapter 9 of this manual, and the Human Resources Administrative Process and Procedures Manual Policy titled Employment of Foreign Nationals.

C. Hiring

Professional and staff personnel are generally employed on an "at will" basis, meaning that either the institution or the individual can end the employment relationship at any time. Although such personnel may sign acknowledgments or other documents setting forth employment policies and expectations, they do not have employment contracts and are not granted employment for any particular period of time.

Faculty and administrative personnel (other than adjunct faculty, graduate teaching assistants, and part-time faculty who are previous USG retirees) are generally employed for a specified time period pursuant to a written contract. A written contract cannot be offered to a prospective institutional employee, however, until the faculty or administrative appointment is approved by the President of the institution. **See Section 1.2 of the Policy Manual.**

Applicants talk to many people during the selections process, each of whom may or may not have hiring authority or know the pay, benefits, and other conditions of employment for the position being filled. For that reason (and others), offers of employment should be made in writing and should set forth the significant terms and conditions of the offer.

Employees sometimes claim to have an express or implied employment contract based on oral representations made during the hiring process, written employment offers, or both. Such claims can be made by any applicant or employee, regardless of the position in question. For that reason, all personnel involved in the recruitment, selection, and hiring process must understand -- and communicate to applicants -- that any offer of employment will be made in written form. Such personnel also must refrain from making any promises or predictions to interviewees and other applicants, especially with regard to the length or duration of employment.

Similarly, written offers of employment should set forth necessary details, such as salary, benefits, hours of work, and any contingencies or conditions placed on the offer (e.g., offer contingent on passing background check and drug screen), but should avoid unnecessary recitals of employment policies and circumstances. If the offer is for employment at will, this should be

stated clearly in the written offer. Regardless of whose signature appears on such an offer, a written offer of employment should be reviewed by the institution's human resource department, its chief academic officer, and/or their designees to insure that it correctly states the terms and conditions of employment.

The need to avoid unauthorized promises and indications of employment is illustrated by the opinion recently issued by the Georgia Court of Appeals in *Board of Regents v. Doe*, 278 Ga. App. 878, 630 S.E.2d 85 (2006). In that case, a search committee selected a candidate for a dean's position at a USG institution. After the selection, the institution's provost sent an offer letter to the candidate outlining the details of the offer but stating that the offer was "tentative pending approval of the Board of Regents . . . ." Nevertheless, the administration confirmed the candidate's selection for a local newspaper, allowed him to meet with faculty regarding administrative matters, encouraged him to conduct fundraising activities on behalf of the institution, and publicly introduced him as the new dean on several occasions. Before the Board could approve the appointment, however, the institution was given additional information that created doubt regarding the selection. As a result, the institution withdrew its recommendation; and the Board never voted on the appointment. In the candidate's lawsuit for breach of contract, the court found that an offer of employment had been made and accepted according to the terms set forth in the offer letter. Although the Board never approved the appointment, the institution's actions reflected an intent to be bound by the employment agreement, such that subsequent Board approval was simply a "perfunctory" act. Although prior Board approval is no longer required for institutional level employment **(see Section 1.2 of the Policy Manual)**, the *Doe* case still illustrates the importance of following the proper procedures, in the proper sequence, when hiring employees.

Offers of employment also should discuss the initial period of provisional employment. All classified employees (employees who are not faculty or graduate assistants) are hired on a six-month provisional basis. For public safety officers, this six-month period does not begin until they have completed their mandatory training for certification as police officers. **See Human Resources Administrative Process and Procedures Manual Policy titled Employee Categories.**

When making an offer for temporary employment, institution personnel should remember that a temporary employee is still an employee. Temporary employees are covered by the same federal and state laws, and have much the same rights, as other USG employees.

In addition, institutions must comply with the Board of Regents's policy on nepotism (employment of relatives). **For additional information, please refer to Sections 8.2.3 and 8.3.1 of the Policy Manual and Human Resources Administrative Process and Procedures Manual Policy titled Employment of Relatives.**

D. Processing New Hires

There are a variety of activities that USG institutions must undertake with respect to new hires. Every incoming employee must complete a State Security Questionnaire, a Loyalty Oath, a Form I-9, and federal and state tax withholdings forms. In addition, every new employee is

required to read and become familiar with the institution's personnel policies and procedures, including policies related to vacation and leave benefits, insurance benefits, retirement benefits, duties to be performed, and conditions of employment. Department heads or supervisors are responsible for explaining the duties and responsibilities of the job to each new employee.

Please refer to Chapters 2 and 9 of this manual, Sections 8.2.4 and 8.2.5 of the Policy Manual, and Human Resources Administrative Process and Procedures Manual Policy titled Employment of Foreign Nationals, for more information on processing new hires.

III. REFERENCE CHECKS

A. Generally

Reference checks are a good way to verify a candidate's job history and can provide valuable insights on what type of employee the candidate would be. Reference checks need not be limited to those individuals listed by the candidate, although the institution should generally comply with the candidate's request that certain people not be contacted. When this happens, the institution can request other points of contact who can provide the same or similar information as the "off limits" reference. If possible, the institution should attempt to contact the individual for whom the candidate actually worked, or the candidate's co-workers or customers, instead of simply speaking with a personnel or human resource representative. **See Human Resources Administrative Process and Procedures Manual Policies on General Criteria for Employment and Background Information.**

B. Georgia Law

Georgia law provides that employers (and their representatives) are presumed to be acting in good faith when, at the request of a prospective employer or former employee, they disclose factual information concerning a current or former employee's (a) job performance, (b) acts or actions which would constitute a violation of Georgia law if such acts occurred in this state, or (c) ability or lack of ability to carry out the duties of the job. If your institution provides more information than dates of employment, position held, and salary, it is important for those providing the reference information to provide only factual information, not opinions or characteristics.

The presumption of good faith on the part of such employers must be overcome by a preponderance of the evidence, unless the information was disclosed in violation of a nondisclosure agreement, or was otherwise considered confidential according to applicable federal, state, or local statute, rule, or regulation. *See* O.C.G.A. § 34-1-4.

IV. EMPLOYEE PERFORMANCE EVALUATIONS

Board policy requires each institution to establish criteria for evaluating faculty performance on at least an annual basis. In addition, faculty members must also receive in-depth pre-tenure reviews in their third year of progress toward tenure. Faculty also must receive post-tenure reviews every five years beginning five years after the most recent promotion or personnel action.

Institutions that employ graduate teaching assistants and/or laboratory assistants must develop procedures to train such assistants in effective teaching methods, to conduct regular assessments of their teaching effectiveness and performance, and to assess their English competency (and provide language proficiency training if needed).

Board policy also mandates that supervisors of senior administrators evaluate such administrators.

Most institutions also require performance evaluations for classified personnel. A good performance evaluation can be a useful tool for recognizing good performance, identifying areas for improvement, communicating performance expectations, and establishing guidelines and benchmarks for achieving better performance. A performance evaluation that is completed in a careless or cursory manner, however, is essentially a waste of time that, in some cases, can limit an institution's ability to effectively manage employee performance issues.

Managers should remember (and explain to their employees) that performance evaluations are not a critique of the employee as a person, but simply a manager's opinion of how well an employee performs the job to which he or she is assigned. Performance evaluations provide an opportunity for managers and employees to discuss job duties and expectations so that everyone is "on the same page," and thus should be done at least annually.

Managers should begin a performance evaluation by reviewing the job description for the position to establish the essential functions and legitimate expectations of the job. Realizing that there are no perfect employees, managers should be honest, candid, constructive, and fair in their comments. Managers also should be sure to apply the same expectations to all employees who perform the same or substantially the same job duties.

Performance evaluations need to be specific with regard to expectations and deficiencies and should correctly classify each issue. For example, if the expectation for a clerk is to prepare 15 to 20 error-free documents a day, and the employee is only generating 10 to 15, this should be clearly addressed as a productivity issue. A rating of "needs improvement," by itself, will not remedy the problem. On the other hand, if the employee is generating 22 documents per day, but with significant errors, this should be addressed as an accuracy or quality of work issue. An employee whose performance is especially poor may need to be placed on a Performance Improvement Plan. **See Chapter 15 of this manual for more information.**

"Bad" employee evaluations generally fall into two categories. The first (and most common) type is the evaluation in which the employee is above average to excellent in all categories, with no identified areas for improvement. The problem is that managers who author such evaluations frequently find cause to discipline or terminate those very same employees in the months following the evaluation. This clear inconsistency often becomes the basis for legal action against the institution. The second type of "bad" evaluation is one in which the manager "unloads" on the employee for every imaginable deficiency, including those that have little to do with the essential functions of the job. Poor performance should be managed with appropriate progressive discipline at the time of the offense rather than the annual evaluation. The purpose of progressive discipline is to allow the employee to rehabilitate poor performance. This

objective cannot be met if the supervisor does not address the conduct until months later during the annual evaluation. Both types of evaluations can create problems if the institution is called on to justify or defend subsequent adverse actions against the recipient employee.

Managers should provide employees with copies of their performance evaluations in a timely manner and should meet with each employee in private to review and discuss the contents of the evaluation. It is also important to have the employee sign a copy of the evaluation and forward that signed copy to the institution's human resources department for inclusion in the employee's personnel file.

If the evaluation is especially critical, it may be appropriate to include a Performance Improvement Plan for that employee with timelines for review and compliance. **Please see Chapter 15 of this manual for more information on Performance Improvement Plans.**

In addition, please refer to Sections 8.3.5, 8.3.6, 8.3.7 and 8.3.12 of the Policy Manual and Human Resources Administrative Process and Procedures Manual Policy on Employee Evaluations, for more information on employee performance evaluations.

V. EMAIL AND VOICEMAIL SYSTEMS

Any institution that provides its employees with access to email or voicemail systems needs to adopt a policy or policies regarding how such systems are used. At a minimum, these policies should include the following provisions:

1. The equipment and software that make up these systems belongs to the institution (assuming this is true).

2. These systems are for business use only, and all communications through these systems are the sole property of the institution.

3. The institution has the right to deny use of these systems to, or discipline, any employee who misuses them.

4. The institution has the right to access and/or monitor all communications made through these systems, and, thus, use of these systems constitutes consent to such access and monitoring.

5. Policies regarding workplace harassment also apply to the use of these systems, and these systems must not be used to harass or otherwise discriminate against others.

6. Access to these systems is granted through individual passwords, and each employee granted such access is required to maintain the secrecy of his or her password.

7. Attempts to access another employee's email or voicemail account is strictly prohibited.

8. Communications made on these systems reflect on the institution, and such communications must be appropriate and non-defamatory.

9. Any communications to external recipients must be approved in advance by a supervisor or manager.

10. Any distribution of trade secrets, copyrighted materials, or otherwise confidential information through these systems is strictly prohibited.

Notwithstanding the foregoing provisions, institutions generally should not routinely monitor email or voice mail communications. Institutions should work with Legal Affairs at the institutional or System level to establish policies as to when and how such communications will be accessed and/or monitored.

VI. PERSONNEL FILES

Unlike many other states, Georgia has no law that requires employers to give employees access to their personnel files. Federal law, however, requires that employers make certain documents, such as retirement information and health insurance plan information, available to employees upon request. In addition, much of the information contained in personnel files is available to employees and others under the Georgia Open Records Act. **Please refer to Chapter 19 of this manual for more information on the Georgia Open Records Act.**

VII. RECEIVING GIFTS

Under Georgia law, it is a crime to bribe a public official or employee in an attempt to influence that official or employee in the performance of his or her duties. It is also a crime for a public employee to solicit, receive, accept, or agree to receive a "thing of value" by inducing the reasonable belief that the giving of the thing will influence the employee in the performance of his or her duties. Georgia law recognizes, however, that some gifts are not "things of value," including:

1. Food or beverages consumed at a single meal or event.

2. An award, plaque, certificate, or similar item given in recognition of civic, charitable, political, professional, or public service.

3. Food, beverages, and registration at group events to which all members of an agency are invited.

4. Actual and reasonable expenses for food, beverages, travel, lodging, and registration for a meeting that are provided to permit participation or speaking at the meeting.

5. Any gift with a value of less than $100.00.

6. Food, beverages, or expenses afforded public officers, their immediate family members, or others that are associated with normal and customary business or social functions or activities.

Accepting something other than those items listed above does not create a presumption of bribery. A person convicted of bribery is subject to fines of up to $5,000.00 and/or a jail sentence of between 1 and 20 years. O.C.G.A. § 16-10-2.

Any vendor who makes gift(s) to one or more public employees totaling more than $250.00 in a calendar year must file a disclosure report form with the State Ethics Commission on or before February 1 of each year. Such disclosures must name the employee receiving such gifts. *See* O.C.G.A. § 45-1-6. Similarly, lobbyists in Georgia must file disclosure reports with the State Ethics Commission on a monthly, periodic, or annual basis, depending on the nature of their lobbying efforts. *See* O.C.G.A. § 21-5-73.

The Board of Regents has established its own policies regarding gifts and gratuities prohibiting any employee from directly or indirectly soliciting, receiving, accepting, or agreeing to receive a thing of value by inducing the reasonable belief that the giving of the thing will influence his/her performance or failure to perform any official action. Additionally institution employees or any other person on his/her behalf, are prohibited from knowingly accepting, directly or indirectly, a gift from any vendor or lobbyist as those terms are defined in Georgia statutes (O.C.G.A. §§ 21-5-70(6) and 45-1-6(a)(5)b). Should a gift be accepted, it must be either returned to the donor or transferred to a charitable organization. Gifts may be accepted by the employee on behalf of the institution subject to reporting requirements of the Board of Regents. If the gift is accepted, the person receiving the gift shall not maintain custody of the gift for any period of time beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift. **For more information, please refer to Sections 8.2.13 and 8.2.20 of the Policy Manual and Human Resources Administrative Process and Procedures Manual Policies titled Gratuity and Conflict of Interest.**

CHAPTER 2

REPORTING NEW HIRES

I. OVERVIEW

Under Georgia and federal law USG institutions are required to report all new hires or re-hires within 10 days of his/her date of hire. *See* O.C.G.A. § 19-11-9.2 and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, 42 U.S.C. § 653A.

II. WHO TO REPORT

A. New Employees

The institutions must report all employees who reside or work in the State of Georgia that will earn wages. Even if the work is only for one day, or he/she is terminated before fulfilling the 10-day reporting period, the employee must be reported.

B. Re-hires or Re-called Employees

The institutions must also report re-hires, or employees who return to work after being laid off, furloughed, separated, granted a leave without pay, or terminated from employment. Institutions must also report any employee who remains on the payroll during a break in service or gap in pay and then returns to work. This includes teachers, substitutes, seasonal workers, etc.

C. Temporary Employees

If an employee is hired through the help of a temporary agency, the temporary agency is responsible for reporting the.

III. WHAT TO REPORT

The USG institutions must report the employee's full name, address, social security number, date of birth, date of hire, and medical insurance availability.

IV. WHERE TO REPORT

The USG institutions can report the information by various methods described below.

A. Electronically –

https://www.newhirereporting.com/NewHireFunctions

Employers who submit reports electronically shall submit the reports in two monthly transmissions not more than sixteen days apart.

B. By Mail –

Georgia New Hire Reporting Program
P.O. Box 38480
Atlanta, GA 30334-0480

C. By Fax –

(404) 525-2983 or (888) 541-0521

CHAPTER 3

EMPLOYMENT OF MINORS

I. OVERVIEW

Georgia law and federal law limit the employment of minors. *See* O.C.G.A. § 39-2-1 et seq. and 29 C.F.R. § 570.1 et seq. Minors are defined as individuals under age 18. Since the universities fall under the Fair Labor Standards Act, all federal laws that are more restrictive than Georgia laws will apply. USG institutions cannot employ minors under age 14, and federal law limits the employment of minors until age 18. **Refer to Policy Manual Section 8.2.2 and Human Resources Administrative Process and Procedures Manual Policy titled Age Criteria.**

II. WORK CERTIFICATES

For a USG institution to employ a minor, it must receive a work certificate from the minor. O.C.G.A. § 39-2-11. The certificate typically comes from the school of the minor but can come from the county school superintendant's office, and must be filed with the Commissioner of Labor within 30 days from its issuance. In addition to the certificate, the superintendent of schools or staff member will issue an identification card to each minor. The identification card will certify that the minor is eligible for employment.

The certificate must include the full name, date, and place of birth of the minor; the name and address of the parents, guardian, or other person having custody of the minor; and verification that the minor has appeared before the issuing officer and presented evidence of age.

A. Recordkeeping

Certificates - The minor must take the original (white) copy of the certificate to the USG institution. The institution must maintain this copy of the certificate on the premises where the work is performed for the duration of the minor's employment.

ID Cards - Minors 16 and 17 years of age who are issued a permanent identification card (Form DOL-4102) by the issuing officer should retain the card themselves. A minor should present their first employer with the original copy of the employment certificate. For subsequent employment, a minor should present the ID card to the new employer, who must make a copy of the ID card and return the original to the minor. A copy of the ID card must be maintained on the premises where the work is performed as long as the minor is employed.

B. Termination of Employment

Upon termination of employment of any minor between 14 and 16 years of age, the institution must return the employment certificate to the issuing officer within five days of the date of termination.

If a minor between 14 and 16 years of age fails to appear for work on more than 30 consecutive days, the institution must return the employment certificate to the issuing officer. This must occur within 5 days after the end of the 30-day period.

III. PROHIBITED HAZARDOUS WORK — 29 C.F.R. § 570.31 et seq. and 29 C.F.R. § 570.50 et seq.

A. Minors ages 14 and 15 years of age cannot:

1. Operate lawn mowers or weed eaters;
2. Load/unload vehicles;
3. Operate power driven food slicers, grinders, choppers, cutters, etc.;
4. Cook;
5. Operate power-driven machinery;
6. Work at a construction site;
7. Perform work requiring use of ladders or scaffolds;
8. Work as a public messenger;
9. Work in a warehouse;
10. Work in a freezer;
11. Operate bakery-type mixers;
12. Perform manufacturing work;
13. Mine; or
14. Perform most processing occupations (such as filleting fish, dressing poultry, commercial laundering).

B. Minors under 18 cannot perform:

1. Jobs involving the manufacturing and storing of explosives;
2. Coal mining, logging and saw mill work;
3. Operating power-driven woodworking machines, bakery machines or paper product machines;
4. Jobs with exposure to radioactive substances;
5. Operating a power-driven hoisting apparatus;
6. Operating power-driven metal forming, punching and shearing machines;
7. Mining, other than coal mining;
8. Meat processing jobs (slaughtering, packing, processing or rendering);
9. Manufacturing brick, tile and kindred products;
10. Jobs operating power-driven circular or band saws and guillotine shears;
11. Work in wrecking, demolition and shipbreaking operations;
12. Roofing work; or
13. Excavation jobs.

IV. DRIVING

Under federal law, no employees under 17 years of age may drive on public roadways as part of their jobs. Seventeen-year-olds may drive on public roadways as part of their employment, ONLY if all of the following requirements are met:

A. The driving is limited to daylight hours.

B. The 17-year-old holds a state license for the type of driving involved in the job performed.

C. The 17-year-old has successfully completed a state approved driver education course and has no record of any moving violation at the time of hire.

D. The automobile or truck is equipped with a seat belt for the driver and any passengers, and the employer has instructed the youth that the seat belts must be used when driving the vehicle.

E. The automobile or truck does not exceed 6,000 pounds gross vehicle weight.

F. Such driving is only occasional and incidental to the 17-year-old's employment.

Employees who are 17 years old may not drive more than one-third of the worktime in any workday and no more than 20 percent of the worktime in any workweek. For more information, see: 29 C.F.R. § 570.52, http://www.dol.state.ga.us/em/cl_hazardous_occupations.htm, and http://www.dol.gov/esa/whd/regs/compliance/whdfs34.htm.

V. HOURS OF WORK

A. Minors 14 and 15 years of age can only work:

1. 3 hours on a school day
2. 8 hours on a non-school day
3. 18 hours in a school week
4. 40 hours in a non-school week
5. Not before 7:00 a.m.
6. Not after 7:00 p.m., but evening hours are extended to 9:00 p.m. for period of June 1 through Labor Day
7. Not during normal school hours *See* 29 C.F.R. § 570.35.

B. Minors 16 and 17 years of age have no work hour restrictions.

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CHAPTER 4

PERSONNEL INVESTIGATIONS CONCERNING EMPLOYMENT

I. OVERVIEW

As discussed in Chapter 1, background checks and other types of pre-employment investigations are valuable tools in the hiring process. However, institutions must be careful to limit their inquiries to matters that relate to the employee's ability and qualifications to perform the job in question, and must refrain from asking about (or considering) collateral information unrelated to the applicant's ability to perform the job. The institution also should treat such information as confidential. Such information should be shared only with human resource managers and the managers who are involved in the hiring decision.

II. FAIR CREDIT REPORTING ACT

A. Overview

The Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (FCRA), protects the rights of employees and applicants when employers use consumer reports and investigative reports to gain information about them. Employers may use such reports when hiring new employees or when considering employees for promotions and reassignments, so long as they comply with FCRA guidelines. Originally designed to ensure that credit reports on consumers are fair and accurate, FCRA now affects employers to the extent that consumer reports and investigative consumer reports may cause individuals to be denied jobs or other employment opportunities.

B. Guidelines for Using Consumer Reports

A "consumer report" is defined by law as any written, oral, or other communication by a consumer reporting agency that: (a) bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living; and (b) is used, or expected to be used or collected, in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for credit, insurance, or employment.

Consumer reports may include criminal background and driving reports. In order to be considered a consumer report, the report must come from a "consumer reporting agency." FCRA defines a consumer reporting agency as an entity that, in exchange for fees or dues or on a cooperative nonprofit basis, regularly engages (in whole or in part) in the practice of assembling or evaluating credit information or other information on consumers for the purposes of furnishing consumer reports to third parties. Thus, by definition, information obtained from law enforcement and other governmental agencies is not included.

Generally, employers who use consumer reports must take five steps to avoid liability under FCRA:

1. Provide a clear and conspicuous written disclosure to the applicant or employee that a consumer report may be obtained for employment purposes. This disclosure must be given before the report is requested;

2. Obtain the applicant's or employee's written consent before requesting the report;

3. Certify to the consumer reporting agency that: (a) FCRA disclosure and consent procedures have been followed; (b) information from the report will not be used in violation of any federal or state equal employment opportunity laws or regulations; and (c) if any adverse action is taken based upon the report, a copy of the report and a summary of rights will be provided to the applicant or employee;

4. Give the applicant or employee a copy of the consumer report and a description of FCRA rights before taking any adverse action (e.g., nonselection) based on the consumer report; and

5. If the employer decides to take an adverse action based upon the consumer report, it must provide the applicant or employee with: (a) notice (oral, written, or electronic) to the applicant or employee of the adverse action; (b) the name, address, and telephone number of the consumer reporting agency; (c) a statement that the consumer reporting agency was not the party who took the adverse action and is not able to explain why the decision was made; and (d) a statement telling the applicant or employee that he or she has the right to dispute directly with the consumer reporting agency the accuracy or completeness of the information provided.

C. Guidelines for Using Investigative Consumer Reports

An "investigative consumer report" means a consumer report (provided by an outside agency) that gathers information about a consumer's character, general reputation, personal characteristics, or mode of living, obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom the consumer is acquainted or who may have knowledge concerning any such items of information. An institution may check references personally; but, if an outside agency is used to gather this information, the employer is subject to FCRA.

Institutions who use investigative consumer reports must comply with the following guidelines to avoid liability under the Act:

1. Provide the applicant or employee with: (a) a written disclosure that an investigative report will be obtained for employment purposes; (b) a statement of the applicant/employee's rights under FCRA; and (c) a statement informing the

employee of his or her right to request additional disclosures of the nature and scope of the investigation;

2. The disclosure must be mailed or otherwise delivered not later than three days after the date on which the report was first requested;

3. When requested by the applicant or employee, the institution must make a complete disclosure of the nature and scope of the investigation that was requested. This information must be mailed or otherwise delivered not later than five days after the request was received or the report was first requested, whichever is later;

4. Certify to the consumer reporting agency that: (a) FCRA disclosure and consent procedures have been followed; (b) information from the report will not be used in violation of any federal or state equal employment opportunity laws or regulations; and (c) if any adverse action is taken based upon the report, a copy of the report and a summary of the consumer's rights will be provided to the applicant or employee;

5. Give the applicant or employee a copy of the investigative report before taking any adverse action based on the investigative report; and

6. If the institution decides to take adverse action against the employee based upon information used from the report, the institution must provide the applicant or employee with: (a) notice (oral, written, or electronic) to the employee of the adverse action; (b) the name, address, and telephone number of the consumer reporting agency; (c) a statement that the consumer reporting agency was not the party who took the adverse action and is not able to explain why the decision was made; and (d) a statement telling the employee that he or she has the right to dispute directly with the consumer reporting agency the accuracy or completeness of the information provided.

D. Possible Liability

FCRA allows applicants and employees to sue employers in federal court for damages, costs, and legal fees. The Federal Trade Commission may also impose penalties for violations of FCRA.

III. THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (FACT ACT)

The Fair and Accurate Credit Transactions Act (FACT Act) was signed into law December 4, 2003. The Act amends the disclosure and adverse action requirements under FCRA for employers when conducting employee investigations. 15 U.S.C. § 1681 et seq.

The FACT Act adds a new section to FCRA that creates some exemptions for employers. Employers are exempt from the FCRA when conducting employee investigations regarding suspected employment-related misconduct or compliance with state, federal, or local laws and

regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer. Disclosure of the results of the investigative report is limited to the employer or an agent of the employer, government officials, regulatory agencies, and other individuals or agencies authorized by law. FCRA still applies, however, when conducting an investigation regarding an employee's creditworthiness.

In the event that adverse action is taken against the employee based on the results of the investigative report, the employer must disclose to the employee a summary of the nature and substance of the investigation upon which the adverse action is based. Given that the consumer reporting agency may gather some of its information from other workers, the sources of the information used in the report need not be disclosed to the employee.

IV. ADDITIONAL INFORMATION

For more information refer to the Policy Manual and the Human Resources Administrative Process and Procedures Manual Policies titled Background Information.

CHAPTER 5

INVESTIGATIONS

I. OVERVIEW

Documentation of a USG institution's investigation of an employee is just as important as the investigation itself because the documentation serves as a record of the entire process. **Refer to the Policy Manual and the Human Resources Administrative Process and Procedures Manual Policies titled Cooperation in Internal Investigation.** If litigation develops, whether criminal or civil, the material gained through the investigation may be used as evidence in court. The USG institution should only document actual facts, observations, and impressions, not opinions or characterizations. The tone of the documentation should be professional and avoid irrelevant derogatory comments about any of the parties, witnesses, or evidence.

Throughout the investigation, the investigator(s) should take notes of interviews. Those notes should be periodically reviewed to ensure that the institution has followed up with all witnesses who have been identified by the accuser and/or the accused, as well as anyone else. The institution should document all attempts to contact individuals who are uncooperative or unavailable.

If the investigation resulted in any disciplinary action, the institution should document what action was taken. It may be that the only necessary action is a verbal reprimand advising the accused to stop the behavior. This conversation should be documented, including a signature by the accused. Furthermore, the institution should follow up with the accuser, advise him or her of the action taken, and encourage him or her to immediately report any further incidents. This conversation should be documented and signed by the accuser.

II. CREATE A CONFIDENTIAL FILE

All documentation of an investigation must remain confidential.[1] Only those individuals with a "need to know" should have access to the investigatory file and any documents therein. Furthermore, any administrative or clerical employees who are responsible for typing or filing these documents should be capable of maintaining this high level of confidentiality. The file should be maintained in a locked or otherwise inaccessible file cabinet; or, if on a computer, the file should be password protected.

A. The separate, confidential file should contain the following:

1. Investigatory notes;

2. Signed original and copies of any statements taken and signed original and copies of notes; and

[1] Personnel files should contain evidence of counseling and disciplinary action taken. However, a separate investigation file is suggested for all but "minor" or insubstantial claims or complaints (e.g., a single incident of profanity or vulgar language by a co-worker).

3. Any written documents or communications pertaining to the situation.

III. THE INVESTIGATION

The first step in the investigation should be a thorough interview of the complainant/ accuser and the interview should be recorded with proper documentation. The institution should conduct the interview in a way that does not bring undue attention to the complainant/accuser and the accused.

Next, the investigator should interview the witnesses. The investigator should ask open-ended questions, i.e., questions that allow the witness to tell his/her version of events. An example would be: "tell me whether any discussions of sex have occurred in the janitorial department." Interviews should uncover what the witness knows rather than provide or suggest information. The witnesses should be told that they are to keep the investigation confidential, and that they will not be retaliated against for providing truthful information in the investigation.[2]

The last step in the investigation should be the interview of the accused.

A. What Is a "Prompt" Investigation?

An investigation should begin within 48 hours of a complaint, especially a sexual harassment complaint. An investigation should not be unnecessarily drawn out. Management should end an investigation and determine what, if any, action to take, as rapidly as the situation allows.

B. What Is a "Thorough" Investigation?

A thorough investigation involves, at a minimum, an interview with the complainant, any witnesses, and the accused. The interviews will serve several purposes: (1) cover a wide range of topics; (2) be designed to educate the parties and witnesses about the institution's harassment policy, if necessary; and (3) inform the parties as to any discipline which can result, especially if someone engages in sexual harassment. Interviews are conducted to gain an understanding of the facts of the case as early as possible and to prepare as many defenses to potential litigation as possible. For this reason, each person should be asked if he or she has any other relevant matters which he or she feels should be discussed before ending the interview. The interviewer should continue asking questions until the person being interviewed has covered all the relevant facts.

[2] On January 26th, the United States Supreme Court issued its decision in *Crawford v. Metro. Gov't of Nashville & Davidson Cnty, Tennessee*, 555 U.S. ----, 129 S.Ct. 846 (2009). The Court held that, by responding to questions from her employer about her allegations of sexual harassment, an employee had "opposed" unlawful conduct under Title VII, and could therefore bring a retaliation claim for her subsequent termination. The decision expands the potential grounds for retaliation lawsuits under Title VII. How much it will expand those grounds remains to be seen.

C. Confidentiality

The interview should also cover issues of confidentiality. The investigator should explain that the institution cannot guarantee confidentiality because a complete and thorough investigation may require disclosures in order to obtain information. Nevertheless, the institution should assure the participants in the investigation of its hope to keep the allegations and identities of persons as confidential as possible. Remind the participants that false allegations spread around to others not involved in the investigation can result in defamation lawsuits against the person who leaked the information.

D. Interviewing the Accuser

Historically, the cause of action for "hostile work environment" discrimination stems from Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e. This law prohibits an employer from discriminating against any individual with respect to the terms and conditions of their employment, because of race, color, religion, sex, or national origin. Harassment is a form of discrimination that can adversely effect a "term and condition of employment." Many courts have subsequently recognized a hostile work environment cause of action arising from protections in the Americans With Disabilities Act (ADA)[3] and the Age Discrimination in Employment Act of 1967 (ADEA)[4]. Therefore, the conduct in question must always be attributable to one of the protected classifications to sustain this cause of action.

Generally, to establish a hostile work environment an employee must show:

1. That the harassment was unwelcome;

2. That the harassment was based on the protected classification (i.e., race, sex, etc.);

3. That the harassing conduct was sufficiently severe or pervasive to affect the "terms, conditions, or privileges of employment;"

4. Either the harassment was committed by a supervisor, or the employer, through its supervisory personnel; and

[3] *Oestreich v. Wal-Mart Stores East LP*, 2009 WL 890729 (N.D.Fla., March 30, 2009) (citing *Burgos v. Chertoff*, 274 Fed. Appx. 839 (11th Cir. 2008)).

[4] Although the Eleventh Circuit Court of Appeals (governing the law in Georgia) has not specifically decided whether hostile work environment claims are actionable under the ADEA, it has implicitly recognized the viability of such claims and has analyzed them under the Title VII framework outlined in *Miller v. Kenworth of Dothan, Inc*., 277 F.3d 1269, 1275 (11th Cir.2002). See *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1245 n. 80 (11th Cir. 2001) (holding that Plaintiffs did not satisfy the requirements for stating a hostile work environment claim "[a]ssuming hostile work environment claims are cognizable under the ADEA"); see also *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834 (6th Cir. 1996) ("[W]e find it a relatively uncontroversial proposition that such a (hostile environment) theory is viable under the ADEA.").

5. That the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action.[5]

a. Severe or Pervasive

The legal definition of a "hostile" or "abusive work environment" is when the workplace is permeated with discriminatory intimidation, ridicule, and insult, which is sufficiently severe or pervasive to the point of altering the conditions of the victim's employment. *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 584 (11th Cir. 2000). To determine if something is sufficiently severe or pervasive to constitute a hostile work environment both an objective and a subjective test must be met. The conduct must be severe or pervasive enough to create an environment that a "reasonable person" would find hostile, and the victim must also subjectively regard that environment as hostile. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). However, the offensive conduct does not have to be both severe and pervasive, it can be one or the other.

b. The Subjective Test

To meet the subjective test, the victim must regard the environment to be hostile. If the victim does not subjectively perceive the environment to be hostile, the conduct has not actually altered the conditions of the victim's employment, and there is no violation of law. This can prove to be tricky because even if the environment does not seriously affect the employees' psychological well-being, it could still detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Courts have also recognized that even when the victim understands the offender to be joking, as long as the victim considered the conduct to be abusive, the subjective test can be met. The targeted employee's conduct is also relevant in determining if they were in fact offended. For example, an employee who frequently uses foul language toward others, will not be as believable when complaining that the foul language of his co-workers created a hostile work environment.

c. Reasonable Person or Objective Test

Recognizing that you can have an "egg shell" employee who is more sensitive to things than others, the courts also require that the offensive conduct be considered severe or pervasive as viewed by a "reasonable person." Therefore, the mere utterance of an epithet which engenders offensive feelings in the targeted employee, may not sufficiently affect the terms and conditions of employment when it is not severe or pervasive enough to create an objectively hostile work environment.

If it seems vague to evaluate what constitutes a hostile work environment based upon what a "reasonable person" would consider a hostile work environment to be, you have picked up on a key issue that tends to resonate in these types of cases. To ensure that your institution is protected, however, it is important for you to ask certain questions.

[5] *Borden v. Mendoza*, 195 F.3d 1238 (11th Cir. 1999).

d. Totality of the Circumstances

To assist in dealing with the inherently vague words, "severe" or "pervasive", the courts have pointed to several factors that should be examined. These include, but are not limited to, the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. However, it is important to consider the totality of all the circumstances in the case.

Employers should take every complaint seriously because hostile work environment cases tend to deal with conduct over a period of time rather than one event. During each complaint the employers have an opportunity and a responsibility to explore if there has been any prior conduct that could be considered pervasive by the victim or a reasonable person. The initial complaint raised by an employee may not be enough to substantiate a hostile work environment cause of action, but if the employer does not take immediate and appropriate corrective action, a lawsuit may not be far behind.

Because every case has unique circumstances, determining the severity of the claim is never a science. However, the basic formula for determining what constitutes a hostile work environment is conduct that is so severe or pervasive, as viewed by the victim and a reasonable person, that it unreasonably interferes with an employee's work performance.

In this jurisdiction, when determining whether a work environment is sufficiently hostile under this standard, there are four general factors to be considered: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 584 (11th Cir. 2000). Stated differently, "a plaintiff must show that 'the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe to alter the conditions of the victim's employment and create an abusive working environment.'" *Rojas v. Fla.*, 285 F.3d 1339, 1344 (11th Cir. 2002). Therefore, it is essential that you ask open-ended questions in the interview of the accuser/complainant, exploring issues such as:

- The type of conduct;
- The frequency of the conduct;
- What specifically was said or done;
- Where it occurred;
- Where the complainant was touched;
- The dates that the conduct occurred;
- The time period over which the conduct occurred;
- Whether or not there was a pattern of previous episodes; and
- How the accuser/complainant responded.

Preferably, the complainant/accuser should put the events in writing at the beginning of the interview, inasmuch as writing down the complaint memorializes the complainant's allegations. Claims in writing will also focus the complainant/accuser on the essential elements and may prevent the complainant/accuser from verbally rambling on and on and changing his or her story later. Furthermore, after reading the claims, institution representatives can ask additional questions based upon the written submissions.

At the conclusion of the meeting, the complainant/accuser should be assured that the institution takes the complaint seriously and that it will thoroughly investigate the complaint; but it should also be explained that it may take several days to complete the investigation. The investigator should explain to the complainant/accuser that the institution will notify him or her of the results of the investigation and thank the complainant/accuser for bringing the matter to the institution's attention. In claims regarding sexual harassment, discrimination, or whistleblower allegations, the complainant/accuser should also be assured that the institution will make sure that no one will retaliate against him or her in any way for complaining to the institution. The complainant/accuser should be told to notify a designated person immediately if he or she suffers further harassment or retaliation. If necessary, the institution may consider altering the working relationship between the accuser and the accused during the investigation.

For allegations of harassment or discrimination or for whistleblowers, the institution should avoid making any changes that the complainant/accuser could later construe as retaliation for making the complaint. In many cases, the law treats retaliation for making a complaint more seriously than the harassment itself. Therefore, if the institution transfers the complainant/accuser instead of the accused, it should seek to do so on the basis that the complainant/accuser requested the transfer. In all events, however, the transfer of the complainant/accuser must involve a neutral, lateral move without any hint of demotion or reduced wages or prestige.

E. Interviewing Witnesses

Following the interview of the accuser, the institution should interview pertinent witnesses whom the complainant/accuser and the accused have identified. The investigators should avoid, at least initially, disclosing any information to the witnesses. The investigators should gather facts, and they should not just disseminate the allegations. Investigators should attempt, so far as is possible under the circumstances of the investigation, to protect the privacy of everyone involved. In some cases, however, investigators may find disclosing some names and facts necessary, or even helpful. Investigators should keep complete notes of the interviews, not only with the accused, but also with all the witnesses. In taking notes, it is important to remember that subsequent litigation may require investigators to disclose their notes. Investigators may consider preparing a statement for each witness to sign, particularly if the complainant appears ready to file a discrimination charge.

F. Interviewing the Accused

After conducting a thorough investigation into the allegations of the accuser and the observations of the witnesses, the institution should then interview the accused. The reason that

the accused should be interviewed last is because it is easier to investigate when the institution has all the facts. For example, if several witnesses all recount the same facts, an investigator will spend less time quibbling with the accused as to whether or not it occurred, but rather the investigator can focus on getting the accused to accept responsibility and change the offensive behavior.

The accused's interview(s) should begin with a summary of the allegations in the complaint, and the accused should be asked to provide his or her side of the story. Interviewers should carefully notice the accused's reaction to the allegations, even if the accused denies the allegations. Does the accused appear surprised, or mad, or sad, or depressed, or happy? Details in areas where the accused and the accuser agree and disagree about what actually happened should be explored. In addition, the interviewer should include questions about the workplace climate: Do workers frequently relate racial jokes or sexual jokes? If the accused believes that the actions that precipitated a complaint were voluntary or consensual, what evidence supports this? Do workers frequently use sexually suggestive or racially derogatory language? Have others found the alleged conduct of the accused offensive? Does the accused have suggestions about how to resolve the situation? The accused should be instructed that the institution will not tolerate any retaliation against the complainant/accuser. He or she should be advised that the institution will conduct a thorough investigation because the institution has not yet determined the truth of the allegations. The accused should be told not to discuss the matter with the accuser or with anyone else.

G. Documenting the Investigation's Outcome

The following should be documented at the conclusion of the investigation:

1. Communications to the complainant and the accused;

2. A final report, including a summary of the investigation, the conclusions of the investigation, and notes on verbal conversations;

3. Any disciplinary action taken; and

4. Do not include derogatory comments or personal opinions, especially about a person's integrity or reputation.

H. What If the Individual Being Questioned Asks for a Lawyer?

If the accused or a witness refuses to talk to the investigator unless his/her lawyer is present, they probably have been watching too much "Judge Judy." Your investigation of a complaint is not a judicial proceeding, it is a business matter. There is no right to legal counsel. Be prepared to explain that there is no right to representation by counsel in the workplace and that following instructions from management is part of the job; therefore, cooperating with an investigation at the institution's direction is one of the employee's job duties.

It is important to stress to all parties from the outset that the investigation is a neutral, fact-finding procedure and that it is the institution, not the complainant, who has decided to investigate and who remains in control of the investigation. The choice of investigator also can reassure the employees. The investigator should be a neutral party who enjoys the respect of both employees and management and has good interpersonal and interviewing skills.

Any employee who refuses to cooperate in an internal investigation may be disciplined, up to and including termination, for insubordination. If the employee persists in the refusal, document the facts thoroughly in the employee's personnel record, which should reflect that the employee was terminated for refusing to comply with a reasonable, direct order (i.e., to cooperate in an investigation). The personnel record should reflect that it was the employee's refusal to follow orders, not the allegation of harassment, that resulted in termination.

I. Privacy Pointers

- Do not bring undue attention to those being (or waiting to be) interviewed;
- Do not bring undue attention to the investigator's purpose; and
- Do not place the accuser, accused, and/or witnesses together in a waiting area.

CHAPTER 6

DRUG AND ALCOHOL TESTING

I. FEDERAL LAW

The Fourth Amendment to the U.S. Constitution protects individuals from unreasonable search and seizure by government entities. This constitutional protection exists even when a governmental entity is acting as an employer.[6] Few governmental "searches" are more invasive, from a privacy standpoint, than drug and alcohol testing. Thus, public employers who conduct such testing must satisfy the "reasonableness" requirement of the Fourth Amendment. In the employment context, this means that a governmental entity cannot test a public employee unless: (a) it has probable cause or some level of individualized suspicion that the employee has taken drugs; or (b) the public's interest in having a particular individual tested (based on the job held or applied for) outweighs the individual's privacy concerns that will be affected by the test. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384 (1989).

Drug testing of faculty members or others employed pursuant to written contracts also must comply with the Fifth Amendment to the U.S. Constitution, which prohibits denial of "property" rights or "liberty" rights without due process of law. Due process challenges can arise when such employees challenge test results, have insufficient opportunity to respond to results, or when there is failure to give them required notice.

In addition, public employees generally have a limited right to privacy. This means that public employers must have specimen collection procedures that respect personal privacy, take appropriate steps to keep test results confidential, and avoid testing that is unwarranted or excessive.

Employees may also lodge discrimination claims if they perceive that an employer is targeting employees in a protected group for drug or alcohol testing. To avoid such claims, public employers should adopt carefully structured policies with respect to when and how employees are selected for testing (e.g., specific events and/or articulated facts and evidence), how testing is performed, and how employees with positive test results are handled.

II. GEORGIA LAW

A. Random Testing of High Risk Employees

Georgia law recognizes that, for certain jobs, the public interest frequently outweighs the privacy concerns of the individuals employed in those jobs. Accordingly, public employees employed and certified as "peace officers" under Georgia law, as well as those employed to provide medical, security, or transportation services, may be subject to random drug testing if they hold "high risk" public jobs. O.C.G.A. § 45-20-90. State agencies must identify as "high

[6] The Fourteenth Amendment to the U.S. Constitution insures that Fourth Amendment protections apply to searches by state, as well as federal, governments.

risk" those jobs where errors or inattention create significant risk of harm to employees or the general public. O.C.G.A. § 45-20-91.

Random drug tests for high risk jobs must be performed according to policies adopted by the Board of Regents. These policies must include specific drug testing methods and assurances of privacy for those high risk employees selected for testing. O.C.G.A. § 45-20-92. An institution must terminate the employment of any high risk employee who fails a drug test or who refuses to submit to a test when selected. O.C.G.A. § 45-20-93.

Although peace officers are not the only employees who can hold high risk jobs, the Attorney General has determined that campus police officers and other security personnel having arrest powers are subject to random drug testing. 1990 Attorney General Opinion No. 90-11. **Please refer to the Policy Manual and the Human Resources Administrative Process and Procedures Manual Policies titled Policy Drug Testing for High Risk Employees for more information regarding drug testing procedures for campus law enforcement.**

Random testing has been found constitutional with respect to:

1. Commercial Drivers - 49 C.F.R. §§ 391.81-.123, *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 932 F.2d 1292 (9th Cir. 1991).

2. Employees in Safety Sensitive and Health Care Positions – *AFGE Local 2110 v. Derwinski*, 777 F. Supp. 1493 (N.D. Cal. 1991).

3. Motor Vehicle Operators and Mechanics – *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989); *English v. Talladega County Bd. of Educ.*, 938 F. Supp. 775 (N.D. Ala. 1996).

4. Employees Carrying Firearms – *AFGE v. Barr*, 794 F. Supp. 1466 (N.D. Cal. 1992).

B. Pre-employment Testing

Private employers are not subject to the same constitutional restrictions as public employers and thus can establish policies requiring pre-employment drug screens for all new employees. Public employers, however, must make such decisions on a case by case basis. Georgia law requires the head of each institution to ensure that all positions are analyzed to identify those whose duties and responsibilities warrant administering an "established test" to selected candidates. This includes, but is not limited to, those jobs designated as "high risk." For new positions, the analysis must be completed within six weeks after the position is created. O.C.G.A. § 45-20-111.

An "established test" means the collection and testing of bodily fluids administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Testing Programs (HHS Regulations 53 Fed. Reg. 11979, et seq., as amended). O.C.G.A. § 45-20-110(2).

In addition to law enforcement and other "high risk" jobs, pre-employment drug testing may be warranted for jobs that involve sensitive information, operation of dangerous equipment, or that otherwise require clear thinking in order to avoid serious harm. Again, the test is whether the public good or interest served by testing an applicant for a particular job outweighs those privacy rights of the applicant that are affected by the test.

An applicant who is offered a position designated for pre-employment testing must undergo testing before or within ten days after starting employment. Refusal to consent to a test disqualifies the applicant from state employment for two years. O.C.G.A. § 45-20-111.

Pre-employment testing must be paid for by the institution. All positive tests must be confirmed by gas chromatography / mass spectroscopy. If a confirmation test indicates the presence of illegal drugs, the results must be reviewed and interpreted by a licensed physician acting as a Medical Review Officer. The Medical Review Officer evaluates the test results together with information obtained from the applicant to determine whether the test resulted in a "false positive." If such a determination is made, the test will be reported as a negative result. All test results must remain confidential and generally shall not constitute a public record. O.C.G.A. § 45-20-111.

C. Other Testing

Georgia statutory law does not address other types of drug testing by public entities. However, it is constitutionally permissible for a public employer to conduct drug testing on an employee when there is probable cause, or at least reasonable suspicion, to believe the employee is using drugs or is under the influence of alcohol at work. An institution wishing to conduct such testing should establish strict procedures, and provide appropriate supervisor training, to insure that such testing is based on objective criteria that is observed and documented by two or more management-level employees.

D. Punishment, Voluntary Disclosure, and Rehabilitation

Any public employee convicted of a drug offense must be suspended for at least two months and must complete an approved drug abuse treatment and education program as a condition of returning to work. Non-employees convicted of a drug offense for the first time are ineligible for public employment for a period of three months from the date of conviction. Following a second conviction, an employee must be terminated and is ineligible for rehire for five years following the most recent conviction. O.C.G.A. §§ 45-23-4, 45-23-5.

The punishments described above are minimums, and public employers are free to impose more severe punishments for drug-related offenses. O.C.G.A. § 45-23-6.

However, an employee need not be terminated if the employee, prior to arrest, notifies the employer of his or her drug use and agrees to treatment before being arrested. Employment must be maintained for up to one year so long as employee follows a treatment plan, although the institution may restrict the employee's job duties during treatment. Statements made by such employees when making the required notification cannot be used against the employee in

criminal or administrative proceedings. The rehabilitation option is available once every five years, provided the employee has not refused a drug test or had a positive drug test. O.C.G.A. § 45-23-7.

For additional information on voluntary disclosure and rehabilitation, please refer to Section 8.2.18 of the Policy Manual.

III. ADDITIONAL RESOURCES

Please refer to Section 8.2.18 of the Policy Manual and the Human Resources Administrative Process and Procedures Policy entitled Drug Testing of High-Risk Employees for more information regarding drug testing.

CHAPTER 7

EMPLOYMENT LAWS

I. FEDERAL EQUAL OPPORTUNITY LAWS

A. Civil Rights Act of 1964 ("Title VII")

Title VII prohibits discrimination by USG institutions on the basis of race, color, gender, religion, sex, and national origin. The Equal Employment Opportunity Commission (EEOC) is charged with enforcing Title VII. **Refer to Section 8.2.1 of the Policy Manual and the Human Resources Administrative Process and Procedure Manual titled Equal Employment Opportunity Americans with Disabilities Act, Employment of Foreign Nationals, Prohibit Discrimination and Harassment.**

1. Harassment

Harassment based on race, color, gender, religion, sex, and national origin is prohibited under Title VII. While all types of harassment is both serious and prohibited, the most common type is sexual harassment. Sexual harassment applies to both sexes and must be taken seriously by all USG institutions. Examples of sexual harassment include unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct that is sexual in nature.

Sexual harassment includes behavior by a supervisor who has authority over the employee and who conditions concrete employment benefits on unwelcome sexual favors and which is accompanied by a tangible job detriment (reassignment, demotion, discharge, etc.). Institutions can be held liable for such harassment even if the institution (or its managers) was not aware of the supervisor's harassing conduct. Sexual harassment also includes behavior that causes a hostile work environment, which is defined as unwelcome sexual harassment based on sex that affected a term, condition, or privilege of employment, and where the institution knew or should have known of the harassment and failed to take proper remedial action. If an employee is harassed by a supervisor and there is also a tangible employment action, then the institution may be automatically liable. It is critical that all institutions have a policy against all forms of harassment, including a complaint procedure. **Refer to Section 8.2.16 of the Policy Manual and the Human Resources Administrative Process and Procedure Manual titled Prohibit Discrimination and Harassment and Amorous Relationships.**

If no adverse employment action was taken, then the institution has a defense if it can prove two necessary elements: (1) the institution exercised reasonable care to prevent and promptly correct any harassing behavior, usually through a policy against harassment (see Appendix); and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the institution. Therefore, a policy against harassment is critical for all institutions.

2. Pregnancy Discrimination Act ("PDA")

The Pregnancy Discrimination Act of 1978 amended Title VII to prohibit discrimination on the basis of pregnancy, childbirth, and related medical conditions. 42 U.S.C. § 2000e(k). The basic principle of the Act is that pregnancy and pregnancy-related conditions must be treated the same as other medical illnesses or disabilities. The EEOC has issued the following interpretations of this law:

a. Employers cannot refuse to hire or promote females, so long as the women are able to perform the normal functions of the job;

b. Employers cannot refuse to hire females because of prejudices against pregnant workers, or because of the prejudices of coworkers, clients, or customers;

c. Employers cannot force pregnant employees to go on leave while they are able to perform their jobs;

d. Employees on pregnancy leave are entitled to the same reinstatement rights as employees on leave for other disabilities;

e. Employers cannot specify a predetermined length of time for childbirth leave;

f. Post-pregnancy childcare leave must be granted on the same basis as leave granted for non-medical reasons;

g. Female employees with pregnancies or pregnancy-related conditions are entitled to the same fringe benefits (such as disability, sick leave, and health insurance) as employees who are unable to work for other medical reasons; and

h. Employers cannot require pregnant employees to exhaust vacation benefits before qualifying for sick pay or disability benefits unless this requirement is equally imposed upon all employees absent from work for medical reasons.

As with the general provisions of Title VII, the Pregnancy Discrimination Act does not require employers to give special treatment to pregnant applicants or employees. The Act only requires employers to treat pregnant workers in the same manner that they treat other temporarily disabled workers. Accordingly, employers (1) are not required to provide light-duty assignments to pregnant employees unless the same is done for employees with other disabilities; (2) can require pregnant employees to meet the same prerequisites for leave as employees with other disabilities; and (3) are not required to give employees returning from pregnancy leave their old jobs unless the same is done for employees with other disabilities.

The Supreme Court's decision in *UAW v. Johnson Controls*,[7] ruled that employers may no longer use sex-specific fetal protection policies to bar women from jobs. Companies often implement such policies when it is not technologically possible to fully protect fetuses from exposure to dangerous substances or when it is not clear whether a danger to fetuses exist, but the Court ruled that such action violates both Title VII and the Pregnancy Discrimination Act. Given this new need to balance protection of the company from liability for injury to a fetus against the threat of a suit for discrimination, employers are encouraged to notify counsel prior to implementing a fetal protection policy or prior to allowing women of childbearing years to work in and around toxic substances which may harm a fetus.

3. Retaliation

Title VII expressly prohibits retaliatory action against any employee or applicant, who has filed a charge, testified, assisted, or participated in any manner in an investigation or proceeding under Title VII. The purpose of the retaliation clause in Title VII is to protect those employees who utilize the tools provided by Congress to protect his or her rights.[8] Employees who allege retaliation need not prove that they opposed an act that was, in fact, unlawful; a retaliation claim arises any time an employee reasonably believes that he or she is opposing discrimination, regardless of whether or not that discrimination actually occurred. In other words, even if it is established that no underlying discrimination actually occurred, an employer can nevertheless be held liable for retaliation. [9]

In order to establish a prima facie case of retaliation, a plaintiff must show: (1) that he or she engaged in a statutorily protected activity; (2) that the employer took adverse employment action against the plaintiff; and (3) that there was a causal link between the protected activity and the adverse action.[10] On June 22, 2006, the United States Supreme Court addressed the issue of what constitutes an adverse employment action in the retaliation context in ***Burlington Northern and Santa Fe Railway Co. v. White***.[11] In *Burlington*, the Court held that the alleged retaliatory conduct must be "materially adverse," meaning that it must "dissuade[] a reasonable worker from making or supporting a charge of discrimination" and further noting that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." The impact of this decision is that an employer can now be found to have retaliated against an employee based on harm outside of the workplace. As a result of the more lenient standard, there are likely to be more retaliation claims proceeding to trial.

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[7] 499 U.S. 187 (1991).

[8] *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983).

[9] *Davis v. State of N.Y.*, 802 F.2d 638 (2nd Cir. 1986).

[10] *Meeks v. Computer Assoc. Intern.*, 15 F.3d 1013, 1021 (11th Cir. 1994).

[11] *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

4. Enforcement Procedures

The Equal Employment Opportunity Commission (EEOC) has authority to investigate, conciliate, and file suit on charges of discrimination under Title VII based on race, color, religion, gender, sex, or national origin. The EEOC also may delegate its powers to local or state "deferral agencies" certified by the EEOC to handle these matters. Georgia has a deferral agency for allegations of discrimination involving the departments and agencies of the State. This agency is the Commission on Equal Opportunity.

B. Civil Rights Act of 1866

Separate and apart from Title VII, 42 U.S.C. § 1981 prohibits discrimination against an employee or applicant on the basis of race by providing that all persons "shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons." The EEOC administration and enforcement procedures applicable to Title VII do not apply to § 1981. Discriminating against someone on the basis of race in an employment setting can be considered a § 1981 violation. State agencies, such as the Board of Regents and USG institutions, are immune from suit under § 1981 by virtue of the Eleventh Amendment to the U.S. Constitution. However, state employees can be sued in their individual capacities under § 1981.

C. 42 U.S.C. § 1983

Section 1983 prohibits retaliation against employees for exercising a constitutional right, such as engaging in speech protected by the First Amendment of the United States Constitution. *Bradberry v. Pinellas County*, 789 F.2d 1513 (11th Cir. 1986). Although state agencies, such as the Board of Regents and USG institutions are immune from liability by virtue of the Eleventh Amendment, individual USG employees may be liable for their conduct if the plaintiff proves that the defendants violated a "clearly established" constitutional right. *Chesser v. Sparks*, 248 F.2d 1117 (11th Cir. 2001). The EEOC administration and enforcement procedures applicable to Title VII do not apply to Section 1983.

D. Equal Pay Act

Unlike many federal statutes, the Equal Pay Act[12] is almost self-explanatory:

> No employer having employees subject to [the Fair Labor Standards Act] . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working

[12] 29 U.S.C. § 206d

> conditions, except where such payment is made pursuant to (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex. . . .

Thus, the Equal Pay Act does not concern itself with promotions, discharges, working conditions or other factors beyond pay, nor does it consider race, religion, national origin, age or disabilities; rather, the sole purpose of the statute is to ensure that men and women receive equal pay for equal work.[13]

The Equal Pay Act applies to employers in industries where either the employer or the employees are engaged in commerce, or in the production of goods for commerce. Utilizing a prima facie test similar to that employed in Title VII actions, plaintiffs must produce evidence that would support the following facts in order to shift the burden to the employer:

1. the employer,
2. paid different wages,
3. to the opposite sex,
4. in an establishment where they both worked,
5. on equal jobs,
6. with equal skill levels, effort, and responsibility,
7. under similar working conditions.

Providing employees with different job titles, or giving them slightly different job duties, will not shield employers from liability under the Equal Pay Act. Courts are primarily concerned that employees share substantially equal core duties, not whether employees have inconsequential differences in job descriptions.[14]

Equal Pay Act claims can be pursued through the EEOC if an employee so desires; however, the law does not require that the employee first approach the EEOC before filing suit.[15] The statute of limitations for Equal Pay Act claims is two years after the cause of action accrues unless the employer willfully violated the Act. In the latter situation the statute of limitations is extended to three years.[16]

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[13] Like Title VII, the Equal Pay Act also contains provisions that prohibit employers from retaliating against employees for the filing of claims.

[14] *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518 (11th Cir. 1992).

[15] *Hall v. International House of Pancakes, Inc*., 2005 WL 1684150 (E.D. Mi. 2005)

[16] *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). With the enactment of the Lilly-Ledbetter Fair Pay

Should a court find that an employer has violated the Equal Pay Act, it may award the individual discriminated against the amount of wages that would have been earned in the absence of discrimination and an equal amount as liquidated damages. Also, unless the employer persuades the court that it acted with a sincere and reasonable belief that its actions were lawful, the courts can double the liquidated damages.[17] The court also can enjoin an employer from committing further violations of the Act.

E. Age Discrimination in Employment Act[18]

In many ways the ADEA is very similar to Title VII, and many of the criteria applied in Title VII cases are also applied in ADEA cases.[19] For instance, the ADEA prohibits age-based employment discrimination against individuals 40 years of age and older, and it applies to employers engaged "in an industry affecting commerce" who employ 20 or more employees.

The ADEA makes it unlawful for an employer to:

1. Fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

2. Limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

3. Equalize wages by decreasing the wages of unprotected employees, i.e., employees under 40;

4. Retaliate against an individual for asserting rights provided under the Act;

5. Publish employment notices or advertisements that indicate age preferences or limitations; or

6. Force employees into retirement.

Act of 2009, the accrual period for the cause of action has been significantly extended. Now, every pay period is considered an "unlawful employment practice," thus restarting the statute of limitations.

[17] *Walton v. United Consumers Club*, 786 F.2d 303 (7th Cir. 1986).

[18] 29 U.S.C. § 621.

[19] *Palmer v. U.S.*, 794 F.2d 534 (9th Cir. 1986).

Prima facie tests utilized in ADEA cases are similar to those used in Title VII cases, and so a plaintiff alleging wrongful discharge or demotion in violation of the ADEA is required to show the following:

1. That he or she was over forty;

2. that he or she was discharged or demoted; and

3. that he or she was qualified to do the job.

In cases involving a reduction in the work force, in which the employee was not replaced, part (3) of the prima facie presented above is changed: The plaintiff must demonstrate that age was a factor in the discharge or demotion.

Retaliation claims under the ADEA are also handled much like Title VII retaliation claims. An ADEA retaliation plaintiff must show that he or she (a) engaged in protected activity, (b) received adverse employment action, and (c) the events were causally connected.[20]

Procedural requirements under the ADEA are also similar to those employed in Title VII cases, at least to the extent that the aggrieved party must file a Charge of Discrimination with the EEOC within 180 days of the act giving rise to the complaint. Like Title VII, the complaining party must also follow up with legal action within 90 days of receiving a right to sue letter from the EEOC.

Employers in age discrimination cases may offer several legitimate, nondiscriminatory reasons as defenses. For example, age considerations can constitute "bona fide occupational qualifications," which is to say that age limits are sometimes legitimate because they are necessary for the safe operation of the employer's business. This defense, however, has been given limited scope and application by the courts and the EEOC, so employers should first consult with legal counsel to verify that the employee at issue falls within a category which is legally subject to the bona fide qualification exception.

Another defense available to employers under the Age Discrimination in Employment Act is that an adverse employment action taken against an older employee was based on reasonable factors other than age, like physical requirements necessitated by the nature of the employer's work. Also, a third defense is triggered when an individual age 65 or older, with at least two years employment in an executive or policy making position, is subjected to compulsory retirement and is entitled to a $44,000 or greater immediate, nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan.

The ADEA authorizes courts to grant "legal and equitable relief as may be appropriate to effectuate the purposes of the Act." Such relief includes orders compelling employment, reinstatement or promotion, front or back pay, and attorney's fees. When an employer is found

[20] *Meeks v. Computer Associates International*, 15 F.3d 1013 (11th Cir. 1994).

to have willfully violated the Act, liquidated damages equal to the amount of back pay also may be awarded.

In 2005, the Supreme Court held employees could pursue disparate impact claims under the ADEA.[21] It was not enough for the employee asserting disparate-impact employment discrimination claim to simply allege that there is disparate impact on workers, or point to generalized policy that leads to such impact; rather, employee must isolate and identify specific employment practices that are allegedly responsible for any observed statistical disparities.

While about half the states had barred disparate impact claims under the ADEA, the Supreme Court found that disparate impacts claims may be brought under the ADEA. Disparate impact claims can be defeated by showing a reasonable business purpose motivated the employment practice. A reasonable employment practice is legal, even if the practice has a disparate impact on older workers under the ADEA. Reasonable employment practices include having legitimate reasons for recruitment, reward and retention purposes and making management decisions grounded on the abilities of the employees.

F. Older Workers' Benefit Protection Act

The Older Workers Benefit Protection Act (OWBPA) was enacted in 1990 to prohibit, with certain exceptions, age differentiation in employee benefit plans. This Act also sets the standard for determining when older workers waive their rights under the Age Discrimination in Employment Act and sets specific guidelines on what must be included in waivers. Therefore, prior to requesting an employee to sign a release of claims, it must be determined whether that person is 40 years or older and whether the specific provisions required under the OWBPA are contained in the document.

G. Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits discrimination against "a qualified individual with a disability" in job application procedures, hiring, firing, promotions, compensation, training and other conditions of employment. A person is "disabled" within the meaning of the ADA if he or she (a) has a physical or mental impairment that substantially limits one or more major life activities, (b) has a record of such impairment, or (c) is regarded as having such an impairment.[22] "Disability," as defined for present purposes, does not include sexual differences like homosexuality, bisexuality, transvestitism, pedophilia, and voyeurism, nor does it include kleptomania, pyromania, compulsive gambling, or psychological disorders resulting from current drug use.[23]

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[21] *Smith v. City of Jackson*, 125 U.S. 1536 (2005).

[22] With the enactment of the Americans with Disabilities Act Amendments Act (ADAAA) in 2009, the definition of disability was liberalized; however, the basic framework remains the same.

[23] Please note that the ADA excludes coverage for disorders caused by **current** drug use. An employee who enters drug rehabilitation, suffers disorders from previous drug use, or is considered a drug addict despite abstaining from the addictive substance is covered by the ADA.

Under the ADA, qualified individuals who cannot perform the essential functions of the job are entitled to a "reasonable accommodation." Reasonable accommodation is any change in the work environment or in the way things are usually done that results in equal employment opportunity. Examples include making existing facilities used by employees accessible to, and usable by, an individual with a disability; job restructuring; modifying work schedules; reassignment to a vacant position; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; and providing qualified readers or interpreters. An employer is not required to lower quality or quantity standards to make an accommodation. An academic institution is not required to alter a core academic function (such as a science lab requirement). An employer is not required to provide an accommodation if it will impose an undue hardship on its operations. Undue hardship is defined by the ADA as an action that is "excessively costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." In determining undue hardship, factors to be considered include the nature and cost of the accommodation in relation to the size, the financial resources, the nature and the structure of the employer's operation, as well as the impact of the accommodation on the specific facility providing the accommodation. Within the USG, the financial resources of USG as a whole will be considered, as opposed to those of an individual institution, when determining undue hardship. Institutions should contact Legal Affairs when an employee requests a reasonable accommodation. **See the Human Resources Administrative Process and Procedure Manual titled Americans with Disabilities Act.**

H. Title IX of the Education Amendments of 1972

Title IX states that no person on the basis of sex shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Sexual harassment has been held to be discrimination under Title IX. In addition to the traditional Title VII sexual harassment claims, students alleging harassment under Title IX must prove that the defendant institution is a federal funding recipient, that the "appropriate person" (someone who had authority to take corrective action) had knowledge of the harassment or discrimination, that the appropriate person acted with deliberate indifference to known acts of harassment in its programs or activities, and that the conduct is so severe and pervasive, and objectively offensive, that it bars the victim's access to the educational opportunity or benefit.

If harassment occurs, the university must take prompt measures to correct or remedy the harassment promptly (eight months is too long). *Williams v. Board of Regents*, 477 F.3d 1282 (11th Cir. 2007). It is a conflict of interest for professors to engage in romantic relationships with students he/she is currently teaching or for a professor who sits on a committee or board to engage in romantic relationships with any student. **See the Human Resources Administrative Process and Procedure Manual titled Amorous Relationships.**

I. Bankruptcy

USG Institutions are prohibited from discharging or discriminating against an employee solely because he or she has sought protection under the Federal Bankruptcy Act. The law

provides no express remedy for employees whose rights under this statute are violated, but employers can assume that courts at least will provide reinstatement and back pay.

II. GEORGIA EQUAL OPPORTUNITY LAW

A. Georgia Fair Employment Practices Act of 1978

The Georgia Fair Emplomen Practices Act applies to public sector employment in Georgia. O.C.G.A. § 45-19-20 et seq. It prohibits failing or refusing to hire, discharging, or otherwise discriminating against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment on the basis of race, color, national origin, religion, sex, disability, or age. It also prohibits limiting, segregating, or classifying institution employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect an individual's status as an employee because of such individual's race, color, religion, national origin, sex, disability, or age. But, an employer is not prohibited from voluntarily adopting and carrying out a plan to fill vacancies or hire new employees in a manner to eliminate or reduce imbalance in employment with respect to race, color, disability, religion, sex, national origin, or age if the plan has first been filed with the Administrator of the Commission on Equal Opportunity for review and comment for a period of not less than 30 days.

These laws are enforced by the Administrator of the Commission on Equal Opportunity, a deferral agency. Its jurisdiction is limited to the employment practices of the departments and agencies of the State of Georgia. The complaint procedure is set forth in the statute, requiring an aggrievied indivudal to file a written complaint with the Aministrator within 180 days of the allege discrimination or harassment. Within 15 days of filing, the USG institution will receive a copy of the complaint. Within 90 days after the complaint has been filed, the Administrator shall make a determination. The Administrator will either dismiss the complaint; try to eliminate the alleged unlawful practice by conference, conciliation, and persuasion (the terms of any conciliation agreement are confidential) or refer the matter to a special master and serve the university with a complaint and have a hearing on the matter.

B. Georgia Age Discrimination Act

Prohibits employment discrimination against employees and applicants ages 40 to 70. The penalty for violation of this statute includes a fine of $100.00 to $250.00 for each instance of discrimination by the institution. O.C.G.A. § 34-1-2.

C. Georgia Equal Employment for Persons with Disabilities Code

Prohibits discrimination on the basis of a disability, unless such disability restricts that individual's ability to engage in the particular job or occupation for which he or she is eligible. Drug and alcohol addiction are specifically excluded. This law also precludes retaliation against any party pursuing such a claim or assisting in the pursuit of another person's claim. O.C.G.A. § 34-6A-1 et seq.

D. Employment Advertisements

It is an unlawful practice for an institution to print or publish an advertisement that indicates any preference, limitation, specification, or discrimination based on race, color, religion, national origin, sex, disability, or age, except that such a notice or advertisement may indicate a preference, limitation, or specification based on race, color, religion, national origin, sex, disability, or age when religion, national origin, sex, disability, or age is a bona fide occupational qualification for employment. O.C.G.A. § 45-19-31.

E. Georgia AIDS Confidentiality Act

It is unlawful to intentionally or knowingly disclose AIDS information. There are certain exceptions to this that require a court order or subpoena. The results of an HIV test may be reported to an individual, or the individual's representative, when that individual or representative ordered such tests of the bodily fluids or tissues of another person. After notifying or attempting to notify the affected individual, a physician is authorized to report AIDS confidential information to a spouse, child, or sexual partner of an HIV-infected individual if the physician believes that this third person is at risk, and to a health care facility when its personnel or patients may be at risk or if the facility has a legitimate need for that information in order to provide health care service to the person in question. O.C.G.A. § 24-9-47.

F. Georgia Equal Pay Act

"Sex Discrimination in Employment Act" - Unless a wage or salary difference is based upon a legitimate seniority system, a merit system, a system measuring earnings by quantity or quality of production, or some other differential based on factors other than sex, the institution must pay male and female employees equally when performing functions requiring equal skill, effort and responsibility, and performed under similar working conditions. O.C.G.A. § 34-5-1 et seq.

In addition to liability for unpaid wages, costs, and attorney fees, violators may also be liable for a fine not to exceed $100.00. *See* O.C.G.A. § 34-5-3(c).

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CHAPTER 8

FAMILY AND MEDICAL LEAVE ACT

I. OVERVIEW

USG institutions are commonly faced with requests for leave under the Family and Medical Leave Act (FMLA). FMLA entitles eligible employees to twelve (12) weeks of unpaid leave in a 12-month period under the following circumstances: (1) to care for a newborn son or daughter; (2) to care for a child placed with the employee through adoption or foster care; (3) care for a son, daughter, spouse, or parent who has a serious health condition; (4) for the employee's own serious health condition; and (5) qualifying exigencies arising because of an employee's spouse, parent or son or daughter (of any age) who is on active duty or has been called to active duty (only for family members of National Guard, Military Reservists and retired military personnel).

Additionally, under the Covered Servicemember Care provision of the FMLA, eligible employees may be entitled up to twenty-six (26) weeks of leave to care for a spouse, parent, son or daughter (of any age) and next of kin of: (1) a current member of the Armed Forces, the National Guard or Reserves or (2) a member of the Armed Forces, National Guard or Reserves who is on the temporary disability retired list, who sustains an injury or illness in the line of duty for which (s)he is undergoing medical treatment, recuperation or therapy is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. A serious illness means an injury or illness that renders the service member medically unfit to perform the duties of his/her office, grade, rank or rating.

Refer to Policy Manual Section 8.2.7.6. Refer also to the Human Resources Administrative Process and Procedure Manual titled Policy on Sick Leave with Pay and the Family and Medical Leave Act.

A. Eligible Employees

The only employees eligible for leave are those who: (1) have been employed for at least 12 months and (2) have worked for the institution for at least 1250 hours during the 12 months preceding the commencement of the leave. The twelve months need not be consecutive, but should be within the last seven years unless the break in employment was due to the fulfillment of National Guard or Reserve Military service obligations. 29 C.F.R. § 825.110. If the employee does not meet both of the enumerated requirements, he/she is not entitled to FMLA leave.

B. Spousal Leave

If the USG System employs a married couple (husband and wife), and they are eligible for leave, then they may be limited to a combined total of 12 workweeks of family leave for the following reasons: (1) birth and care of a child; (2) for the placement of a child for adoption or foster care, and to care for the newly placed child; and (3) to care for an employee's parent who has a serious health condition. 29 C.F.R. § 825.120(a)(3). A husband and wife who are eligible

for FMLA leave and are employed by the USG System may be limited to a combined total of twenty (26) workweeks of leave during a single 12-month period if leave is taken to care for a covered servicemember with a serious injury or illness. 29 C.F.R. § 825.127(d).

C. Key Employees

Although the FMLA entitles employees to the same or equivalent position at the end of FMLA leave, USG institutions may deny reinstatement after FMLA leave to a "key employee" if such denial of restoration is necessary to prevent "substantial and grievous economic injury." A "key" employee is one who is among the highest paid 10 percent of the employees employed within 75 miles of his or her worksite. If reinstatement may be denied, written notice must be given at the time the employee gives notice of the need for leave. Before labeling someone as a key employee however, it is wise to consult with legal counsel.

D. Calculation Methods for FMLA

The 12-month period that USG employees will be eligible for FMLA leave can be calculated by various methods. USG institutions can calculate FMLA by either the calendar year, for example January 1 to January 1; a fixed 12-month leave year, for example using a fiscal year like July 1 to July 1; a 12-month period measured forward from the date any employee's FMLA leave begins; or a rolling calendar year, which is the 12-month period measured backward from the date an employee uses any FMLA leave. This period will determine when FMLA leave has been exhausted. If your institution has not already done so, be sure your FMLA policy specifies how leave will be calculated. If your calculation period is not communicated to the employees and a FMLA claim arises, the court or DOL will use the calculation period that is the most beneficial to the employee under the circumstances. The rolling calendar year calculation is suggested as you calculation method.

Calculation of leave to care for a Covered Servicemember is different from all other forms of FMLA leave. An eligible employee is entitled to twenty-six (26) weeks of leave in a single 12-month period. The single 12-month period begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this single 12-month period, the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited. 29 C.F.R. § 825.127(c)(2).

E. Serious Health Condition

An otherwise eligible USG employee is entitled to FMLA leave for the employee's "serious health condition." A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than three (3) consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Because it is the ultimate responsibility of the employer to determine if a serious health condition exists, precise documentation is necessary. The best way to document a serious health condition is by using the Certification of Health Care Provider for Employee's Serious Health Condition Form WH-380-E.

If the USG institution has an employee handbook/manual, then the handbook must contain an FMLA policy. Electronic publication of an FMLA policy is allowed. In addition to posting the FMLA Notice of Rights Under the FMLA, institutions are also required to either have the posting in the employee handbook/manual (electronic allowed) or given to all new employees upon hire.

F. Military Family Leave

On January 28, 2008, President Bush signed into law the "Military Family Leave" amendments to the FMLA that provide new qualifying reasons for leave and a new leave entitlement.

1. Qualifying Exigency

Under the new amendments and regulations, an eligible employee is entitled to take up to 12 weeks of FMLA leave because of "any qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty in the United States Armed Forces (including the National Guard and Reserves). This type of leave does not apply to a family member of an individual enlisted in the Regular Armed Forces. 29 C.F.R. § 825.126(b)(2)(i). "Qualifying exigencies" include: (1) short notice deployment to address any issues related to an impending call or order of seven (7) or less calendar days (leave can be taken for a period of seven (7) calendar days from the date of the notice); (2) attendance of military events including any official ceremony, program or event sponsored by the military and family support/assistance programs sponsored by the military, military service organizations or the Red Cross; (3) arrangement of childcare and school activities when the call to duty necessitates a change; to provide urgent childcare when the need arises from the call to duty; to enroll or transfer to a new school; and, to attend a staff meeting with school or daycare; (4) making or updating financial and legal affairs (e.g. prepare will, power of attorney); (5) attending counseling sessions for the employee, for the covered military member or the child of the military member provided the need for counseling arises from the military call to active duty; (6) rest and recuperation, including spending time with a covered service member who is on short-term, temporary R&R for up to five (5) days for each instance of R&R; (7) attendance at post-deployment activities_such as ceremonies, briefings and events or other official ceremonies or programs sponsored by the military for a period of 90-days following termination of active duty status; or (8) any additional

activities or other events arising out of active duty or call to duty when the employer and employee agree to both the timing and duration. 29 C.F.R. § 825.126.

2. Care for the Serious Illness of Injury of a Covered Servicemember

The amendments also give qualified employees the right to take leave for up to 26 weeks under FMLA leave in a single 12-month period to care for a spouse, son, daughter, parent, or "next of kin" (closest blood relative) who is a "covered servicemember" suffering from a serious illness or injury incurred in the line of duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disabled retired list. This includes physical and psychological care of the covered servicemember. A "serious injury of illness" means, in the case of a member of the Armed Forces, an injury or illness incurred in the line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating. 29 C.F.R. § 825.127(a)(1).

The covered servicemember leave entitlement is to be applied on a per-covered servicemember or per-injury basis. Therefore, an eligible employee may be entitled to take more than one period of twenty-six (26) workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness. 29 C.F.R. § 825.127(c)(2). The exception provides that no more than twenty-six (26) workweeks of leave may be taken within any "single 12-month period."

The institutions may request certification of the familial relationship and of the medical condition; however, the "injury or illness" certification form is different from the traditional medical certification form used for standard FMLA leave requests.[24] Although an employer may seek "clarification" of information on the covered servicemember's medical certification, it may not seek a second or third opinion, or request recertification. 29 C.F.R. § 825.310.

"Serious injury or illness" leave that is not taken in the "single 12-month period" is forfeited (in other words, it cannot be carried over from year to year). 29 C.F.R. § 825.127(c).

II. EMPLOYEE OBLIGATIONS

The FMLA requires both employees and institutions to meet certain obligations, including timing considerations. The obligations of employees are described in more detail below.

A. USG Employees Are Obligated to Give the Institution Notice of the Leave – If a USG employee's need for leave is foreseeable, for example a planned surgery, the employee must notify the institution of the leave at least 30 days in advance. If the need for leave is not foreseeable (i.e., an emergency surgery), the employee must provide notice "as soon as practicable." While the regulations do not define what leave is foreseeable or not, be sure to look at all the facts and circumstances of the situation. Remember, an employee is not required to specifically say "I want FMLA leave," when requesting leave. The regulations state that

[24] DOL Form WH-385.

simply calling in "sick" is insufficient. 29 C.F.R. § 825.303(b). Therefore, if the employee does not specifically request FMLA leave, it is the institution's responsibility to recognize requested leave as eligible and designate it as such.

B. USG Employees Are Required to Provide Medical Certification - An employee who requests leave for his/her own serious health condition, to care for a family member with a serious health condition, for qualifying exigency leave, or to care for a covered servicemember with a serious illness or injury must provide a medical certification. However, the employee is only obligated to provide the certification if requested in writing by the employer to the employee. The certification forms drafted by the Department of Labor are available at the Department of Labor's website. http://www.dol.gov/esa/whd/fmla/.

Employees must provide such certification from the health care provider within 15 calendar days, unless it is not practicable to do so under the circumstances. 29 C.R.R. § 825.305(b). If an employee fails to provide timely certification within 15 days of being asked to do so in writing by the institution, and the need for leave was foreseeable, the institution may deny the employee leave until the required certification is provided. If the need for leave is not foreseeable, the employee must still attempt to provide the certification within 15 days of the institution's request, or as soon thereafter as practicable under the circumstances. Failure to provide certification within a reasonable period, whether the leave is foreseeable or unforeseeable, may result in the discontinuation of leave and, ultimately, termination.

An institution may contact the employee's healthcare provider for two purposes only: clarification and authentication of the medical certification. The person assigned by the institution to contact the employee's healthcare provider must be a healthcare provider, human resource professional, a leave administrator, or a management official, but in no case may it be the employee's direct supervisor. The institution's representative may request no additional information beyond that included in the certification form. However, prior to making any contact with the healthcare provider, the employer must first provide written notice to the employee and allow the employee seven (7) days to resolve any deficiencies in the certification. 29 C.F.R. § 825.305(c).

Additionally, the employee is not required to permit his or her healthcare provider to communicate with the employer. However, if the employee denies the employer permission and doesn't otherwise clarify an unclear certification, the institution may deny the designation of FMLA. 29 C.F.R. § 825.307(a).

C. USG Institutions Can Request Second and Third Certifications When There Is Doubt As to the Validity of the First Certification - When the first medical certification is placed in doubt, the institution may require and pay for a second medical opinion by the medical provider of its choice (but one unrelated to the employer). If the first and second opinions differ, the institution, again at its own expense, may require the opinion of a third health care provider, who is approved jointly by the employee and the institution. This is again paid for by the institution. The third opinion is final and binding.

USG institutions may not seek second or third certifications for leave taken to care for a covered servicemember.

D. Recertifications for FMLA Leave - During an employee's leave, the institution may require subsequent recertification regarding the employee's status and intent to return to work. The institution may not request such certification more frequently than every 30 days, unless special circumstances exist.

USG institutions may not seek recertifications for leave taken to care for a covered servicemember.

III. INSTITUTION RESPONSIBILITIES

Like their employees, institutions also have obligations under the FMLA.

A. FMLA Postings and Notices Required to Be Given to Employees – Each USG institution is required to post a notice, in a conspicuous place, explaining the FMLA's provisions, including the new provisions related to military family leave. (See Appendix C). Additionally, the poster must be included in the employee handbook/manual or given to each newly hired employee. Electronic posting is allowed. Employee handbooks/manuals must include a statement of the employees' rights and obligations under the FMLA along with a copy of the employer's leave policy. When an employee gives notice of the need for FMLA leave, the following must be provided in writing: (1) Notice of Eligibility and Rights and Responsibilities Notice[25] which includes eligibility for leave, stating that the leave will be counted as FMLA leave, a statement that medical certification is required, with consequences for failure to provide certification, whether or not the employee is "key employee," statement regarding entitlement to substitute paid leave for any portion of unpaid FMLA leave, and whether and to what extent the institution requires substitution of paid leave, reporting requirement during leave, a statement of the employee's right to maintenance of benefits during FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave, and a statement of the employee's potential liability for payment of health insurance benefits; and (2) Designation Notice[26] which includes amount of leave, requirements for substitution of paid leave, and any fitness for duty certificate required upon return from leave. 29 C.F.R. § 825.311(b).

B. Request for Medical Certification and Designation of Leave - The institution should request the medical certification and designate leave at the time notice for the leave is given, or within five business days thereafter. 29 C.F.R. § 825.300(d).

C. Maintenance of Health Benefits While on FMLA - A USG institution must maintain an FMLA employee's health insurance under the group health plan for the period of the leave at the same level, and under the same conditions, as would have been available had the employee continued working. Should a new group health plan be introduced while the employee is on leave, the employee must be given the opportunity to join this new plan on the same terms

[25] DOL Form WH-381.

[26] DOL Form WH-382.

and conditions as active employees, except for those that may be dependent upon seniority or accrual during the leave period.

If an employee chooses not to retain health coverage during FMLA leave, then upon the employee's return he or she is entitled to be reinstated on the same terms as existed prior to taking leave without any qualifying period, physical examination, or exclusion of preexisting conditions.

IV. INTERMITTENT LEAVE

USG institutions may face a difficult time with the administration of "intermittent leave." Intermittent leave is defined as leave taken in separate blocks of time because of a single illness or injury. Intermittent leave may include leave taken in increments as small as the increments on the time clock. Examples of intermittent leave include medical appointments or repeated scheduled chemotherapy.

If medically necessary, any employee may take intermittent FMLA leave for reasons related to a serious health condition of the employee or a family member, for a qualifying exigency or for a covered servicemember's serious illness or injury. Note, however, that the FMLA does not entitle employees to intermittent or reduced leave for childbirth or for placement of a child through adoption or foster care. One way to look at the FMLA is to see it as a federally mandated attendance policy: absences for reasons enumerated in the FMLA may not be considered when taking disciplinary measures for excessive absenteeism unless the employee has exhausted the 12-week entitlement. Since the FMLA requires employers to grant 12 weeks of leave for specified reasons and allows employees to take leave intermittently to attend to the serious medical condition of self, child, spouse, or parent, or next of kin in limited circumstances, unforeseen absences for these reasons will fall within the protection of the FMLA. Institutions' attendance policies should be modified accordingly. Additionally, when an employee is required to substitute paid leave for FMLA, the institution can follow all procedures for requesting such leave. For example, if the vacation policy requires two (2) weeks advance notice and the FMLA leave was unforeseeable, then the institution can require the employee to wait two (2) weeks to use paid leave.

For an example of how the FMLA will impact the administration of an institution's attendance policies, consider the following illustration: "X" has a child who develops an extremely high fever early Monday morning. X is required to take her child to the emergency room for care and is unable to call work until one hour after the beginning of her scheduled shift. A doctor advises X to keep her child at home for three additional days and to follow-up with an additional doctor's appointment on Thursday. Consequently, X informs the institution that she will not return to work until Friday.

In the above example, the employee's absences are within the purview of the FMLA and may not be counted against her attendance record if she provides proper medical certification within a reasonable period of time after notification of this requirement. Of course, her absence may be counted against her 12-week entitlement under the FMLA, assuming she is given proper notice by the institution.

A. Institutions Are Allowed to Transfer Employees - When an employee takes intermittent leave, the employee may be transferred temporarily to another position to better accommodate the leave, but only during the period of leave. The alternative position must have equivalent pay and benefits (even if temporarily increased by the institution), but it does not have to have equivalent duties.

B. Avoid Discipline for FMLA Protected Leave - Absences for reasons enumerated in the FMLA may not be considered when taking disciplinary measures for excessive absenteeism.

V. EMPLOYEES RETURNING FROM LEAVE

A. Employees Must Be Returned to the Same or Equivalent Position - Upon return from FMLA leave, the employee (other than a "key employee") is entitled to reinstatement in the same or an equivalent position (pay, benefits, privileges, working conditions, status, responsibility, skill, effort, authority, and all other conditions of employment). The institution must give the employee a reasonable opportunity to fulfill the conditions of the employee's previous job upon his or her return to work, even if some event during the leave suggests that the employee no longer qualifies for the position. If the employee is unable to fill the position because of a physical or mental condition, including the continuation of a serious health condition, the institution's obligations may be governed by the ADA.

B. Institutions Can Require Fitness-for-Duty Tests - Before an employee on personal medical leave pursuant to the FMLA leave can return to work, the institution may require a fitness-for-duty certification from the health provider stating that the employee is able to return to work regarding the condition that necessitated the need for FMLA leave. However, the employee must first be warned prior to the commencement of FMLA leave that he/she will be subject to a fitness-for-duty certification. 29 C.F.R. § 825.300(d)(3). Additionally, if the fitness for duty test includes a medical provider reviewing the essential functions of the job, a list must be provided at the time of the Designation Notice. The institution can deny restoration to employment until an employee submits the required fitness for duty certification.

VI. FORMS

New FMLA forms were issued with the regulation in January 2009. While they are not mandatory, the forms help to simplify the often document intensive FMLA procedure. The following forms are listed in the appendix.

1. Certification of Health Care Provider for Employee's Serious Health Condition. DOL Form WH-380-E.

2. Certification of Health Care Provider for Family Member's Serious Health Condition. DOL Form WH-380-F.

3. Notice of Eligibility and Rights & Responsibities. DOL Form WH-381.

4. Designation Notice. DOL Form WH-382.

5. Certification of Qualifying Exigency for Military Family Leave. DOL Form WH-384.

6. Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave. DOL Form WH-385.

VII. CONCURRENT ADDITIONAL LEAVE

In certain circumstances the institution may allow its employees up to one year of unpaid leave. The institution, on a case by case basis, will determine whether it can reasonably accommodate the employee by providing leave. **Refer to Policy Manual Sections 8.2.7.1, 8.2.7.2, 8.2.7.3, 8.2.7.4, 8.2.7.5 and 8.2.7.7. See also the Human Resources Administrative Process and Procedure Manual titled Sick Leave Without Pay and Personal Leave.**

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CHAPTER 9

IMMIGRATION

I. VERIFYING IDENTITY AND WORK AUTHORIZATION

USG institutions can hire a United States citizen or a permanent resident ("green card" holder) for any open position. Persons who are not U.S. citizens or permanent residents require special permission (such as a work visa) to work in the U.S. The federal Immigration Reform and Control Act ("IRCA") (8 U.S.C. §1324a) requires all employers to complete a Form I-9 for all new hires, to verify that they are authorized to work in the U.S. Form I-9 is available online in both English and Spanish (although the Spanish version can only be used in Puerto Rico) at: **http://www.uscis.gov/i-9** .

In order to complete Form I-9, an institution representative must examine a new employee's original identification documents (not copies), and must attest under penalty of perjury that he or she has verified the employee's authorization to work in the United States. Page three of the Form I-9 lists the documents that may be used to establish an employee's authorization to work in the United States. It is extremely important to ensure that the documents presented are among those listed on the I-9. For federal documents, one way to do this is to make sure the document numbers match those listed on the I-9.

Effective April 3, 2009, employers were required to use the new I-9 Form. The new form looks much like prior versions, but the list of acceptable documents has changed. Since December of 2007, the following documents are no longer acceptable:

- Certificate of United States Citizenship (Form N-560 or N-561)
- Certificate of Naturalization (Form N-550 or N-570)
- Form I-151, a long out-of-date version of the Alien Registration Receipt Card ("green card")
- Unexpired Reentry Permit (Form I-327)
- Unexpired Refugee Travel Document (Form I-571)
- Effective April 3, 2009, out-dated versions of temporary resident cards and work cards can no longer be accepted.

The following List A documents are still acceptable under the new Form but must not be expired:

- U.S. Passport
- Unexpired Permanent Resident Card or Alien Registration Receipt Card (Form I-551)
- Foreign passport with temporary I-551 stamp

- Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, or I-688B)

In addition, the List A documents also permit the use of "an unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer."

Institutions must ensure that employees complete Section 1 of the I-9 form before they begin work. Thereafter, the institution must complete Section 2 of the form by the end of the third business day after employment begins -- even if the employee is not scheduled to work for some or all of that period. A new form must be completed each time an employee is hired, except when an employee is re-hired within three years of completing the prior I-9.

If any of the employee's documents used to show work authorization have an expiration date, the institution must re-verify the employee's authorization to work prior to each document's expiration date. Reverification will only be necessary when the employee checks the fourth box at the top of the I-9 – time-limited work authorization. Reverification is done by examining a new work authorization document, recording it in Section 3 of the I-9, and having an institution representative sign and date Section 3. Reverification is not required for identity documents such as a driver's license, or for U.S. passports and green cards (even though they carry expiration dates).

I-9 forms must be retained for three years from the date employment begins or for one year from the date the employment ends (whichever is longer). 8 U.S.C. § 1324a(b)(3)(B)(i). Generally, the best practice is to maintain I-9 forms in a file separate from employee personnel files. In addition, institutions should make copies of each new hire's documents when they are presented and keep these copies with the employee's I-9 form.

Employers generally are not required to determine the authenticity of documents presented by new employees. Sometimes, however, employers receive a letter from the Social Security Administration stating that certain employees' names and Social Security numbers do not "match" (referred to as a "mis-match" or "no-match" letter). See 20 C.F.R. § 422.120(a). When this happens, the institution should ask the identified employees for any information that would explain the mis-match. Assuming the employee offers a satisfactory explanation, employment can continue. If the employee cannot offer a satisfactory explanation, of if a second mis-match letter is received, the institution has "constructive notice" that the employee lacks work authorization. USG institutions are advised to contact the Office of Legal Affairs for assistance in resolving such situations.

The United States Citizenship and Immigration Service (USCIS) is charged with enforcing federal immigration law and with granting visas to aliens visiting and working in the United States. Federal immigration law makes it illegal for any employer to: (a) knowingly hire an alien who is not authorized to work in the United States; (b) hire any individual without verifying identity and work authorization; (c) continue the employment of a person if the employer knows or should know the person is not authorized to work; (d) knowingly forge,

counterfeit, alter, or falsely make any document for the purpose of satisfying any immigration-related requirement; (e) knowingly use, accept or receive any false document for the purpose of satisfying any immigration-related requirement; (f) discriminate in hiring or firing against a citizen or other "protected individual" (e.g., permanent resident aliens, refugees, political asylees, or newly legal immigrants who have filed a "declaration of intent" to become U.S. citizens) on the basis of national origin or citizenship status; (g) intentionally require an employee to present any specific document or combination of documents for I-9 purposes; (h) intentionally require an employee to present more or different documents than are minimally required for the employment verification process; or (i) intentionally refuse to honor documents tendered by an employee that reasonably appear to be genuine.

II. ELECTRONIC VERIFICATION OF WORK STATUS

The Georgia Security and Immigration Compliance Act requires all agencies, departments, and other subdivisions of the State of Georgia to use the "Federal Work Authorization Program" (now known as "E-Verify") to verify information on all new employees.[27] E-Verify (formerly known as the "Basic Pilot" or Employment Eligibility Verification Program) is an Internet-based system operated by the Department of Homeland Security in partnership with the Social Security Administration that allows participating employers to electronically verify the employment eligibility of their newly hired employees using I-9 information.

A public employer may not submit an E-Verify inquiry until after an individual accepts an offer of employment and after the employee and the employer complete the Form I-9. An employer may initiate the query before a new hire's actual start date but may not pre-screen applicants or delay training or start dates based upon a tentative non-confirmation or other delay in the confirmation of employment authorization. The employer must initiate the query no later than the end of three business days after the new hire's actual start date.

No adverse employment consequences may be taken against an employee based on an E-Verify inquiry unless E-Verify has returned a final non-confirmation of employment authorization. The Office of Legal Affairs at the System of institution level should be contacted before any adverse action is taken based on non-confirmation.

In addition, an employer cannot use an employment authorization response to speed up an employee's start date, as it would be unfair to other employees who have received a tentative non-confirmation. Employers must verify employees in a non-discriminatory manner and may not schedule the timing of queries based upon the new hire's national origin, citizenship, status, race, or other characteristic protected by law.

Georgia public employers must designate an individual to monitor new employee work eligibility verification and must maintain a file of all required written records for public

[27] The law also prohibits public employers from entering into contracts for "physical performance of services" unless the contractors or subcontractors who will perform the work also use the E-Verify system. For additional information on contractor/subcontractor requirements, contact the Office of Legal Affairs at the System or institution level.

inspection. Such records shall be maintained in accordance with the public employer's applicable record retention schedule and in compliance with applicable federal law. Georgia public employers also must send copies of all documents required for their registration and participation in the E-Verify program (including the required Memorandum of Understanding executed as part of the registration process) to their respective agency head or his or her designee.

The new law does not require the use of E-Verify to check employment eligibility for current employees, nor should it be used to do so. **Additional information on E-Verify can be found under the "For Employers" link at http://www.uscis.gov**.

III. WORK VISAS

An alien may be legally present in the United States and yet not be legally authorized to work in the United States. Generally, aliens who are permanent residents ("green card" holders), refugees, or asylees are authorized to work in the United States. Other aliens, however, must have a visa or work card that authorizes them to work for a U.S. employer.

There are many types of visas, some of which authorize work and some that do not. Generally, aliens cannot obtain work visas unless they have a college degree (or equivalent) and work in jobs that require college degrees. Applicants for professor or instructor positions usually will qualify for work visas, but those for other types of positions may not.

The most common type of work visa found in higher education is the H-1B, which must be sponsored by the employer. H-1B visas are initially granted for three years and are renewable up to a total of six years (for all employers). Generally, H-1B visas are available to individuals who hold a four-year university degree (or its equivalent in academic course work and prior job experience) and who will be employed in a position that requires that level of education. Thus, if a particular job does not normally require a four-year degree at both the hiring institution and similar institutions, that position likely will not qualify for an H-1B visa. In addition, the position will not qualify for an H-1B unless the foreign worker's salary will equal or exceed the "prevailing wage" for that position in the same geographic area.

H-1B visas have several advantages for institutions of higher education. Although the federal government "caps" the number of H-1B visas that are granted each year to private employers, this cap does not apply to colleges and universities.

An H-1B is also a "dual intent" visa. An H-1B visa holder is considered a "no," that is, someone who will eventually leave the United States and return to his or her home country. Because an H-1B is a dual intent visa, however, there is no prohibition against an H-1B worker applying for permanent residency status. This is important because an H-1B can only be extended for a total of six years, and foreign workers with H-1B visas must apply for permanent residency if they wish to remain employed beyond their sixth H-1B year. A foreign worker may be entitled to work beyond their sixth H-1B year, provided their labor certification application (one step in the process of obtaining permanent residency) has been pending at least 365 days at the time their sixth year of H-1B eligibility is exhausted.

If an institution terminates the employment of an H-1B holder prior to the end of the visa, the institution is responsible for return transportation costs for the foreign worker (but not for family members) to his or her home country. Institutions that terminate the employment of an individual with a work visa are required to notify USCIS when the foreign worker's employment ends, regardless of whether the termination is voluntary or involuntary.

For teaching positions, an institution may hire a foreign worker requiring visa sponsorship over other minimally qualified U.S. citizens, and may sponsor that worker for labor certification leading to permanent residency. An institution also may hire a foreign worker for non-teaching positions over other minimally qualified applicants who are U.S. citizens. This is consistent with the established practice of hiring the best available candidate for each position. With non-teaching positions, however, the institution cannot sponsor a foreign worker for labor certification (green card) if a minimally qualified U.S. citizen is ready, willing, and able to perform the job. Thus, an institution can temporarily hire a foreign worker who is the best candidate for a particular non-teaching job; but it cannot sponsor that worker for labor certification if a minimally qualified U.S. citizen is ready, willing, and able to perform the job at the time of sponsorship. For this reason, an institution may decide not to sponsor any work visas for non-teaching positions. Similarly, an institution can decide not to hire anyone who will require visa sponsorship for certain positions (e.g., due to a hiring unit's budget limitations). If an institution decides to sponsor a work visa for a particular position, however, it should do so for anyone who applies for that position in order to avoid claims of illegal discrimination under Title VII or IRCA. See 8 U.S.C. § 1324b(a)(1)(A).

An institution planning to file a visa petition on behalf of an incoming foreign worker should remember that it may take several months for USCIS to approve the petition, and the foreign worker cannot begin working until the institution has received a USCIS notice of approval. If the incoming employee is currently working on an H-1B visa for another employer, however, the institution can file a petition to transition the worker's H-1B to that institution; and the worker can begin employment once the institution receives a notice of receipt from USCIS acknowledging receipt of the transition application.

Foreign workers hired for teaching positions frequently are present in the U.S. on F-1 student visas sponsored by the university that has granted or will grant their degrees. Students holding F-1 visas are authorized to work for the institution where they are enrolled, but are not authorized to work at another institution unless they obtain CPT or OPT work authorization.

Curriculum Practical Training (CPT) authorizes an F-1 student to teach at another institution and receive academic credit for doing so from the student's degree-granting institution. CPT must be approved by a student's academic advisor as well as by USCIS. Because an F-1 student gets academic credit for CPT, the student must pay tuition to the degree-granting institution. CPT can be used to permit new faculty members to begin working while they complete graduate degrees. F-1 students must apply for CPT through their degree-granting institutions.

Optional Practical Training (OPT) authorizes an F-1 visa holder who has completed his or her degree requirements to work for up to 12 months. OPT is designed to give F-1 scholars an

opportunity to apply knowledge gained in the classroom to a practical work experience. F-1 scholars must apply for OPT through their degree-granting institutions.

In some cases, it may be possible for an F-1 visa holder to obtain OPT in less time than they could obtain an H-1B visa. However, F-1 visa holders cannot begin work until they receive an Employment Authorization Card (Form I-688) from USCIS reflecting their OPT status.

Another type of work visa that is typically easier to obtain is the TN, which is only available to foreign workers from Canada and Mexico.

Lastly, spouses of J-1, L-1, and E work visa holders are eligible for EAD work cards, which permit any kind of employment.

Immigration and visa issues can be quite complex. This chapter provides an overview of visa issues frequently encountered by USG institutions, but it does not provide comprehensive guidance on such issues. The Attorney General for the State of Georgia has appointed attorney Myron N. Kramer as a Special Assistant Attorney General to assist the University System of Georgia and its institutions with immigration matters. Mr. Kramer may be contacted at Kramer & Associates, P.C., 125 Clairemont Avenue, Suite 330, Decatur, Georgia 30030, (404) 892-2030.

Please refer to Sections 8.2.5 and 8.2.12 of the Policy Manual, and Section III(D) of Volume 3A of the Business Procedures Manual, for more information regarding immigration compliance.

CHAPTER 10

BENEFITS

I. CORE EMPLOYEE BENEFITS

The University System of Georgia offers a core employee benefit package consisting of group health, dental, and life insurance, as well as retirement plan options for all regular employees who work one-half time or more. All University System employees are covered by workers' compensation, and certain employees also enjoy social security participation.

A. Health Insurance

Hospitalization, surgical, medical and major medical benefits are available to regular employees of the USG who work one-half time or more. These benefits are also available to dependents of the same employees. The USG pays that portion of the cost of such insurance as is designated from time to time by the Board. **For details on Health Insurance benefits, please see the Human Resources Administrative Process and Procedure Manual titled Group Health Insurance.**

B. Dental Insurance

For details on Dental Insurance benefits, please see the links found at http://www.usg.edu/employment/benefits/dental/.

C. Life Insurance for Employees and Retirees

Group life insurance, with accidental death and dismemberment coverage is available to regular employees of the USG who work one-half time or more. The USG, as employer, pays the premium on the basic amount of life insurance, which is $25,000.00. This amount of insurance is designated "basic life insurance," and the maximum premium therefore is established by the Board. In addition, "supplemental life insurance" is offered to these same employees with no employer participation in the premiums. Group life insurance for dependents of these employees is available to them in amounts as established from time to time by the Board. There is no employer contribution to the dependent life insurance premiums.

For information on Group Life Insurance, please see the Human Resources Administrative Process and Procedure Manual titled Group Life Insurance and Employment Beyond Retirement. Detailed information can be found at http://www.usg.edu/employment/benefits/life/life-ins.pdf.

D. Retirement Plan Information

A University System retiree or career employee who, upon his/her separation of employment from the USG, meets the criteria for retirement as set forth in **Sections 8.2.8.2 (Definition of a Retiree/Eligibility for Retirement)** or **8.2.8.4 (Career Employee) of the**

Policy Manual remains eligible to continue as a member of the basic and dependent group life insurance and health benefits plans. The USG continues to pay the employer's portion of the cost for such benefits.

The Teachers Retirement System of Georgia (TRSGA) is a defined benefit retirement plan. There is also an Optional Retirement Plan, which is a defined contribution retirement plan. **For further information on retirement plans, please see the Human Resources Administrative Process and Procedure Manual titled Education Leave Without Pay** and **http://www.usg.edu/employment/benefits/retirement/.**

E. Tuition Assistance Program

The Tuition Assistance Program (TAP) replaced the Tuition Remission and Reimbursement Program, effective November 1, 2004. This program was implemented with the Spring Semester 2005. TAP is an employee supplemental educational assistance program. **For additional information, please see Sections 8.2.17 and 8.2.19 of the Policy Manual and http://www.usg.edu/employment/benefits/tuition/.**

F. Georgia Higher Education Saving Plan

Institutions of the USG are authorized to provide for employee deductions for the Georgia Higher Education Savings Plan under the provisions of Internal Revenue Code Section 529. **For further information, please see http://www.gacollegesavings.com.**

II. OTHER INSURANCE

Each institution of the University System may offer other group insurance protection on a voluntary basis if the total cost of such protection is paid by the employee. **For additional information, see the Human Resources Administrative Process and Procedure Manual titled Employee Benefits and Services.**

CHAPTER 11

PROTECTING EMPLOYEE HEALTH INFORMATION (HIPAA and FERPA)

I. OVERVIEW

The Health Insurance Portability and Accountability Act (HIPAA) regulates access to an individual's Protected Health Information (PHI). 42 U.S.C. § 201 et. seq. Health plans and their administrators are subject to HIPAA, as are healthcare providers who electronically transmit information in connection with health insurance enrollment, claims, and other covered transactions.[28] HIPAA requires such entities to implement safeguards and provide privacy notices telling individuals of their privacy rights with respect to PHI.

PHI includes all individually identifiable health information transmitted or maintained by a covered entity regardless of form (oral, written, or electronic) including: (i) information about the past, present, or future physical or mental health or condition of an individual; (ii) the provision of health care to an individual; and (iii) past, present, or future payment for the provision of health care to an individual.

Thus, to the extent an institution has a benefit plan (such as a flexible spending plan) that is administered in-house (instead of by a third-party administrator), that institution will be covered by HIPAA. Coverage also may be triggered if an institution's campus health center files insurance claims electronically. If covered, the institution must review its current procedures related to PHI and, if warranted, formulate a plan for HIPAA compliance.

II. CONSENT REQUIREMENTS AND PRIVACY RULES

PHI may be used for purposes of treatment and payment without consent, but PHI may only be disclosed to a health plan sponsor if the sponsor certifies that it will only use the information in accordance with HIPAA. The sponsor must return or destroy all PHI received from the insurer once that information is no longer needed for the purposes for which disclosure was made. The sponsor also must implement security procedures that identify the employees who will have access to PHI and restrict access only to identified employees.

Privacy policies must ensure that only the necessary amount of PHI is released to third parties. Such policies should describe the uses and disclosures of PHI that are allowed for payment, treatment and health care operations, and the restrictions or limitations on uses or disclosures imposed by HIPAA.

Individuals also may elect to authorize disclosure of PHI to third parties. For example, an individual who is injured in an automobile accident may authorize an institution to release his or her medical records to an attorney. Each USG institution has a designated Privacy Officer who is responsible for HIPAA compliance. Any authorizations, subpoenas, or other requests for PHI should be reviewed by the institution's Privacy Officer or his or her designee before PHI is released to a third party.

[28] Flex plans are considered health plans under HIPAA.

III. EMPLOYER ACCESS TO PHI

Medical records maintained by the employer as part of the employee's personnel records are not considered PHI. When an employee provides medical information to the employer (e.g., doctor statement for sick leave, authorization for disclosure of PHI for fitness for duty examination, etc.), the information becomes part of the employment record and is no longer PHI. Nevertheless, doctors' reports on workers' compensation cases, pre-employment physicals, and other records containing information on an individual's medical condition must be kept confidential and access limited on a "need-to-know" basis pursuant to the ADA. Furthermore, the ADA requires the employer to keep medical files on each employee which are separate from the employee's personnel files. 29 C.F.R. § 1630.14(c)(1).

Employees who request accommodation under the Americans with Disabilities Act (ADA) or leave under the Family and Medical Leave Act (FMLA) must provide sufficient medical information to allow their employers to determine whether or not to grant such requests. Accordingly, when an employee refuses to provide such information by withholding consent under HIPAA, the employer may deny the requested leave or accommodation. 29 C.F.R. § 825.305(d). In evaluating such requests, however, employers should carefully limit their inquiries so they obtain only enough information to make a decision; and they should carefully protect the confidentiality of such information.

IV. FERPA FOR STUDENT EMPLOYEES

A. Overview

Additional privacy concerns apply with respect to students (including student employees) by virtue of the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g. FERPA is designed to ensure student and parental access to individual educational records but to otherwise protect such records from unauthorized and unwarranted disclosure. Under FERPA, the term "education records" generally means records, files, documents, and other materials containing information on individual students that are maintained by an educational institution or its employees or agents. However, there are some important categories of information that are not protected by FERPA, including:

- Records maintained by an institution's law enforcement unit if created by that unit for law enforcement purposes (but educational records in the possession of such units do not lose their FERPA protection). 20 U.S.C. § 1232g(a)(2)(B)(ii).

- Records related to individuals employed by the institution (including student employees) that are made and maintained in the normal course of business, relate exclusively to the individuals in their capacity as employees, and are not available for any other purpose. 20 U.S.C. § 1232g(a)(2)(B)(iii).

- Records on college students made or maintained by a physician, psychiatrist, psychologist, or other recognized healthcare provider acting in his or her professional capacity, provided such records: (a) are used only in connection with providing treatment to the student; and (b) are not available to anyone other than

persons providing treatment to the student, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice. 20 U.S.C. § 1232g(a)(2)(B)(iv).

It is important to note that records related to students who are employed as a result of their status as students are educational records protected by FERPA. For example, if a particular employment opportunity (such as a graduate research position) is only available to students, any records related to persons employed in that position are protected by FERPA.

FERPA generally prohibits institutions from disclosing any educational records containing "personally identifiable information," such as the names and addresses of students or their parents, personal identifiers (social security numbers or student identification numbers), and personal characteristics or other information that would make the student's identity easily identifiable.

There are some limited instances under FERPA when personally identifiable information may be released without authorization. For example, authorization is not needed in order to disclose personally identifiable information from student education records to officials at the institution (including faculty) if the institution determines such officials have a legitimate educational interest in the information. In addition, authorization is not needed to release directory information, provided the institution has given parents and students public notice regarding the release of directory information without authorization, what constitutes directory information, their option to refuse permission for the release of such information, and the time period in which they can notify the institution of such refusal. The types of data that may be designated as "directory information" include a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

Parents and eligible students (students 18 years old or older) also may provide written authorization for an institution to release educational records to a third party, such as a prospective employer. Such authorizations must specify the records to be disclosed, state the purpose of the disclosure, identify the party or class of parties to whom such disclosures may be made, and be signed and dated by the parent or student.[29] If requested, the institution also must provide the student or parent a copy of the information that was disclosed. 20 U.S.C. § 1232g(b)(4)(B).

Students cannot sue institutions who violate their FERPA rights, but the U.S. Department of Education can withhold federal funding from such institutions. *Frazier v. Fairhaven School Comm.*, 276 F.3d 52 (1st Cir. 2002).

[29] An electronic authorization is considered to be a "signed and dated written consent" when it identifies and authenticates a particular person as the source of the request and indicates such person's approval of the information contained in the electronic consent.

B. Interaction with HIPAA

There has been much debate about whether student medical records created or maintained by post-secondary schools (i.e., institutions of higher education) are covered by HIPAA, FERPA, or both. Unfortunately, the federal agencies responsible for overseeing compliance with HIPAA and FERPA have provided little guidance on this issue. To some extent, the answer will vary from institution to institution based on the type of information at issue; why and how it was created, collected, or maintained; and who created or has access to it.

The definitions contained in the sections III and IV.A of this chapter are an important part of this analysis. For example, suppose an individual is enrolled at and employed by the same USG institution in a position that is available to anyone (including non-students). Under those circumstances, information collected by the institution as an employer, based solely on the employment relationship, will not be covered by FERPA or HIPAA. *See* 45 C.F.R. § 160.103.

On the other hand, if an individual is employed in a position that is only available to students, any and all information collected as a result of that employment will likely be covered by FERPA, and thus not covered by HIPAA. *See* 45 C.F.R. § 160.103. Similarly, any medical information contained in educational records (such as immunization records required for admission) are clearly subject to FERPA and not HIPAA.

The real challenge comes in classifying individual medical information that is created and maintained by campus health centers. If the information is an education record (which is defined quite broadly), it is covered by FERPA; but if it is maintained solely by a physician or other healthcare provider solely for treatment purposes, it is likely covered by HIPAA.[30] The distinction is an important one. If a student-patient needs to be referred to an off-campus specialist, information protected by FERPA cannot be shared with the specialist unless a parent or the "eligible" student provides written consent for the disclosure. Similarly, information protected by HIPAA cannot be shared with faculty or other institution personnel for research purposes.

If an institution is unsure about how to classify student medical information, the safest course of action is to insure that its campus health center releases no student medical information to third parties (including off-campus healthcare providers) without written consent that satisfies both HIPAA and FERPA requirements.

V. PENALTIES FOR HIPAA VIOLATIONS

Any failure to comply with HIPAA's portability, access, and renew ability provisions can result in a tax of $100 per person to whom the noncompliance relates for each day in the non-compliance period. The American Recovery and Reinvestment Act of 2009 increased this amount to up to $1,000 per violation due to "reasonable cause and not to willful neglect" (with a maximum penalty of $100,000); up to $10,000 for each violation due to willful neglect that is

[30] Campus health centers that treat non-students and electronically file insurance claims are subject to HIPAA with respect to records of non-students.

corrected (subject to a $250,000 maximum); and up to $50,000 for each willful violation that is not corrected properly (subject to a maximum penalty of $1.5 million dollars during a calendar year).

VI. OTHER CONCERNS

A health plan cannot disclose PHI to another plan maintained by the same employer without the participant's consent, even if it is for the participant's benefit. For example, an employee's health plan cannot disclose information to the short-term disability carrier without the employee's consent.

In addition to complying with HIPAA provisions regarding release authorizations, covered entities must carefully review their file retention and handling procedures for HIPAA compliance. Appropriate safeguards include: (i) locking filing cabinets; (ii) limiting the number of keys or pass codes provided to employees; (iii) segregating PHI from personnel files; and (iv) shredding documents once the retention period has expired.

Records related to HIPAA compliance must be maintained for at least six years.

VII. ADDITIONAL RESOURCES

Please refer to Section 12.5.2 of the Business Procedures Manual and www.usg.edu/legal/hipaa for more detailed information regarding USG policies and procedures for HIPAA compliance. Please refer to Section 12.5.1 of the Business Procedures Manual for additional information on FERPA compliance.

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CHAPTER 12

HOURS OF WORK

I. FAIR LABOR STANDARDS ACT

Federal law entitles all employees, who are not otherwise exempt, to be compensated at a rate of one and one-half of their hourly wage for hours worked over 40 per week. 29 U.S.C. § 201 et. seq. Employees entitled to overtime are referred to below as "non-exempt" employees. The Fair Labor Standards Act (FLSA) and related federal and state laws govern the payment of minimum wage and overtime compensation to certain employees. The Wage and Hour Division of the U.S. Department of Labor is responsible for administering the FLSA. **Refer to the Human Resources Administrative Process and Procedure Manual titled Work Week and Overtime, Fair Labor Standards Act Leave for more information.**

A. Minimum Wage Requirements

The federal minimum wage was increased to $7.25 per hour effective July 24, 2009. A non-exempt employee must receive at least the minimum wage for each hour worked in the workweek.

If an employee is paid an hourly rate for some hours during the week and a piece rate (e.g., twenty-five cents for each page typed) for others, the hourly rate must be at least the minimum wage, and the piece-rate earnings must average at least the minimum wage for the piece-rate hours. Likewise, if an employee is paid a flat rate to perform a particular task outside the purview of that employee's job responsibilities, this flat rate, when divided by the hours worked, should be equal to or greater than the minimum wage. The average of the two in any week must be at least equal to the current minimum wage.

The following types of workers may, with explicit authorization from the Department of Labor, be paid less than the minimum wage: student learners, apprentices, messengers, certain disabled workers, and full-time students. Before employing workers in any of these groups at a reduced rate, however, a certificate of exemption must be obtained by the USG institution from the Wage and Hour Division. *See* 29 C.F.R. § 519 (full-time student workers); 29 C.F.R. § 520 (learners, apprentices, and others); and 29 C.F.R. § 525 (disabled workers).

B. Overtime Requirements

Classified non-exempt USG employees, including staff, students, and temporary workers, are entitled to overtime. Non-exempt employees who work overtime may be paid for the overtime hours they work or compensatory time may be given in lieu of overtime. One and one-half hours of compensatory time must be given for every hour of overtime worked. Non-exempt employees who do not opt to receive compensatory time must be paid one and one-half times their "regular rate" for all "hours worked" in excess of 40 in any workweek. USG employees classified as "exempt" professional and administrative personnel are not entitled to receive overtime.

Each workweek is a separate unit for overtime purposes. As a general rule, hours may not be averaged over two or more weeks for overtime purposes.

An employee's "regular rate" of pay, i.e., hourly wage, is the rate earned whether on an hourly rate or by a fixed weekly salary. If the employee earns a salary, then the salary ordinarily must be divided by 40 hours in order to get the regular rate of pay. *See* 29 C.F.R. § 778.113. If an employee is paid extra in the form of incentives or night-shift premiums, for instance, then that individual's regular rate of pay for overtime purposes is determined by taking the employee's total compensation for the week, excluding certain overtime premiums, and dividing it by the total number of hours worked during the week, excluding overtime hours. 29 C.F.R. § 778.108.

Determining whether an employee's activity constitutes "hours worked" requires application of the following test: "Are such activities within the broad range of compensable 'principal activities' that are necessary to the business and that are performed primarily for the employer's benefit in the ordinary course of business?" *See generally* 29 C.F.R. § 785. Some examples of areas where it is questionable/tricky if the employee should be entitled to overtime includes:

1. Meal Periods - If an employee is completely relieved from duty for the purpose of eating, the time allotted for the meal period, if for at least 30 consecutive minutes, is not counted as time worked. It is not necessary that an employee be permitted to leave the premises; however, if the employee is expected to answer the phone or the like during the meal period, then such time is compensable. 29 C.F.R. § 785.19.

2. Rest Periods - Short rest periods of 20 minutes or less must be counted as hours worked. However, unauthorized extensions of work breaks need not be counted as hours worked when the USG institution has expressly and unambiguously communicated to the employees that the break is for a specific length of time and that employees will be subject to disciplinary action for violation of this rule. 29 C.F.R. § 785.18.

3. Lectures, Meetings, and Training Periods - Time spent by an employee attending lectures, meetings, and training periods, need not be counted as hours worked if all of the following conditions are met: (1) the meetings are held outside working hours; (2) attendance by employees is completely voluntary; (3) the course, lecture, or meeting is not directly related to the employee's job; and (4) the employee does not perform any productive work during his attendance. 29 C.F.R. § 785.27. Training sessions are compensable where they are designed to make the employee handle his or her job more effectively as opposed to training the employee for a new job or skill. 29 C.F.R. § 785.29.

4. Travel Time

a. Home to Work Travel - USG institutions are not required to compensate employees for their "[n]ormal travel" between home and work. 29 C.F.R. § 785.35.

b. Home to Work on Special One-Day Assignment - When an employee regularly works at a fixed location in one city and is given a special one-day assignment in another city and returns home that same day, this time spent traveling to and from the other city is considered work time. The USG institution may, however, deduct time that the employee would normally spend commuting to the regular worksite. 29 C.F.R. § 785.37.

c. Travel That Is Part of a Day's Work - Time spent by an employee traveling as part of his or her principal activity is work time and is compensable. An example of such travel time would be from job site to job site during the workday. 29 C.F.R. § 785.38.

d. Travel Away From the Home Community - Any travel that keeps an employee overnight is travel away from the home. When travel away from home cuts across the employee's workday, it is considered work time. However, as a DOL enforcement policy, time spent in travel away from home outside of regular work hours as a passenger on an airplane, train, boat, bus, or automobile is not considered work time. 29 C.F.R. § 785.35.

C. White Collar Exemptions

USG professional and administrative employees may be exempt from earning overtime if they meet the requirements of the so-called "white collar" exemptions. 29 C.F.R. § 541. The term "white collar" is used to refer to the "executive," "administrative," and "professional" exemptions to the FLSA. Employees that meet all the elements of the exemption test are exempt from overtime compensation. Thus, if the employee works over 40 hours in a workweek, he/she will not be entitled to overtime payments. If there is a question about whether a position is exempt or non-exempt from overtime, please contact Jeff Thompson of Constangy, Brooks & Smith, LLP, at (478) 621-2423.

In order for the "white collar" exemptions to apply, (except the outside sales exemption and, in limited circumstances, the computer exemption), the employee must be paid on a "salary basis" at a rate of at least $455.00 per week ($23,660.00 per year), and must meet the all of the elements of the following tests:

1. Executive Employee Exemption. 29 C.F.R. § 541.100.

In addition to being paid on an appropriate salary basis, an "executive" exempt employee must meet the following duties:

a. Primary duty must be to manage an enterprise or manage a customarily recognized department or subdivision of the enterprise;[31]

b. Must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

c. Must have the authority to hire and fire other employees, or at the very least must make suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of employment status of other employees that are given particular weight by the USG institution.

2. Administrative Employee Exemption. 29 C.F.R. § 541.200.

In addition to being paid on an appropriate salary basis, an "administrative" exempt employee must meet the following duties:

a. Primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the USG institution or the USG institution's customers;[32] and

[31] "Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

United States Department of Labor Fact Sheet 17(B)(" Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA)")(July 2008).

[32] In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent

b. Primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

3. Learned Professional Exemption. 29 C.F.R. § 541.301.

In addition to being paid on an appropriate salary basis, a "learned professional" exempt employee must meet the following duties:

a. Primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

b. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction; and

c. The advanced knowledge must be in a field of science or learning.

4. Creative Professional Exemption. 29 C.F.R. § 541.302.

In addition to being paid on an appropriate salary basis, the primary duty of a "creative professional" employee must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

5. Computer Employee Exemption. 29 C.F.R. § 541.400.

To be exempt under the "computer employee" exemption, the employee must meet the following tests:

a. Must be compensated either on a salary basis or a fee basis at a rate not less than $455.00 per week or, if compensated on an hourly basis, at a rate of not less than $27.63 an hour;

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judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

The term "matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

United States Department of Labor Fact Sheet 17(C)("Exemption for Administrative Employees Under the Fair Labor Standards Act (FLSA)")(July 2008).

b. Must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field; and

c. Primary duties performed must include (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; or (2) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) a combination of duties described in (1), (2) and (3), the performance of which requires the same level of skills.

6. Outside Sales Employee Exemption. 29 C.F.R. § 541.500.

There is no salary requirement for the "outside sales" exemption. To be exempt under the "outside sales" exemption, the employee must meet the following tests:

a. Primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the USG institution's client or customer; and

b. Must be customarily and regularly engaged in such activities away from the USG institution's place or places of business.

7. Highly Compensated Employees Exemption. 29 C.F.R. § 541.601.

To be exempt under the "highly compensated employee" exemption, the employee must meet the following tests:

a. Must have a guaranteed total annual compensation (including base salary, commissions, non-discretionary bonuses and other forms of incentive compensation) of at least $100,000.00 (which must include at least $455.00 per week paid on a salary or fee basis); and

b. Must customarily perform one or more of the duties or responsibilities as defined by the exemptions for executive, administrative, or professional employees.

D. Exempt Employees Salary Deductions

It is important for USG institutions to be careful when making deductions from employees' paychecks, especially for employees who are classified as exempt. If improper deductions are made, the exemption will be lost; and the employee will be entitled to overtime. **See the Human Resources Administrative Process and Procedure Manual titled Fair Labor Standards Act Leave.**

The regulations basically prohibit deductions from salary that are based on either quality or quantity of work performed. The regulations allow USG institutions to make salary deductions for unpaid disciplinary suspensions of a full day or more that are imposed in good faith for violations of established workplace conduct rules.

Examples of Allowable Deductions:

1. USG institutions can deduct for partial day absences from an exempt employee's leave bank (for example, sick leave or vacation) without losing the employee's exempt status. This is so because deductions from leave banks have been determined not to constitute a deduction from an employee's salary (WH Opinion Letter - FLSA2005-41, October 24, 2005);

2. USG institutions can deduct from salary for one or more days for any personal reason, other than sickness or accident (29 C.F.R. § 541.602(b)(1));

3. USG institutions can deduct from salary for one or more days for sickness or accident, if the deduction is in accordance with a bona fide sickness and accident plan, policy or practice (29 C.F.R. § 541.602(b)(2));

4. USG institutions can offset amounts received by the employee as payment for jury fees, witness fees, or military pay (29 C.F.R. § 541.602(b)(3));

5. USG institutions can deduct from salary for unpaid disciplinary suspensions of one or more full days imposed in good faith for violations of workplace conduct rules or violations of safety rules of "major significance," for example a sexual harassment policy (29 C.F.R. § 541.602(b)(4)); and

6. USG institutions can deduct for intermittent leaves taken under the Family and Medical Leave Act (29 C.F.R. § 541.602(b)(7)).

If the exempt status is destroyed, the institution may be liable for unpaid overtime, as well as overtime for future work by the now non-exempt employee. It is critical for institutions to avoid making improper deductions that could change the status of an employee from exempt to non-exempt.

E. Compensatory Time Off

In limited situations, in lieu of overtime, USG employees can earn compensatory time off, or "comp time." 29 C.F.R. § 553.22. That is, they can earn comp time at the rate of one and one-half hours of time off per hour of "overtime." Before the institution can substitute comp time for overtime, there must be a written agreement between the employee and the institution before the overtime work is performed.

If the work of an employee for which compensatory time may be provided includes work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. Employees engaged in police and fire protection work may accrue up to 480 hours of compensatory time. If such work was in any other vocation, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. 29 C.F.R. § 553.21. If the hours accrued exceed the amounts set forth above, the employee shall be paid overtime compensation for the additional overtime hours of work.

II. GEORGIA LAWS

In addition to the federal Fair Labor Standards Act, the State of Georgia also has laws that regulate the wages of employees and the methods of payment.

A. Minimum Wage Law – The State of Georgia has a minimum wage law in addition to the federal minimum wage. Currently, Georgia's minimum wage law is not greater than the federal minimum wage law. O.C.G.A. § 34-4-3. Therefore, every USG employee must receive a minimum wage of not less than the federal minimum wage set forth above in Section I.A.

B. A USG institution cannot prohibit its employees or applicants from receiving overtime or compensatory time.

C. Record Keeping Requirements – USG institutions must maintain records showing: (1) the name, address, and occupation of each person employed by them; (2) daily and weekly hours worked by each such person; and (3) wages paid to each such person. If requested by the Labor Commissioner, the institution must also furnish a sworn statement of such records. These records must be open for inspection by the Georgia Department of Labor at any reasonable time. Institutions also need to post copies of any regulation or order issued pursuant to these provisions in a conspicuous place in an area frequented by employees. O.C.G.A. § 34-4-5.

D. Payment of Wages

1. Method of Payment - USG employees or their agents must be paid by lawful money of the United States, by check, or, with the consent of the employee, by credit transfer to the employee's account with a bank, trust

company, or other financial institution. O.C.G.A. § 34-7-2. Any instrument issued in payment of wages must be negotiable and payable in cash on demand and without discount. Moreover, every institution must, on demand, redeem checks in cash on the regular payday, or, when there is no regular payday, within 30 days after issuance.

2. Time of Payment – Non-exempt USG employees must be paid at least twice per month on regularly designated paydays. O.C.G.A. § 34-7-2. Other employees may be paid on a monthly basis. Payments must be for the full net amount of wages earned during the pay period.

3. Payment of Outstanding Wages Upon Death of Employee - It is lawful for an institution to pay the surviving spouse, lawful guardian of any surviving minor children, or otherwise designated legal beneficiary of a deceased employee all outstanding wages or other monies due up to $2,500.00. Such funds are exempt from any and all process of garnishment. Additionally, the payment of such sum operates as a release of all claims to the money by the estate of the employee, creditors, the surviving spouse, minor children, or their guardians. O.C.G.A. § 34-7-4.

4. Payment for a Specific Term of Employment – When a contract of employment provides that wages are payable at a stipulated period, the presumption arises that the hiring is for such period. O.C.G.A. § 34-7-1. Accordingly, it is important for every employment contract to specify a term or to indicate that employment is "at will." An indefinite hiring may be terminated at will by either party.

5. Charitable Deductions – The USG institutions can deduct amounts from an employee's paychecks for the purpose of contributions to charitable organizations approved by the board at the written request of the employee if a deduction of $1.00 or more is made per deduction period or $1.00 or more is made per designated charitable organization. O.C.G.A. § 45-20-50.

III. STUDENT WORKERS

There are numerous students who work in some capacity at USG institutions. If a particular student is considered an employee, he or she must paid in compliance with the FLSA, as set forth above. This leads to a more basic question -- when is a student worker considered to be an employee of the institution?

There is no one factor that determines when an individual is "employed" for FLSA purposes. Instead, such determinations depend upon the "economic realties" of the relationship as evidenced by overall circumstances. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). Both the courts and the Wage and Hour Division of the U.S. Department of Labor

(WHD) have provided some guidance on this issue. If all of the following six factors are met, then an employment relationship does not exist.[33]

Factors to Determine If Student Workers Will Be Considered Employees:

1. The training is similar to what would be given in a vocational school or academic educational instruction;

2. The training is for the benefit of the student;

3. The student does not displace regular employees, but works under their close observation;

4. The employer that provides the training derives no immediate advantage from the activities of the students, and on occasion the employer's operations may actually be impeded;

5. The students are not necessarily entitled to a job at the conclusion of the training period; and

6. The employer and the students understand that the students are not entitled to wages for the time spent in training.

Following the court decision in *Marshall v. Regis Educational Corp.*, 666 F.2d 1324 (10th Cir. 1981), WHD now takes the position that students working as resident hall assistants or dormitory counselors are not employees if they participate in bona fide educational programs and receive compensation in the form of reduced room or board charges, free use of telephones, tuition credits, and the like. But see *Cuddeback v. Florida Board of Education*, 381 F.3d 1230 (11th Cir. 2004) (graduate research assistant who received stipend, benefits, and sick and annual leave, and whose appointment was non-renewed based on non-academic reasons, was an employee for purposes of Title VII of the Civil Right Act of 1964).

However, students are normally considered employees when their work is not part of an overall educational experience, is performed primarily for compensation, and is principally a benefit to the institution (e.g., food service workers, ushers at athletic events).

IV. BEST PRACTICES

A. Properly classify all employees as "exempt" or "non-exempt."

B. Have accurate records for all time worked by non-exempt employees, and a record-keeping process that can be easily and properly followed.

[33] (WH Opinion Letter - FLSA2004-5NA, May 17, 2004)

C. Do not permit unauthorized overtime (and handle as a disciplinary matter rather than by withholding pay).

D. Have employees sign off on timekeeping records and on any changes to them.

E. Do not permit employees to work during lunch or meal periods.

F. Only suspend exempt employees without pay in weekly increments, unless a violation of a major safety or workplace conduct rule occurs.

G. Always be sure to pay employees at least the minimum wage for hours worked. This is especially important in situations when an employee is terminated or resigns and still owes a debt to the university. Please be sure his/her paycheck reflects at least the minimum wage for hours worked and time and one-half for any overtime.

H. Because of possible overtime implications, be careful with incentive bonuses for non-exempt employees. Monies earned for incentive bonuses must be calculated into the employee's hourly rate for overtime purposes.

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CHAPTER 13

GARNISHMENT

I. OVERVIEW

A garnishment is a three-way legal proceeding involving a debtor, a creditor, and a garnishee. A third-party creditor who garnishes an employee-debtor's wages is, in effect, demanding that the employer-garnishee satisfy the employee's unpaid debt by giving a portion of the employee's salary, wages, commissions, bonuses, or other earnings directly to the creditor. Wage garnishment occurs when the employer, by way of a court order, withholds the earning of an employee for payment of a debt. There is direct liability for employers when proper procedures are not followed. O.C.G.A. §§ 18-4-62 & 18-4-90. Garnishments are permitted for child support. O.C.G.A. § 19-11-19.

Subject to certain limitations, a creditor can garnish the pay of a debtor after the creditor obtains a court's judgment against the debtor. An employer becomes the garnishee once he or she is served with a summons in a garnishment proceeding. The employer must then file an answer to the creditor's summons within 45 days after service of the summons.

II. ANSWER OF THE EMPLOYER

The institution must file an answer in the county indicated on the summons, and if no county is indicated, the answer should be filed in the county where the employee resides or where the garnishment was filed. The institution must answer the garnishment, describing the money or property subject to garnishment, not sooner than 30 days, and not later than 45 days, after service of the summons. O.C.G.A. § 18-4-62(a). However, if the defendant debtor is no longer an employee of the garnishee and if the garnishee has no money or other property of the defendant, which would be subject to garnishment, the garnishee does not need to wait the 30 days to file its answer. O.C.G.A. § 18-4-62(b) The institution must deliver to court any money or property admitted in the answer to be subject to garnishment. A copy of the answer must be served on the plaintiff/creditor or the plaintiff's attorney, as reflected on the summons. The institution can charge the employee an administrative fee of the greater of $25.00 or 10 percent of the garnishment, not to exceed $50.00, O.C.G.A. § 18-4-97, or, for child support orders, a fee in the amount of $25.00 for the first deduction and $3.00 for each subsequent deduction. O.C.G.A. § 19-6-33.

III. DEFAULTS

If an institution fails to answer a garnishment by the 45th day after service of a summons, it will be in default, which means that the employer becomes potentially liable for all of the employee's debt. Default may be opened as matter of right by filing an answer and paying court costs within 15 days of the default. After 15 days following the default, a judgment may be entered against the employer for the entire amount the plaintiff claims is owed by the employee. O.C.G.A. § 18-4-90.

IV. CONTINUING GARNISHMENT

Debts subject to continuing garnishment, like child support garnishments, are those owed at the time the summons is served plus debts accruing through the 179th day thereafter. Procedures governing continuing garnishments are similar to those for other garnishments. An answer must be filed no later than 45 days after service of summons. Subsequent answers must be filed no later than 45 days after the last answer date. The last required answer must be filed within 195 days after service of the summons. O.C.G.A. § 18-4-113.

V. DISCHARGE OF GARNISHED EMPLOYEE

Institutions are not subject to garnishments after the termination of an employee. However, an institution may not discharge an employee by reason of garnishment of earnings for any one indebtedness, even though more than one summons may be served in connection with the one debt. Two or more successful garnishments by separate creditors within the same 12-month period are valid grounds for discharge. O.C.G.A. § 18-4-7. The Federal Consumer Credit Protection Act provides that an employer who willfully violates this prohibition shall be fined not more than $1,000.00, or imprisoned for up to one year, or both. 15 U.S.C. § 1674. **See Section 8.2.15 of the Policy Manual for additional information.**

VI. RELEASE OF SUMMONS

There are certain situations that will release a garnishee of the duty to file an answer and to deliver the property of the defendant. The clerk of the court must issue a release of garnishment if: (1) the plaintiff or plaintiff's attorney so requests in writing; (2) the amount claimed due has been paid, along with court and other costs; (3) a dissolution bond is filed by the defendant and approved by the clerk; (4) the court, following a hearing, orders a release from the garnishment; or (5) the garnishment is dismissed.

VII. AMOUNTS SUBJECT TO GARNISHMENT

In most instances, a garnishment may not exceed 25 percent of an employee's disposable earnings for a week, or the amount by which disposable earnings for a week exceed 30 times the federal minimum hourly wage prescribed by the FLSA, whichever is less. O.C.G.A. § 18-4-20(d). However, a 50 percent ceiling replaces the 25 percent figure mentioned above when the garnishment follows a judgment for alimony or child support. Disposable earnings are monies paid after legally mandated deductions, such as taxes, social security, etc. When earnings are paid bi-weekly or monthly, the employer simply uses the appropriate multiple of the minimum hourly wage. For example, the ceiling for a bi-weekly employee for a debt other than alimony or child support is the less of 25 percent of disposable earnings OR the amount by which disposable earnings for the period exceed the federal minimum wage multiplied by 60 (30 times 2 for the two week pay period). O.C.G.A. § 18-4-20.

Wages due to deceased employees, up to $2,500.00, are exempt from garnishment and may instead be paid to widows or minor children. O.C.G.A. §18-4-22. Wages owed to a person involuntarily hospitalized, whose spouse was living with him/her at that time of hospitalization, are exempt from garnishment.

VIII. GARNISHMENT OF RETIREMENT FUNDS

Funds or benefits from a pension or retirement program and certain IRA accounts are exempt from the process of garnishment until paid or otherwise transferred to a member of such program or its beneficiary. This exemption does not apply to garnishments based on a judgment for alimony or child support. Upon payment or transfer to a member or beneficiary, such benefits remain exempt to the extent provided in O.C.G.A. § 18-4-20 and set forth in Section VII of this chapter. Retirement benefits paid to Georgia residents from a teachers' retirement system of another state are also exempt from garnishment, provided the other state's laws provide for substantially the same treatment for benefits received in that state from the Teachers Retirement System of Georgia.

IX. ADMINISTRATIVE GARNISHMENTS RELATED TO STUDENTS

Under Georgia law, an employer cannot garnish wages without a court order. Under federal law, however, the U.S. Department of Education (ED) has the authority to administratively garnish the wages of an employee who has been delinquent in repaying federal student loans. This authority comes from the Higher Education Act, 20 U.S.C. § 1095a, which also authorizes the agencies who guarantee such loans (referred to as "guarantors" or "guaranty agencies") to pursue administrative garnishments. At times, ED also has relied on other federal laws, the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3720D, and the Consumer Credit Protection Act, 15 U.S.C. §§ 1671-1677, for administrative garnishments.

An employee who receives an administrative garnishment order must complete and return the enclosed employer certification within the time specified in the enclosed instructions. The garnishment order will indicate a reasonable time in which the employer must begin making the required withholding. Withholdings may follow the normal pay cycles and must continue until the employer receives notification to discontinue the garnishment. An employer must ignore any assignment or allotment by an employee that would limit or prohibit the employer from making the required withholding, unless such assignment or allotment was made for a family support judgment or order. *Bache Halsey Stuart Shields Inc. v. Killop*, 589 F. Supp. 390 (1984). All amounts withheld must be promptly paid to ED or the guaranty agency.

The amount of money that can be administratively garnished depends on the employee's "disposable pay," that is, that part of the employee's compensation remaining after the deduction of any legally required withholdings (without changing the employee's current deductions). An employer who receives an administrative garnishment order must withhold no more than the lesser of 15 percent of disposable pay or an amount equal to the employee's disposable income minus 30 times the federal minimum wage, unless the employee provides written consent to deduct a greater amount. 20 U.S.C. § 1095a(a).

Some employees will be subject to multiple garnishment orders, some of which will have priority over others. Multiple garnishment or withholding orders are handled as follows:

1. If other garnishment or withholding orders are received after the administrative (ED or guaranty agency) garnishment, the institution must first withhold the amount required for the administrative garnishment before complying with any

subsequently received withholding orders, except when one of the other garnishments is a family support withholding order or another federal law establishes a different priority. 15 U.S.C. § 1673.

2. If other garnishment or withholding orders were received before the administrative garnishment, the institution must respond to the administrative garnishment by withholding the smaller of: (i) the amount specified in the garnishment order; (ii) an amount equal to the employee's disposable income minus 30 times the federal minimum wage; (iii) an amount equal to 25 percent of the employee's disposable income minus any amounts withheld under orders received before the administrative garnishment. 15 U.S.C. § 1673.

3. For employees subject to multiple administrative garnishments, the institution must withhold the combined amounts specified in each order, but not more than 25 percent of the employee's disposable pay. 15 U.S.C. § 1673.

Institutions may withhold more than the amount specified above if written consent is provided by the employee.

Employees hired within 12 months after being involuntarily terminated from a previous job, however, cannot have their pay garnished by the ED or a guaranty agency until they have been reemployed continuously for at least 12 months. In addition, an institution cannot garnish the wages of an employee who has filed for bankruptcy relief so long as the automatic bankruptcy stay remains in effect.

Institutions who fail to comply with administrative garnishment orders are liable for the amounts that should have been withheld, plus attorneys' fees, costs, and possibly punitive damages.

Institutions are prohibited from refusing employment to, disciplining, or terminating any individual based on an administrative garnishment related to a student loan. 20 U.S.C. § 1095a(a)(8). Institutions who do so may be ordered to reinstate the individual, and to pay back pay and punitive damages, as well as the individual's attorneys' fees. 20 U.S.C. § 1095a(a)(8).

CHAPTER 14

EMPLOYEE DISPUTES

I. GRIEVANCES

The term "grievance," in the traditional sense, refers to a contractual right granted to union employees by which they (or rather their union representatives) can file complaints with their employer and have those complaints resolved through mediation and/or binding arbitration.

USG employees do not have a right to file a "grievance" in the traditional sense. However, USG employees have the right to appeal any final institutional decision to the Board of Regents. Only an institution President can issue a "final institutional decision." Such an appeal must be submitted to the Board in writing within 20 days following the final institutional decision. The Board may then grant a hearing at its discretion; employees do not have an automatic right to a hearing on such an appeal. **Please refer to Section VIII of the By-Laws of the Board of Regents for more information.**

Board policies also require each institution to establish a procedure by which employees can appeal "grievances [that] cannot be resolved through normal administrative channels at the institution." **Please see the Human Resources Administrative Process and Procedure Manual titled Grievance and Dispute Resolution**. Such procedures should provide a mechanism by which the institution's president appoints a Board of Review to hear the employee's appeal. Board of Regents' policy requires that Boards of Review be appointed within 10 working days after the written appeal is received. Presidents are not required to appoint a different Board of Review for each appeal, but may appoint members to serve on a permanent or rotating basis. Such procedures also must state the process by which the Board of Review forwards its recommendation to the President and by which the President renders the final decision of the institution. Finally, they must clearly put the employee on notice that appeals to the Board of Regents must be made in writing within 20 days after the final institutional decision is issued in writing by the President.

Given the variety of complaints that employees sometimes have, institutions may want to place limits on the types of complaints entitled to Board of Review hearings, provided a Board of Review examines the written complaint and determines that the employment action in question does not involve demotion, suspension, termination, or some other action that would invoke due process protections. **For additional information on due process, please refer to Chapter 15 of this manual.**

In order to minimize appeals and maximize employee morale, however, institutions also should adopt procedures for resolving employee complaints at the supervisory or departmental level. Many employees who have complaints simply want to be heard, and many complaints can be resolved by discussing the employee's issues in an open and productive manner. It may be a cliché, but many employees simply want their "day in court."

Along those lines, institutions should adopt and promote an "open door" approach to resolving employee complaints and concerns. First-line supervisors and managers should be

encouraged to listen to employees and to discuss any concerns they might have. Supervisors may discover that their employees face problems and challenges of which they were unaware. Ultimately, the supervisor's response may be: "I hear your concerns, but we still have to do it this way." Even then, however, the employee may be content knowing that his or her concerns have been heard and taken seriously.

For disputes and complaints that cannot be resolved at the supervisory level, institutional procedures should permit employees to discuss their concerns with the next highest level of authority. This is simply extending the open door policy up the chain of command. It also may be beneficial to include provisions by which a senior or departmental manager, or even a human resources representative, can sit down with the employee and the immediate supervisor to discuss the problem and explore possible ways in which to address the employee's concerns without undermining the supervisor or compromising the needs and reasonable expectations of the institution. Thus, while managers may occasionally meet with employees who do not report to them directly, they should only use these meetings as a forum for the employee to discuss his or her concerns. They should not promise to correct problems or hint that they will "straighten out" the supervisor, nor should they take any corrective action without involving the employee's immediate supervisor.

Another approach to employee complaints is to designate an ombudsperson to receive and investigate complaints and to issue a report and/or recommendation to the manager who has overall responsibility for the complainant's department or business unit. Again, while such procedures may be beneficial, it is important that ombudspersons and senior managers refrain from any actions that undermine the employee's immediate or departmental supervisors, or that in any way usurp authority from the normal chain of command.

II. HEARINGS

Institutional procedures should also include procedures for Board of Review hearings.[34] Such hearings are not judicial proceedings and need not be overly formalistic. Accordingly, legal rules of procedure and evidence do not apply, and such legal objections can be ignored. The grieving employee should be allowed to bring an advisor to assist and advise the employee during the hearing, but such advisors should not be allowed to argue or question other participants on the employee's behalf.

It is up to the institution whether to permit employees to bring attorneys to such hearings. Many institutions permit attorneys to be present during such hearings and consult with their clients on breaks, so long as they do not address the panel or others while the hearing is in progress.

Generally, Boards of Review can consider any evidence, even over objections that certain testimony is "hearsay" (a term overused and often misused by disgruntled employees). The burden is generally on the employee to show that the decision in question was unreasonable or inappropriate. Generally, if the supervisor's or manager's decision appears reasonable, the Board of Review should recommend that the decision be upheld. In reaching a decision, a Board

[34] *See* the Human Resources Administrative Process and Procedure Manual policy on Grievances.

of Review should bear in mind that employers do not need evidence "beyond a reasonable doubt" before making employment decisions. Instead, managers and supervisors can make a legally defensible decision based on reasonably reliable information that the employee, more likely than not, engaged in or was responsible for the conduct in question.

During Board of Review hearings, the institution should be represented by a manager in the chain of command above the employee's immediate supervisor. Both sides may call witnesses, who may be questioned by either side and by the review panel itself. In addition, the panel can make any inquires it deems relevant and reasonable.

One member of the Board of Review should be designated as the chair and should be responsible for running the hearing and insuring that neither side becomes abusive, especially with regard to questioning witnesses. Board of Review hearings may be recorded, but there is no legal requirement that this be done.

Institutional procedures for appeals hearings should parallel those set out in the Human Resources Administrative Process and Procedure Manual policy on Grievances.

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CHAPTER 15

DISCIPLINE

I. CLASSIFIED EMPLOYEES

Individuals employed by the Board of Regents and USG institutions are not covered by the State Merit System and are not entitled to hearings and other procedural safeguards provided to most other Georgia public employees. *See* O.C.G.A. § 45-20-1(e).[35]

All classified (professional, non-faculty administrative, and staff) employees are on provisional status during their first six months of employment,[36] and the institution that employs them can terminate that employment during the provisional period for any reason (except for a reason that is legally prohibited by federal or state discrimination laws).

In addition, non-provisional classified personnel are employed without contracts on an "at will" basis, and have no property interest in their jobs. *Warren v. Crawford*, 927 F.2d 559 (11th Cir. 1991); *Braswell v. Bd. of Regents*, 369 F. Supp. 2d 1362 (N.D. Ga. 2005). Therefore, an employee does not have a due process claim based upon a termination itself. *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

In some cases, however, classified employees may be able to claim a violation of procedural due process if they can show damage to reputation in connection with termination of employment. Procedural due process can be satisfied, however, by an opportunity for a "name clearing" hearing either before or after termination. *Cotton v. Jackson*, 216 F.3d 1328 (11th Cir. 2000).

For that reason, and in the interest of fairness, Board of Regents policies require that classified employees be given an opportunity to appeal employment decisions involving demotion, suspension, or dismissal. **See the Human Resources Administrative Process and Procedure Manual policies entitled Dispute Resolution and Grievance Policy.** Each institution should adopt a policy by which employees can appeal such decisions to the next highest level of authority. Such policies should clearly state the procedures by which: (a) an employee can request a review of the decision at issue; (b) the president of the institution renders the final institutional decision; and (c) the employee can appeal the institutional decision to the Board of Regents. **They also should parallel the policies set forth in the Human Resources Administrative Process and Procedure Manual policy titled Dismissal, Demotion and Suspension.**

Although job expectations and requirements vary among departments, there are some employment issues (such as attendance and leave benefits) that will be common to most departments and business units. Institutions should strive to follow the same approach to such

[35] Both the State Merit System and the Board of Regents use the term "classified employees," which leads to confusion on this point, but the term has different meanings in each context.

[36] For employees hired as public safety/ law enforcement officers, the six-month provisional period does not begin until completion of their mandatory training for certification as police officers.

issues on a campus-wide basis. Thus, before disciplining employees, managers should consult their institution's human resources department.

When meeting with an employee as part of an investigation that could lead to disciplinary action, or to inform an employee that disciplinary action is being taken, a supervisor should always have another supervisor or management level employee present.[37]

Employees frequently assume that they can treat a disciplinary meeting as a legal proceeding and that they can bring an attorney or some other representative with them. This is incorrect. USG employees also do not have the right to have other employees, family members, or attorneys present during their meetings with managers.

In addition, a manager generally should not talk to anyone claiming either to represent an employee or to be acting on the employee's behalf, including the employee's family members. If contacted by an attorney claiming to represent an employee, a manager should refer the attorney to Legal Affairs at the institutional or System level.

Any written counseling or discipline given to an employee should be signed by a manager. In most cases, this should be the employee's immediate supervisor. A manager should generally begin such a meeting by relating the conduct at issue, as well as the manager's understanding of the employee's role or responsibility for such conduct. The manager should then explain how that conduct violates the institution's policies or established expectations. After that, the manager should explain the consequences of the conduct, present the written document to the employee, and wait while he or she reads it. The manager should listen to any reasonable response the employee may have, but generally should not spend too much time revisiting the issue or defending the disciplinary decision (unless the employee offers compelling information not previously known to the manager). Finally, the manager should ask the employee to sign and date a copy of the written document for the personnel file. If the employee refuses, the manager should add a note at the bottom of the document that: "Today John Doe received a copy of this document, but refused to provide a signature acknowledging receipt." Both the immediate supervisor and the other manager present should then add their signatures and the date under that statement. If the employee refuses to sign because he or she disagrees with the document, then the manager should ask the employee to put his or her disagreements in writing.

From a management perspective, discipline is much different from punishment. The goal in imposing discipline is not to punish the employee, but rather to discourage certain types of behavior and emphasize the importance that the employer places on the policies and/or standards being enforced.

Most employers currently use some form of "progressive discipline." In most instances, this involves issuing a counseling or mild discipline (such as a written reprimand) when an employee violates a rule or expectation, to be followed by increasingly severe disciplinary measures in response to subsequent violations of the same or similar rules. Progressive

[37] Different organizations will have slightly different understandings of the terms "manager" and "supervisor," but in this chapter they are used interchangeably.

discipline serves a dual function. First, it gives an employee ample opportunity to realize that the employer is serious about the rules in question and to correct his or her behavior. Second, it creates a disciplinary record the employer can refer to and rely on in the event the employee is eventually terminated. In other words, it is a way to salvage a reasonable employee while at the same time creating a disciplinary history for one who proves unsalvageable. In creating and implementing a progressive discipline system, however, managers should never commit to following the line of progression in all cases, but should reserve the right to impose more severe discipline (including termination) whenever the situation or offense warrants.

A Performance Improvement Plan (PIP) is a useful tool that can be used with or in lieu of disciplinary action. A PIP is nothing more than a written document that discusses an employee's current behavior or performance problems and sets benchmarks for improvement. Generally, a PIP is structured so that the employee's immediate supervisor will meet with the employee 30, 60, and 90 days after the PIP is introduced. The PIP can specify ever increasing benchmarks for the 30, 60, and 90-day periods, such that the expected performance after 90 days is that normally expected for the position. Alternatively, the PIP can simply specify the ultimate performance goals and schedule 30, 60, and 90-day meetings to discuss progress. Either way, the supervisor must follow up by monitoring the employee's progress and by meeting with the employee at the specified intervals to discuss the employee's improvement (or lack thereof) as well as strategies for making additional improvements.

As with progressive discipline, a PIP serves two purposes: (a) assisting an employee in improving his or her performance; and (b) creating documentation of actual performance in relation to job expectations.

PIP's are frequently put in place as a follow-up to disciplinary action. Sometimes, however, an employee's only problem is an apparent inability to perform to acceptable standards with respect to quantity or quality of work. In those cases, a supervisor may elect to use a PIP -- without accompanying disciplinary action -- as a means of determining whether the employee can perform as expected. When used that way, a PIP also can be a useful tool for managing faculty performance.

Whether linked to previous disciplinary action or not, a PIP should clearly state the consequences of failing to achieve the desired performance, especially if it means the possibility of termination.

Please refer to the Human Resources Administrative Process and Procedure Manual Section on Employment Policies for additional information on disciplining classified employees.

Temporary or part-time personnel serve without written contract at the pleasure of the president, chief academic officer, or their immediate supervisor, any of whom may terminate such employees without cause or advance notice. **See Section 8.3.9.3 of the Policy Manual.**

II. TENURED POSITIONS

Non-tenured faculty members do not have an on-going property interest in their employment and thus are not entitled to a review of a decision not to renew their contracts of employment or to re-appoint them for subsequent years. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). However, Board policy requires that non-tenured, tenure-track faculty members be given advance written notification of such non-renewal decisions according to the schedule set forth in **Section 8.3.9.2 of the Policy Manual**.

Different legal and procedural standards apply to faculty who are tenured or who are currently employed pursuant to a written contract. Such faculty members are legally entitled to due process in the event of termination, suspension, or other disciplinary action that affects the faculty member's property or liberty interests arising from employment. Generally, such employees are entitled to a limited pre-disciplinary hearing that is followed by a more comprehensive post-disciplinary hearing. The pre-disciplinary process only need include oral or written notice of the charges, an explanation of the institution's evidence, and an opportunity for the faculty member to tell his or her side of the story. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985).

Under some circumstances, however, the need for a pre-disciplinary hearing is negated by the nature of or circumstances surrounding the conduct in question. For example, a faculty member charged with a felony can be suspended immediately, provided the institution arranges for a prompt, post-suspension hearing. Similarly, an institution who believes immediate suspension is warranted can suspend the faculty member with pay without depriving the faculty member of the benefits of the job, and then convert the suspension to one without pay if that proves warranted by a subsequent, pre-disciplinary hearing. *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807 (1997).

It is important to note that, although tenured faculty and faculty under current contract are entitled to due process, they still can be disciplined and terminated. Board of Regents policy provides that such faculty can be disciplined and/or terminated for a variety of offenses, including:

1. Conviction or admission of guilt of a felony or crime involving moral turpitude during the period of employment (or discovery that the faculty member willfully concealed such a conviction or admission occurring prior to employment);

2. Professional incompetency, neglect of duty, or default of academic integrity in teaching, in research, or in scholarship;

3. Violation of state controlled substances laws (including manufacture, distribution, sale, use or possession), or teaching or working under the influence of alcohol such that the faculty member's performance of duties on behalf of the institution is impaired;

4. Conviction or admission of guilt in a court proceeding of any criminal drug offense;

5. Physical or mental incompetency as determined by law or by a medical board of three or more licensed physicians and reviewed by a committee of the faculty;

6. False swearing with respect to official documents filed with the institution;

7. Disruption of any teaching, research, administrative, disciplinary, public service, or other authorized activity; and/or

8. Other grounds as specified by institutional statutes or policies.

Each institution should adopt policies and procedures related to faculty discipline that parallel or incorporate **Section 8.3.9 of the Policy Manual**. Such policies and procedures should set forth clear procedures for faculty members to pursue institutional level appeals. The institution need only offer the faculty member an opportunity to request an appeal, but the decision need not be reviewed unless requested by the faculty member. Such procedures should also be clear on when and how the institution's president renders the final decision of the institution. This is important because it is the institution's final decision that is appealed to the Board of Regents.

Because of due process considerations, it may or may not be feasible to follow a progressive discipline process with faculty. An alternative approach is to hold counseling sessions with faculty members without the "penalty" or disciplinary component. Such counseling sessions should otherwise mirror the progressive discipline approach set forth above. This includes reminding the faculty member of the previous occasions in which he or she violated policy or failed to meet established standards for performance. This approach will create an appropriate record to support any discipline that subsequently may be imposed.

Please refer to Sections 8.3.9, 8.3.9.1, 8.3.9.2, 8.3.9.3 and 8.3.9.4 of the Policy Manual for more information on disciplining or terminating faculty members.

III. NEGLIGENT RETENTION AND SUPERVISION

Employers frequently rely on disciplinary action as a means of enforcing policies and promoting acceptable behavior, such as complying with a dress code or being on time for work. Appropriate discipline is even more important when employees exhibit harassing, aggressive, or violent behavior in the workplace. If permitted to go unchecked, such behavior can escalate and expose the employer to various types of legal liability. In addition to discrimination and harassment claims, such behavior can lead to tort claims for negligent retention and negligent supervision.

Claims for negligent retention arise from an employer's duty to exercise ordinary care not to hire or retain an employee the employer knew or should have known was not suited to the particular environment or who otherwise poses a risk of harm to others. Thus, an employer may

be liable for negligent retention if the employee harms a third party (including a co-worker), the injury was proximately caused by the employer's having retained the employee, and it was reasonably foreseeable that such employee might have injured others in the negligent or incompetent performance of his duties. It is not necessary that the employer should have contemplated or been able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff, so long as there is a causal connection between the injury and the characteristic or incompetency of the employee.

Negligent retention claims (sometimes characterized as negligent hiring) may arise based on claims that an employer should have discovered the employee's problematic trait during a background and/or reference check. They also can arise when employers either fail to discover or fail to properly address problem behavior that occurs after the offending employee is hired.

The Supreme Court of Georgia has rejected the notion that employers can defend against negligent retention claims by not doing background checks unless required to by statute.[38] Whether or not an employer's investigative efforts were sufficient to fulfill its duty of ordinary care is dependent upon the unique facts of each case. For example, an institution that does not require background checks for groundskeepers or residence hall directors may be exercising reasonable care with respect to the former group but may be negligent with respect to the latter.

Claims for negligent supervision are similar to those for negligent retention or hiring. With negligent supervision, however, the harm is caused by an employee's tendencies or patterns of behavior that the employer learned of or should have discovered during the employment relationship.[39] Such claims also may be referred to as "negligent training." Negligent supervision claims are frequently asserted along with claims for racial or sexual harassment.

Employers can minimize or avoid liability for negligent retention and negligent supervision claims by establishing procedures by which employees can discuss concerns and report inappropriate conduct by fellow employees, by promptly investigating such employee complaints, and by taking prompt action to address meritorious complaints (including disciplining or terminating the offending employee, as appropriate).

[38] *Munroe v. Universal Health Serv., Inc.*, 277 Ga. 861 (2004).

[39] *Remediation Res., Inc. v. Balding*, 281 Ga. App. 31 (2006).

CHAPTER 16

CONTINUATION OF HEALTH BENEFITS

I. CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT ("COBRA")

A. Introduction

As pointed out above, COBRA[40] is a federal law, which establishes a uniform nationwide legal obligation for most employers to extend group health plan continuation privileges to employees and beneficiaries of the employer's plan who would otherwise lose coverage on the occurrence of certain events. Because of its complexity and importance, COBRA will be treated with more detail in this chapter than some of the other laws discussed.

COBRA amends the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code (IRC), and the Public Health Service Act (PHSA). On December 19, 1989, President Bush signed the 1989 Revenue Reconciliation Act (hereinafter "the 1989 Act") which made significant changes in COBRA. Likewise, on August 21, 1996, President Clinton signed the Health Insurance Portability and Accountability Act, which created a "portable" health insurance for employees and transformed COBRA as well. In addition to COBRA, courts are now holding employers to erroneous promises of COBRA coverage--even where COBRA would not apply.[41]

COBRA affects all "employers" maintaining a group health plan, with the following exceptions:

1. A joint employer plan in which each and every employer maintaining such plan employed fewer than 20 employees on at least 50 percent of its working days in the preceding calendar year;

2. A single employer plan where there were fewer than 20 employees working for the employer on at least 50 percent of its working days in the preceding calendar year;

3. A governmental plan other than a state or local government agency covered by the Public Health Service Act; or

4. A church plan.

An "Employer" is defined by the "controlled group" concept found in the tax code. This concept encompasses a broad ownership group in addition to the immediate facility that employs an individual.

[40] 29 U.S.C. §1161.

[41] *See Thomas v. Miller*, 489 F.3d 293 (6th Cir. 2007).

COBRA covers medical, dental, vision, hearing, prescription drug benefits, Health Maintenance Organization plans, and cafeteria plans. However, COBRA does not cover life insurance and disability income insurance benefits or plans. The key to COBRA coverage is that medical care must be provided under the group plan. Medical care includes the diagnosis, cure, mitigation, treatment or prevention of disease, and transportation essential to such medical care. It does not include programs that encourage good health (e.g., vacations, on-the-job first aid, exercise, or other fitness programs).

Such plans may cover active, disabled, or retired employees; they may provide direct payment, on-site treatment, indemnity, or reimbursement; the policy may be group or even individual if the arrangement involves the provision of medical care to two or more employees. Only if the employer has no involvement in the plan whatsoever is the employer no longer a "plan sponsor." Each plan must be analyzed to determine whether it is a separate group health plan under COBRA. Each group health plan must provide separate notices, elections, costs, and coverage provisions. Separate plans are determined by different benefit packages or options, coverage of bargaining unit and non-bargaining unit employees, separate insurance contracts, and separately funded portions of a self-funded plan.

Such plans are covered on the first day of the first plan year beginning on or after July 1, 1986, unless the plan is maintained pursuant to a collective bargaining agreement ratified prior to April 1986. In that case, the plan is covered by COBRA on the first day of the first plan year beginning on or after January 1, 1987, or upon the expiration of the bargaining agreement, whichever comes later.

The plan year is that which is designated in the plan document. If none is designated, it is the limit/deductible year or the policy year (if insured) or the later of the calendar year or the employer's taxable year (if self-insured).

B. Individuals Entitled to COBRA

Any employee who loses group health coverage due to termination of employment or reduction in hours and who is covered by the group health plan is covered by COBRA as a "qualified beneficiary" unless that employee was terminated for "gross misconduct." 29 U.S.C. § 1163. In the event an employee's discharge is to be treated as gross misconduct for COBRA purposes, an employer must check its state insurance code to determine whether continuation and conversion coverage is required.[42] The state insurance code will apply if the plan is insured (if an insurance policy has been purchased for the plan). Legal counsel should be consulted whenever there is a gross misconduct determination to be made.

Remember that COBRA coverage is as broad as the coverage of your group health plan. Therefore, if your group plan extends coverage to part-time, seasonal, probationary, or disabled "active" employees, then COBRA also protects these employees once they actually are "covered" under the plan. The 1989 Act states that a "covered employee" is an individual who receives group health coverage by virtue of his performance of services (for example,

[42] If an employee is terminated for misconduct, the Georgia Insurance Code does not require continuation of benefits. O.C.G.A. § 33-24-21.1.

independent contractors, partners, and self-employed persons) for one or more persons maintaining the plan (Section 7862(c)(2)(B) of the 1989 Act, effective plan years beginning after December 31, 1989). However, if there is a waiting period under your group plan prior to actual coverage, or if coverage is voluntary, no COBRA rights extend to mere "eligibility." Employees who are "entitled" to (covered by) Medicare before a qualifying event should be treated as qualified beneficiaries. Nonresident alien employees who received no earned income from the employer (under I.R.C. § 911(d)(2)) are not qualified beneficiaries.

"Qualified Beneficiaries" covered by COBRA also include covered dependent children and covered spouses of active, disabled, or retired employees, or surviving spouses of covered employees, but only if these individuals were covered under the plan the day before the qualifying event. There is an exception, however, for a child born to, or placed for adoption with, a covered employee during a period of COBRA coverage. Such a child is also a qualified beneficiary. Only "qualified beneficiaries" have the right to the separate election of COBRA coverage, independent of the employee and independent of one another. Beneficiaries of covered employees who are terminated for gross misconduct have no continuation rights under COBRA.

Beneficiaries of nonresident alien employees who received no earned income from the employer (under I.R.C. § 911(d)(2)) are not qualified beneficiaries.

C. When Does COBRA Apply

COBRA requires that a group health plan sponsor shall provide that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled under the plan to elect within the statutory election period continuation coverage under the plan. If the plan provides for conversion, COBRA requires the plan to offer qualified beneficiaries an election of conversion coverage under the plan within the last 180 days of COBRA coverage.

COBRA will cover the following events, if they automatically cause a loss or reduction in coverage under the terms of the plan, even if the actual loss of coverage occurs later than the event. These events may occur at any time while an employee is employed with the employer. If so, the events are referred to as primary, and the COBRA coverage period is calculated from the event forward. However, any of the 36-month events and the 29-month events may occur during an 18-month COBRA coverage period (after COBRA has been timely elected and paid). If so, the events are referred to as secondary and result in a calculation of a total of 36 or 29 months from the first (primary) event forward, and not a piggyback of 18 plus 36 or 29 months. The qualifying events are as follows:[43]

1. Loss of coverage due to the death of a covered employee (a 36-month event for surviving covered spouse and any covered children);

2. Loss of coverage due to the termination of the covered employee (for reasons other than gross misconduct) or reduction in employee's hours. With the exception of gross misconduct, COBRA coverage applies regardless of the

[43] 29 U.S.C. § 1163.

reasons for the termination or reduction in hours. For example, retirement, layoffs, voluntary quits, strikes, leaves of absence, call to military service, and ordinary discharges would trigger COBRA protection (an 18-month event for the covered employee, covered spouse, and any covered children);

3. Loss of coverage due to the divorce/legal separation of a covered spouse from a covered employee (a 36-month event for covered spouse and any covered children losing coverage). Remember, if the plan permits coverage of separated spouses until divorce, then no automatic loss of coverage occurs upon legal separation. In that case, only divorce is a qualifying event under the plan. Remember also that whether or not a child will lose entitlement to "active" coverage depends upon the court's order;

4. Receipt of disability determination by the Social Security Administration (SSA) within an 18-month COBRA coverage period placing the onset of disability on or before the 18-month event (a 29-month event for the disabled qualified beneficiary);

5. The 1989 Act added Medicare entitlement as a qualifying event. If an employee becomes entitled to Medicare at any point during active employment or at any point during an 18-month coverage period (triggered by an 18-month qualifying event), it will provide the opportunity to the covered spouse and/or children (but not to the employee) to elect a total of 36 months of coverage;

6. Dependent child ceases to be covered as "dependent" under the terms of the group health plan (for example, maximum age, graduation, or marriage) (a 36-month event for the covered child losing dependent status); or

7. Bankruptcy of the company that sponsors a retiree group health plan is also a qualifying event; however, it is important to note that this is an event for retiree group health plans only.[44]

These qualifying events entitle a covered employee and/or each covered dependent to elect to continue existing coverage following the actual loss of coverage whenever it occurs. Loss of coverage includes changes in the terms and conditions of that coverage which was in effect before the qualifying event in addition to a total loss of coverage. The loss of coverage must occur within the maximum period of COBRA coverage but need not occur immediately after the qualifying event.

These qualifying events trigger both employer action and plan administrator action. When a qualifying event occurs, it must be identified as either one that requires the employer to notify the plan administrator or one that requires the qualified beneficiary to notify the plan administrator. If it is an employee's death, termination, reduction in hours, Medicare entitlement or the employer's bankruptcy filing, then the employer (personnel department) has 30 days from

[44] *Supra* note 42, at 90.

the date of the event until notice must be given to the plan administrator designated in your plan. This notice may be on interoffice correspondence forms but should be documented and retained by the plan administrator. However, the beneficiary's COBRA rights cannot be forfeited for failure to give timely notice unless the company's initial COBRA letter, benefits booklet, and 18-month qualifying event letter clearly state this requirement. 29 C.F.R. § 2590.606.

D. Continuation Coverage Periods

An 18-month COBRA coverage period is available for employees and other qualified beneficiaries if the qualifying event is the termination of the employment of the covered employee or a reduction in the covered employee's hours. The 18 months is calculated from the first qualifying event (not the loss of coverage).[45]

A 36-month COBRA coverage period, calculated from the first qualifying event (not the loss of coverage),[46] is available for all other qualifying events. This 36-month coverage period is a maximum cap that applies to secondary qualifying events and limits the total coverage offered to 36 months from the first qualifying event.

COBRA has been amended to constitute "Medigap" coverage for disabled covered employees, spouses, and children who are qualified beneficiaries and who are in an 18-month COBRA coverage period. An 18-month qualifying event may be extended to 29 months of COBRA coverage if:

1. Eighteen months of COBRA coverage is timely elected and paid; and

2. The qualified beneficiary is disabled during the first 60 days of COBRA coverage (as determined by the Social Security Administration (SSA)); and

3. The qualified beneficiary provides the plan administrator with written notice of the SSA determination within 60 days of that determination and within the 18-month coverage period. (Section 4980B(f)(2)(B) of the 1989 Act.) In the unlikely event that SSA subsequently determines that the qualified beneficiary is no longer disabled within the extended 29-month period, this is a canceling event. The qualified beneficiary must notify the plan administrator of this event, and coverage may be terminated as of the month beginning more than 30 days after the final determination that the individual is no longer disabled. During the extension period of 11 months after the expiration of the initial 18-month coverage period, the plan may impose a 150 percent premium rather than the usual 102 percent premium on the disabled qualified individual.

The 29-month period applies not only to the disabled individual, but also to the non-disabled family members of the disabled individual. The plan may not, however, be able to

[45] Under certain circumstances a plan may treat the loss of coverage as the qualifying event in which case the maximum COBRA period and notice requirements are measured from the date coverage is lost.

[46] *Supra* note 45.

charge the non-disabled family members the higher premium after the initial 18 months of coverage.

E. Termination Of Continued Coverage

Continued Coverage may be terminated if:

1. The Company stops providing group health benefits to its employees;

2. Required premiums are not paid within the grace period for late premium payment established by the plan. Congress has set a 30-day minimum grace period so that the plan grace period may be greater than but not less than 30 days from the due date under the plan;

3. A qualified beneficiary becomes actually covered as an employee or beneficiary under another group health plan[47] or becomes entitled to Medicare benefits (subject to some exceptions); or

4. The maximum period for continued coverage is reached.

In addition, a plan may terminate a qualified beneficiary's COBRA coverage upon the occurrence of an event (such as submission of a fraudulent claim) if the plan would also terminate the coverage of a similarly situated active employee.

F. Notices And Elections

On May 26, 2004 final regulations were issued regarding new COBRA notice requirements. These regulations amend Part 6 of Title 1 of ERISA. The final regulations on the notice rules contain several parts which include: (1) a general notice requirement, (2) rules for the employer to provide notice of the occurrence of a qualifying event, (3) responsibilities of covered employee or qualified beneficiaries to provide notice of a qualifying event, (4) election notice that the plan administrators must provide, and (5) model forms for notice and elections.

1. General Notice

Written notice of the right to continuation coverage provided under the plan must be provided to the covered employee and the covered employee's spouse. 29 C.F.R. § 2590.606-1. The notice should be given no later than 90 days after the date on which the individual's coverage under the plan begins.

[47] **Note:** The employer's power to cancel COBRA based on subsequently obtained coverage under another employer's group health plan significantly weakened under the 1989 Act. Other group health coverage will not cancel COBRA if it contains any exclusion or limitation concerning any preexisting condition suffered by the COBRA participant 29 U.S.C. § 1162. The effective date for this provision is significant; it applies to any qualified event occurring after December 31, 1989, AND retroactively for any election of coverage that occurred during the calendar year 1989, to require reinstatement of coverage for any period of COBRA coverage for which payment was tendered on a timely basis, even if payment was rejected.

The notice must include the following:

a. The plan's name and contact information of the person responsible for administering COBRA benefits;

b. A general description of the plan's COBRA provisions, including information about qualifying events, when COBRA benefits can be extended and the plan's requirements for the payment of COBRA premiums; and

c. An explanation of when a qualifying beneficiary is responsible for notifying the plan administrator about a qualifying event and the plan's procedures for providing such notice.

29 C.F.R. § 2590.606-1(c).

A plan administrator may satisfy the notice requirement by sending a single notice if, based on the most recent information, the covered employee and the employee's spouse reside at the same location.

2. Employer's Notice Requirements

The employer must notify the plan's administrator about a qualifying event that triggers an individual's right to elect COBRA continuation coverage. This notice must be provided within 30 days of the qualifying event or within 30 days of the date of loss of coverage. Qualifying events include termination of the qualified employee, reduction in the employee's hours, the employee's death, and the employee's enrollment in Medicare. The notice must include information sufficient to enable the plan administrator to determine the plan, the covered employee, the qualifying event and the date of the qualifying event. 29 C.F.R. § 2590.606-2(c).

3. Notice Requirements for Covered Employees and Qualified Beneficiaries

Covered employees or qualified beneficiaries must give notice to the plan administrator with 60 days of certain qualifying events. These events include a covered employee's legal separation or divorce, a dependant child's loss of eligibility to be covered as a dependant under the plan, a Social Security Administration determination that a qualified beneficiary is disabled or is no longer disabled, or a second qualifying event. 29 C.F.R. § 2590.606-3(a).

Plan administrators can establish "reasonable procedures" for covered employee and qualified beneficiaries to follow in supplying this notice. The final regulations have a list of requirements that the plan administrators must follow in order for the procedures to be considered reasonable. 29 C.F.R. § 2590.606-3(b). A plan's notice procedures will be deemed to be reasonable if they: (1) are described in the plan's summary plan description; (2) specify the individual or entity designated to receive such notice; (3) specify the means by which notice is given; (4) describe the information concerning the qualifying event or determination or disability

that the plan deems necessary in order to provide continuation coverage rights consistent with the COBRA requirements; and (5) complies with the notice timing requirements.

If a plan fails to establish reasonable procedures, a covered employee's or qualified beneficiary's written or oral notification of a qualifying event given to any person who customarily handle employee benefit matters will be considered valid and binding notice. If the plan administrator fails to respond to this written or oral notice, penalties of up to $110 per day could be assessed. 29 C.F.R. § 2590.606-3(b)(4).

4. Notice Requirements for Plan Administrators

The plan administrator must supply the covered employee or qualified beneficiary with a COBRA election notice within 14 days of receiving notice of a qualifying event. If the employer is responsible for notifying the plan administrator and the employer is the plan administrator, the employer has 44 days to provide the election notice. 29 C.F.R. § 2590.606-4(b)(2). The election notice must describe the continuation coverage being made available, how long it will last and any event that may cause early discontinuation; explain how COBRA rights must be exercised and that each qualified beneficiary has an independent right to elect continuation coverage; set forth the plan's payment requirements, including grace periods and consequences of nonpayment; describe any conversion options and how choosing them may affect continuation coverage rights; and explain the consequences of electing or not electing continuation coverage, including any effects on the individual's HIPAA portability and special enrollment rights. 29 C.F.R. § 2590.606-4(b)(4).

When a plan administrator receives notice of a qualifying event from a person who is not eligible to receive continuation coverage, the plan administrator must provide notice explaining why the coverage is not available. Additional notice is also required regarding early termination. The notice must indicate the reason for termination, the date of coverage termination, and any rights the qualified beneficiary may have to elect alternative group or individual coverage.

5. Model Notices

Accurately completing the model notices will fulfill the requirements of the regulations; however, use of the model notices is not required. 29 C.F.R. § 2590.606-4(g). The model notices are for use by single-employer plans. Multi-employer plans and plans sponsored by unions will have to modify the model notices to reflect the special rules or practices that apply in the case of such plans.

The Trade Act of 2002 added a special election period to COBRA for eligible beneficiaries who qualify for Trade Act Assistance (TAA) benefits because their jobs are eliminated for trade-related reasons such as competition from foreign imports. 2002 Trade Act, § 203(e), Pub. L. No. 107-210 (2002). If such individuals do not elect COBRA coverage during the normal 60-day election period, they may still elect COBRA coverage during the 60-day period beginning on the first day of the month in which the individual becomes eligible for TAA benefits as long as the eligibility determination is made no later than 6 months after the TAA-related loss of health insurance coverage. *Id.*

Within 45 days of the election[48], the qualified beneficiary must pay for the period of continued coverage prior to the initial payment. Thereafter, regular premiums must be paid timely. 26 C.F.R. § 54.4980B-8, Q/A-1(a). The plan must provide the qualified beneficiary with a 30-day grace period for the regular monthly premium payment unless the plan or insurance policy provides a longer grace period. 29 U.S.C. § 1162(2).

The premium is the cost to the plan for such period of coverage for similarly situated non-COBRA-qualified beneficiaries determined on an actuarial cost basis. This cost is determined on a 12-month basis. In addition to this premium, the plan may assess a 2 percent administrative fee. IRC § 4980B(f)(2)(C)(i). Remember, COBRA permits 150 percent of the premium to be charged during the new 11-month disability "Medigap" COBRA period.

In determining what coverage to offer to qualified beneficiaries, the plan administrator should remember the following:

a. COBRA coverage continues that coverage which was maintained prior to the qualifying event. However, dependents are entitled to exercise rights as "qualified beneficiaries" that they would not have as dependents (e.g., add on a spouse after marriage, add on a newborn after birth, and add on dependents during an "open enrollment" period); and

b. All qualified beneficiaries are subject to plan modifications and are entitled to exercise plan options as any other group members.

The legal penalties to which an employer will be subject for COBRA violations include the following:

a. An excise tax on the employer (if the plan is not a multi-employer plan), the plan (if a multi-employer plan), or any person or organization responsible for administering the plan or providing the benefits, if the person has assumed this responsibility under a written agreement. The excise tax is equal to $100 per day of noncompliance per covered beneficiary (with a $200 per day maximum for all qualified beneficiaries in the same family). IRC § 4980B(b). The noncompliance period used to compute the amount of tax is the period from the beginning of the failure to comply until the earlier of (a) the date the failure is corrected or (b) six months after the last day the beneficiary would have been entitled to COBRA coverage.The Internal Revenue Service (IRS) is given the authority to waive the excise tax if the failure to comply is due to "reasonable cause and not to willful neglect" and the tax is excessive relative to the failure involved. IRC § 4980B(c). This change in penalty,

[48] ***Note:** The 1989 Act admonishes against the practice of many employers to demand payment immediately for COBRA coverage upon election of coverage. The Act clearly prohibits such a demand; early payment of any premium before the 45th day after the initial election of coverage may be encouraged but not required (Section 7862(c)(4)(C) of the 1989 Act).

replacing both the loss of tax deduction status and the taxation of highly compensated employees, is effective for plan years beginning after 1988.

b. Penalty of $110 per day for failure to issue any initial notice on any qualifying event notice to qualified beneficiary under ERISA.

c. Administrative enforcement actions through the Department of Labor, the IRS, or Health and Human Services.

d. Civil actions against the plan and/or individual fiduciaries under ERISA and PHSA.

29 C.F.R. § 2575.502c-1.

The rules for COBRA continuation coverage are complex and subject to change. Employers should seek legal advice in designing and administering their COBRA compliance programs.

G. Temporary COBRA Subsidy

With the passage of the American Recovery and Reinvestment Act of 2009 ("ARRA"), the Federal government provided a temporary employer subsidy for COBRA premiums for certain employees who suffer involuntary terminations. Pub. L. No. 11-5 (2009). Only "assistance eligible individuals" may receive the subsidy. *Id.*

An assistance eligible individual is a person who becomes eligible for COBRA between September 1, 2008 and December 31, 2009 due to a covered employee's involuntary termination of employment and also applies to spouses and dependents who are eligible for COBRA coverage. The full subsidy is available to individuals with a modified adjusted gross income of up to $125,000 ($250,000 for joint filers) or less for the taxable year in which the subsidy is received. A reduced subsidy is available if the individual's modified adjusted gross income is between $125,000 and $145,000 ($250,000 and $290,000 for joint filers).

An assistance eligible individual pays 35% of his or her COBRA premium. The remaining 65% of the COBRA premium will be reimbursed by means of a payroll tax credit to the employer or the insurer (in the case of an insured plan that is not subject to COBRA). The subsidy will be available for nine months, but not beyond the end of the maximum period of coverage required under COBRA or the individual's becoming entitled to coverage under another group health plan or Medicare.

Plan administrators must notify qualified individuals of the availability of the premium subsidy and the option to enroll in different coverage (if any) as part of their regular COBRA notice. Model notices have been issued by the Department of Labor for use by plan administrators.

II. PORTABILITY

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), signed into law by President Clinton on August 21, 1996, had a significant impact on the medical benefits coverage provided by employer-sponsored group health plans. Pub. L. 104-191, 110 Stat. 1936 (1996). Under HIPAA, a "group health plan" is defined as any employee welfare benefit plan that provides medical care to employees or their dependents directly or through insurance, reimbursement, or otherwise. Among other provisions, HIPAA requires group health plans to include portability of coverage through preexisting condition limitations, prohibits such plans from denying coverage to individuals or charging higher premiums based on health status, and guarantees renewability of coverage to certain individuals.

One goal of HIPAA is to make health care coverage continuous for employees who lose their jobs and find new employment within a reasonable period of time. This goal is accomplished through a two-step process. First, a group health plan may impose a preexisting condition exclusion only if such exclusion (1) relates to a condition for which medical advice, diagnosis, care, or treatment was recommended or received within the six-month period ending on the enrollment date and (2) extends for a period of not more than 12 months after the enrollment date (18 months in the case of a late enrollee). Second, the period of any preexisting condition exclusion under a group health plan must be reduced by the length of the period of "creditable coverage" applicable to the participant or beneficiary as of his enrollment date. 29 C.F.R. § 2590.701-4(a)(1).

The term "creditable coverage" means coverage of the individual under a group health plan, health insurance plan, Medicare, or other similar health care provision. However, a period of creditable coverage is not counted if there is a break in coverage of at least 63 days (other than any applicable waiting period) between the end of the creditable coverage and the participant's or beneficiary's enrollment date under the new coverage. Therefore, if an employer has a new hire who was covered under his previous employer's group health plan for at least 12 months and who had a break in coverage of fewer than 63 days between the end of such coverage and the enrollment date under his new employer's group health plan, the employee cannot be subjected to any preexisting condition exclusion under the plan. However, if the new hire was covered under his previous employer's group health plan for only eight months, then he could be made subject to any preexisting condition exclusion under the new employer's plan for a period of up to four months. The creditable coverage rules must be applied with care, however, because periods of coverage with different employers and coverage under COBRA or Medicare are "tacked" together if they are not separated by a 63-day break in coverage. 29 C.F.R. § 2590.701-5. In addition, the period between the loss of coverage and the beginning of the special COBRA election period for Trade Assistance Act eligible individuals does not count toward calculating a 63-day break in coverage.

In order to ease compliance with these new provisions, HIPAA imposes certain certification requirements on group health plans and insurance plans. 29 C.F.R. § 2590.701-3(d)(1). Pursuant to these requirements, a plan must provide written certification setting forth the period of creditable coverage of the individual under such plan, the period of coverage under COBRA (if any), and the waiting period imposed with respect to the individual for coverage under such plan. Such certification must be provided (1) at the time an individual ceases to be

covered under the plan or otherwise becomes covered under COBRA; (2) in the case of an individual becoming covered under COBRA, at the time such individual ceases to be covered under COBRA; and (3) upon request made on behalf of an individual not later than 24 months after the date of cessation of coverage under the plan or under COBRA. 29 C.F.R. § 2590.701-5(a)(3)(i)(B).

In addition to the portability provisions, HIPAA provides that a group health plan may not establish eligibility rules based on health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. 29 C.F.R. § 2590.702(a)(1). Moreover, a plan cannot require any individual to pay a premium that is greater than such premium for a similarly situated individual enrolled in the plan on the basis of any of the above-listed factors. 29 C.F.R. § 2590.702(d). Also, HIPAA prohibits group health plans from imposing any preexisting condition exclusion related to pregnancy and restricts such plans from imposing any preexisting condition exclusion against a newborn or newly adopted child (including a child placed for adoption), provided such child (1) is covered under creditable coverage within 30 days of birth, adoption, or placement and (2) does not have a break in creditable coverage of 63 days or longer.

Any failure to comply with HIPAA's portability, access, and renew ability provisions can result in a tax of $100 per person to whom the noncompliance relates for each day in the non-compliance period. IRC § 4980D. The American Recovery and Reinvestment Act of 2009 increased this amount to up to $1,000 per violation due to "reasonable cause and not to willful neglect" (with a maximum penalty of $100,000); up to $10,000 for each violation due to willful neglect that is corrected (subject to a $250,000 maximum); and up to $50,000 for each willful violation that is not corrected properly (subject to a maximum penalty of $1.5 million dollars during a calendar year). Pub. L. No. 11-5 (2009).

The portability, access, and renewability requirements under HIPAA generally went into effect for plan years beginning after June 30, 1997.

III. CONTACTING THE EMPLOYEE BENEFITS SECURITY ADMINISTRATION

Atlanta Regional Office – Serving GA, AL, TN, NC, SC, Northern FL, MI
Employee Benefits Security Administration
61 Forsyth Street. SW, Rm 7B54
Atlanta, GA 30303
Phone: (404) 302-3900
Fax: (404) 302-3975

IV. ADDITIONAL INFORMATION

Further information on insurance can be found at Section 8.2.9 in the Policy Manual and the Human Resources Administrative Process and Procedure Manual Section titled Employee Benefits and Services.

CHAPTER 17

WHISTLEBLOWER PROTECTION

I. OVERVIEW

"Whistleblowers" are employees who report violations of state or federal statutes, rules or regulations to more senior members of management or to government officials. 31 U.S.C. § 3729. Usually, whistleblowing involves allegations that federal or state funds are being misused or misdirected away from their intended purposes. For example, an accounting clerk who complains to a university vice president that federal funding for student loan programs was used to purchase personal items for the home of another vice president may be characterized as a whistleblower.

Complaints made by whistleblowers should be investigated. The amount of investigation required depends on the facts and circumstances of the case. Ideally, the preferred method for investigating these claims is to obtain assistance from someone who does not have a close working relationship with the employees who are the focus of the complaint and yet who can be trusted to maintain confidentiality so that careers and reputations are not unnecessarily harmed.

Many times the investigation into whistleblowing complaints reveals no wrongdoing. Regardless of whether or not a complaint proves to be true, a whistleblower may be legally protected against retaliation by supervisory personnel so long as the complaint was made in good faith. "Good faith" means the complaint was not known to be false when it was made, and there was a reasonable basis for concern.

Retaliation may take a variety of forms, including (but not limited to) demotion, denial of promotion, discipline, termination, intimidation, transfer, reassignment, and reduced pay or hours.

II. FALSE CLAIMS ACT

The False Claims Act, 31 U.S.C. § 3729 et seq., is the primary federal law governing whistleblowing. With the exception of tax fraud, which is governed by other laws, the False Claims Act proves legal liability for persons and organizations who improperly receive or avoid payment to the federal government of funds that belong to the federal government. Among the things the False Claims Act prohibits are the following:

1. Presenting false claims for payment;

2. Using false records to get claims approved;

3. Conspiring to defraud the government with false claims; and

4. Using false records to avoid government obligations.

III. GEORGIA LAW

To help combat fraud and waste, the State of Georgia provides its own mechanism whereby the University System can investigate and correct financial mismanagement. O.C.G.A. § 45-1-4 authorizes public employers (like USG) to receive and investigate complaints and information received from employees concerning fraud, waste, and abuse. Here are some of the more significant points of the Georgia law on how to conduct fraud investigations:

1. The identity of complaining employee cannot be revealed unless disclosure of the person's identity is unavoidable during the investigation. If the employee's identity must be disclosed, USG must give the employee seven days written notice of that fact before the disclosure actually occurs;[49]

2. No retaliatory action can be taken against an employee who makes complaint of fraud or waste to a supervisor or government agency, unless the complaint was knowingly false or made with reckless disregard for the truth;[50] and

3. No retaliatory action can be taken against an employee who refuses to participate in a practice that the employee reasonably believes violates a rule, regulation or law.[51]

Employees who violate legal, constitutional or statutory privileges, or other legally recognized confidentiality obligations, are not protected against retaliation by this law. For example, a university law enforcement official who learns of possible fraud when mistreating a suspect may receive no legal protection by this statute.

[49] O.C.G.A. § 45-1-4(c).

[50] O.C.G.A. § 45-1-4(d)(2).

[51] O.C.G.A. § 45-1-4(d)(3).

CHAPTER 18

MEETING AFFIRMATIVE ACTION OBLIGATIONS

WHILE AVOIDING UNLAWFUL PREFERENCES

The concept of affirmative action generally conjures up an idea or notion of quotas that an institution must obtain to continue contracting with the government. However, affirmative action, as it relates to employers, is vastly different.

I. BACKGROUND

In September of 1965, President Johnson issued Executive Order 11246, which prohibited employers who were contracting with the federal government from discriminating based on race, religion, color, and national origin. The Executive Order also required these employers to take a pro-active approach by affirmatively employing and advancing minorities in employment. In 1976, the Executive Order was amended to prohibit employers from discriminating against women in employment and also required employers to affirmatively place and provide advancement opportunities to women. Enforcement of the Executive Order is through the Office of Federal Contract Compliance Programs (OFCCP).

II. COVERAGE UNDER EXECUTIVE ORDER 11246

To fall within the basic coverage threshold of Executive Order 11246, an institution must be contracting with the government in excess of $10,000.00 in any 12-month period.[52] Once an institution is covered by the Executive Order, it is thereafter prohibited from engaging in employment discrimination on the basis of race, color, sex, religion, or national origin. The institution must take a pro-active stance with regard to affirmative action as detailed in the regulations.

Although institutions with $10,000.00 of government contracts are covered by the regulations, this does not obligate such institutions to establish a written Affirmative Action Plan (AAP). Only those institutions who (1) have 50 or more employees[53] and (2) have entered into at least one government contract for $50,000.00[54] or more in any 12-month period are required to establish a written affirmative action plan for each of their establishments.

Once an institution begins contracting with the government in the specified amount and has the requisite number of employees, it is then required to comply with all the requirements of

[52] *See* 41 C.F.R. § 60-1.5(a). This $10,000.00 threshold amount is calculated in the aggregate, meaning that the institution can have several government contracts of a lesser amount that may be up to $10,000.00, thus establishing jurisdiction.

[53] The requirement of 50 employees or more is generally determined institution-wide. Therefore, it is irrelevant that some facilities or divisions have less than 50 employees for determining the basic coverage threshold.

[54] *See* 41 C.F.R. § 60-1.40(a).

Executive Order 11246 as set forth by the regulations.[55] The regulations provide a 120-day window of time for an employer to come into compliance with Executive Order once such employer has met the basic coverage threshold.[56]

III. CONTENTS OF THE AAP

A. Organizational Display or Workforce Analysis

For the OFCCP to determine whether an institution has artificial barriers to equal employment opportunity, the institution must make an organizational analysis of the current work force to show the percentage of qualified minorities and women in various areas through the organization. This can be accomplished by creating a work force analysis as described under the old regulations or an organizational display as described in the new regulations.

1. Organizational Display

An organizational display is an organization chart that identifies each organizational unit in the employer's establishment. The chart should show the relationship of each organizational unit to other organizational units within the establishment.

In a more traditional setting, an organizational unit might be a department, division, section, branch, or group. In a non-traditional setting, an organization unit might be a project team or job family. The term also includes an umbrella unit. An example of an umbrella unit is a department that has subordinate units such as sections or branches.[57]

The organizational display must contain the following for each organizational unit:

a. name of the unit;

b. job title, gender, race and ethnicity of the unit supervisor (if the unit has a supervisor);

c. total number of male and female incumbents; and

d. total number of male and female incumbents in each of the following groups: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives.[58]

[55] Even though only one facility, generally the corporate headquarters, of a large corporation enters into a government contract, the OFCCP takes the position that all facilities of the corporation are subject to the requirements of Executive Order 11246. Note that these requirements generally do not apply to independent subsidiaries of the company unless such subsidiaries meet the "single entity test" established by the agency. This would apply to all institutions within USG.

[56] 41 C.F.R. § 60-2.1(c)

[57] 41 C.F.R. § 60-2.11(b)(2)

[58] 41 C.F.R. § 60-2.11(b)(3)

2. Workforce Analysis

The following four steps are necessary to complete a workforce analysis:

a. List each job title as it appears in applicable collective bargaining agreements or payroll records ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision.

b. If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line.

c. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges.

d. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives. The wage rate or salary range for each job title must be given. All job titles, including all managerial titles, must be listed.[59]

B. Job Group Analysis

To create a job group analysis, jobs with similar content, wage rates, and opportunities are combined to form job groups.[60]

Similar content – duties and responsibilities of the job titles that make up the job group.

Similar opportunities – training, transfer, promotions, pay, mobility, and other career enhancement opportunities offered by the jobs within the job group.

The job group analysis must include a list of the job titles that comprise each job group, and the employer must separately state the percentage of minorities and the percentage of women it employs in each job group.[61]

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[59] 41 C.F.R. § 60-2.11(c)

[60] 41 C.F.R. § 60-2.12(b)

[61] 41 C.F.R. § 60-2.13

C. Availability Analysis

This is an estimate of the number of qualified minorities and women available for employment in each job group. The availability is expressed as a percentage of all qualified persons available for employment in each job group. The analysis is done to determine whether there are any barriers to equal employment opportunities within a particular job group.[62]

Two factors that must be considered are:

1. The percentage of minorities and women with requisite skills in the reasonable recruitment area, which is defined as the geographical area from which the employer usually seeks or reasonably could seek workers to fill the positions in question;[63] and

2. The percentage of minorities and women among those promotable, transferable, and trainable within the contractor's organization.[64]

The institution should then compare the incumbency or percentage of minorities and women employed in each job group to the availability. If the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage, then the institution must establish a placement goal.[65]

D. Placement Goals

The purpose of placement goals is to measure the progress toward achieving equal employment opportunity. It is a means of setting objectives or targets for making the affirmative action plan work.[66] Just because an institution determines that a placement goal is needed does not mean that there is a finding or admission of discrimination.[67]

When establishing placement goals, the following principles apply:

1. Placement goals may not be rigid and inflexible quotas which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

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[62] 41 C.F.R. § 60-2.14(a)

[63] 41 C.F.R. § 60-2.14(c)(1)

[64] 41 C.F.R. § 60-2.14(c)(2)

[65] 41 C.F.R. § 60-2.15(a) & (b)

[66] 41 C.F.R. § 60-2.16(a)

[67] 41 C.F.R. § 60-2.16(b)

2. In all employment decisions, the institution must make selections in a nondiscriminatory manner. Placement goals do not provide the institution with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, or national origin.

3. Placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.

4. Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations do not require an institution to hire a person who lacks qualifications to perform the job successfully, or to hire a less qualified person in preference to a more qualified one.[68]

The institution must set placement goals so that the percentage annual placement goal is at least equal to the availability figure derived for women or minorities for that job group.[69]

E. What Is Required of Employers in a Compliance Review

For compliance reviews, the OFCCP generally sends a Compliance Officer to conduct the review, however they may send a number of Compliance Officers as well as the Director of the Regional Office. Additionally, the OFCCP may request information prior to the on-site investigation phase of the review. This enables the agency to review your work force and to focus in on areas where full compliance may be questionable. These questionable areas will constitute the initial focus of the on-site investigation.

Compliance reviews are generally conducted at the facility and can have the potential of resulting in great liability for violations found during the investigation.

The review has three stages:

1. The Desk Audit Phase

During the desk audit phase of the review, employers are required to submit their written affirmative action plan as well as supplemental data that the OFCCP has requested.

2. The On-Site Investigation

Once the desk audit phase of the review is completed, OFCCP may schedule an on-site investigation. It is at this stage that OFCCP will do an exhausted review of all levels of employees. The investigations can focus on hiring practices, termination procedures, compensation, promotion opportunities, career development programs, training/development,

[68] 41 C.F.R. § 60-2.16(e)

[69] 41 C.F.R. § 60-2.16(c)

benefits, stock options, leased cars, expense account authorizations, club memberships, travel time and allowances and charges, important committee activities, and diversity in key corporate departments. Additionally, techniques utilized by the Compliance Officers during their review will highlight the promotion processes, promotion decision makers and criteria utilized, a review of all records of promotion candidates (including similarities and differences for successful and unsuccessful candidates), and any effort to identify corporate cultures and formal or informal mentoring programs. This same procedure is utilized for the hiring process as well.

The OFCCP will also conduct a review of the pay status in salaried positions. Although OFCCP cannot enforce the Equal Pay Act, regulations do provide that they may remedy compensation issues under "disparate treatment."

The review of the employment activity statistics as well as the compensation statistics may provide the most potential for monetary liability against the company.

The on-site investigation initially begins with an entry-level conference with the CEO, President or Senior Management Official of the company at that particular location. During this conference, questions will be discussed regarding the importance of equal employment opportunities and affirmative action efforts at the top level of management. At this state, the CEO should discuss programs that have been put in place at the company, which take a pro-active stance on equal employment opportunities as well as affirmative action. Additionally, OFCCP will inquire as to the CEO or senior management official's direct reports and whether these employees are evaluated on their equal employment opportunities and affirmative action efforts.

Following the initial conference, the OFCCP will begin in-depth interviews with all human resource personnel that directly report to the CEO or senior management official regarding departmental emphasis on EEO/AA for each area. The interviews will discuss personal efforts and programs regarding recruiting and promotions of minorities and females. Such personnel not only need to be aware of programs, but need to be able to articulate the progress that has been made under such programs. The Compliance Officers will review placement efforts of minorities and females both internally and externally.

Following the interviews, the Compliance Officers may begin an in-depth review of human resources programs such as:

a. Recruiting.

b. Formality of career counseling with employees.

c. Training programs for management.

d. Succession planning (inclusion of females and minorities).

e. Diversity training.

f. Mentor programs for minorities and females.

g. Tuition reimbursement.

h. Compensation systems regarding equal pay analysis.

i. Job posting in corporate offices.

j. Inventory of job skills of minorities and females.

k. Review of history of minority and female promotions and potential discrimination.

The OFCCP may also interview other existing employees, both management and non-management regarding the institution's emphasis of equal employment opportunities and affirmative action.

Other areas that will be closely scrutinized by the agency include employer's orientation programs for new employees, as well as evaluation forms regarding EEO/AA efforts by management. Not only will the agency look at the employer's community involvement, but the agency will also evaluate the employer's history with regard to the community involvement and the awareness of EEO/AA. The agency will review the recruiting efforts for minorities and females and all positions with an emphasis on sales positions. Also, long-range programs established to increase representation of minorities and females will be reviewed.[70]

The agency will also review compensation and benefits programs for potential discrimination. The agency will look into future company programs to place minorities and females in a pipeline for advancement as well as potential ramifications of adverse publicity in affirmative action failures or claims of liability, including affected class cases.

3. The Off-Site Phase

An off-site analysis of the affirmative action plan and any supporting documents is conducted to determine whether the employer is complying with the Executive Order.

[70] It should be noted that all of this information is in addition to the general information that is reviewed during a normal compliance review.

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CHAPTER 19

OPEN RECORDS ACT

I. OVERVIEW

The Georgia Open Records Act provides procedures for the disclosure of public records in the custody or under the control of public officials/record custodians. It further creates civil and criminal penalties for records custodians who fail or refuse to follow its procedures.

A. Requirements

All public records (unless exempt as set forth below) are open to inspection by the general public. O.C.G.A. § 50-18-70(b). Requests may be written or verbal. A custodian does not have to prepare summaries of documents, nor must it compile records in any requested order not in existence at the time of the request. O.C.G.A. § 50-18-70(d).

Requests must be acknowledged/fulfilled within three business days. O.C.G.A. § 50-18-70(f). During that time, the custodian must determine whether the records can be inspected (or are legally excluded from inspection), and then, during that same period, must notify the individual who made the request whether (and when) the records will be available. O.C.G.A. § 50-18-70(f). The custodian must provide a timely schedule even if it will take more than three days to assemble and produce the records. O.C.G.A. § 50-18-70(f). If records are not subject to disclosure, the custodian must respond within three business days with citation of legal authority exempting such records. O.C.G.A. § 50-18-72(h). The custodian can amend or supplement a designation one time within five days of the discovery of an error. O.C.G.A. § 50-18-72(h).

B. Civil and Criminal Penalties

Noncompliance can result in legal action against the custodian. O.C.G.A. § 50-18-73. It is a criminal misdemeanor, subject to a maximum fine of $100.00 for a custodian to intentionally refuse to comply with the Act. O.C.G.A. § 50-18-74.

II. COVERED AND EXCLUDED RECORDS

"Public Records" include "all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information . . . prepared and maintained or received in the course of the operation of a public office or agency." O.C.G.A. § 50-18-70(a). Records include documents created by the University System and/or stored with the University System, on-site or off-site. They include e-mails, even on a home computer, if generated in the course of public work. They do not include certain types of the following:

A. Disciplinary Records - State administrative suspension, revocation, personnel, etc., proceedings, O.C.G.A. § 50-18-70(e); but other records of improper employee activity, like sexual harassment investigations are subject to disclosure. *See Fincher v. State*, 231 Ga. App. 49, 497 S.E.2d 632 (1998); and *Fulton DeKalb Hosp. Authority v. Miller & Billips*, 293 Ga. App. 601, 601, 667 S.E.2d 455,

456 (2008) (holding Open Records Request included disclosure of all records relating to the sexual harassment investigation, including witness statements, interview recordings, notes, investigative reports, tape-recorded interviews, interview notes, and in-house attorney's final report to the General Counsel because the process was a routine internal inquiry).

B. Historical Records - For 75 years following receipt, records of historical research value with restrictions on public access placed by the donor or owner. O.C.G.A. § 50-18-72(a)(9).

C. Intellectual Property - Trade secrets and confidential information. O.C.G.A. § 50-18-72(b)(1).[71] Records, data, etc., developed, collected or received on medical, scientific, technical, scholarly, or artistic issues until published, patented or made public. O.C.G.A. § 50-18-72(b)(2). Computer programs and software. O.C.G.A. § 50-18-72(f).

D. Legal Records - Attorney-client privileged information and attorney work product. O.C.G.A. § 50-18-72(e)(1 & 2).

E. Medical/Research Records - Medical and veterinary records that would cause an invasion of privacy. O.C.G.A. § 50-18-72(a)(2). Identity/personally identifiable information of persons who participate in research projects. O.C.G.A. § 50-18-72(c)(2).

F. Other Private Records - Records required by the federal government to be kept confidential. O.C.G.A. § 50-18-72(a)(1). Social security numbers, insurance and medical information, mother's maiden name, credit and debit card information, and financial data, contained within personnel records. O.C.G.A. § 50-18-72(a)(11.1 – 11.3). However, representatives of the news media are allowed access to social security numbers and dates of birth for persons other than teachers, employees of a public school, or any nonelected employees of the State of Georgia or its agencies, departments, or commissions, or of any county or municipality or its agencies, departments, or commissions. O.C.G.A. § 50-18-72(a)(11.3)(A).

G. Personnel Records - Payroll records showing union membership. *Gwinnett County v. Childs*, No. 99-0250-2 (Sup. Ct. Walton County, April 21, 2000). In limited cases, personnel records of law enforcement agencies. O.C.G.A. § 35-8-15. Personnel records containing confidential evaluations for purposes of selecting, hiring, suspending or firing public officers and employees, until 10 days after the records are presented to the agency or the investigation is concluded. O.C.G.A. § 50-18-72(a)(5). Portions of records identifying persons applying for

[71] If a request risks disclosure of secrets belonging to outside parties, contact them immediately so they can take steps to protect their legal interests. Mark records appropriately once the outside parties identify the records that they consider to be protected from disclosure. *Georgia Dep't of Natural Res. v. Theragenics Corp.*, 273 Ga. 724, 545 S.E.2d 904 (2001).

or considered for employment or appointment as executive head of USG institutions, so long as the records of the top three candidates are released 14 days before making a final decision. O.C.G.A. § 50-18-72(a)(7).

H. Security and Law Enforcement Records - Records that would reveal home addresses, telephone numbers, social security numbers, identities of immediate family members, or insurance or medical information of law enforcement officers. O.C.G.A. § 50-18-72(a)(13). Investigation files for ongoing criminal investigations. O.C.G.A. § 50-18-72(a)(4). Police, incident and arrest reports are not excluded from inspection, ***Lebis v. State***, 212 Ga. App. 481, 442 S.E.2d 786 (1994) & ***Napper v. Georgia Television Co.***, 257 Ga. 156, 356 S.E.2d 640 (1987), nor are accident reports requested by a person involved in an accident, Op. Att'y Gen. Nov. 2, 1999. Security plans for buildings or activities currently in effect relating to same. O.C.G.A. § 50-18-72(a)(15)(A)(i). Locations of security equipment or surveillance cameras. O.C.G.A. § 50-18-72(a)(15)(A)(iii). Blueprints, plans, etc., that could compromise security. O.C.G.A. § 50-18-72(a)(15)(A)(iv).

I. Exceptions to Exceptions - The rules do not prevent disclosure if (1) an individual with proper identification requests his/her own records, (2) the record subject is deceased and disclosure is limited to day and month of birth and mother's maiden name, (3) information is provided to a credit agency seeking payment/credit information, or (4) information is legally required to comply with legal or regulatory requirements. O.C.G.A. § 50-18-72(a)(11.3)(B)(i-ix).

III. PROCEDURE FOR PRODUCING RECORDS

A. Electronic Records - Computer records can be made available by electronic means, including internet access. Security can be used to control access. O.C.G.A. § 50-18-70(g). Custodians may charge the actual costs of computer disks and tapes. O.C.G.A. § 50-18-71(f). However, there is no charge for conversion of documents into electronic form. O.C.G.A. § 50-18-71.2.

B. Copy Costs - The requester has the right to copy records under custodial supervision. O.C.G.A. § 50-18-71(a). The custodian may charge up to 25¢ per page for copies. O.C.G.A. § 50-18-71(c). The custodian must notify the requester of estimated total charges before completing the request, or else the requester is not responsible for the charges. O.C.G.A. § 50-18-71.2.

C. Service Charges - The custodian must provide 15 minutes of free staff time to retrieve records and may charge for time after that. O.C.G.A. § 50-18-71(d). The hourly charge equals the salary of the lowest paid full-time employee with the skill to respond to the request. O.C.G.A. § 50-18-71(d); ***McFrugal Rental of Riverdale, Inc. v. Garr***, 262 Ga. 369, 418 S.E.2d 60 (1992).

D. Redaction of Records - A document must be produced if a portion of the document is protected but can be "redacted." O.C.G.A. § 50-18-72(g). To redact a document, the custodian makes a copy, blacks out the offending portion of the copy, and then copies the copy. The second copy is then produced to the person who requested the document.

IV. ADDITIONAL RESOURCES

The University System's Office of Legal Affairs offers links to helpful record retention guidelines at www.usg.edu/legal/links.

CHAPTER 20

INDEPENDENT CONTRACTORS

USG institutions, like other organizations, frequently utilize the services of outside contractors for a variety of tasks. An independent contractor is a person or entity who contracts with the institution to deliver a particular service or project. Independent contractors deliver the service or project to the specifications established in their contracts, but they do not usually take instructions from the institution regarding how the service or project is performed or completed.

I. INDEPENDENT CONTRACTOR VS. EMPLOYEE

From a human resource perspective, it is important to distinguish between employees and independent contractors. An employer has various legal responsibilities to its employees, such as complying with laws related to minimum wage, social security and other required withholdings, workers' compensation, and workplace discrimination. An employer generally does not owe such obligations to independent contractors. For that reason, some employers may refer to workers as independent contractors in order to avoid the expense of complying with various employment laws. Not surprisingly, federal and state agencies do not blindly accept the designation an employer gives to its workers, but perform their own analysis to determine if a particular worker is an employee or an independent contractor. Depending on the particular law in question, employers can face significant penalties (including severe federal tax penalties) if an agency determines that workers are employees but have not been treated as such. *See* I.R.C. § 6671(b).

There is no single test that determines whether a particular worker is an employee or independent contractor, nor is there any one factor that creates an employment relationship. Instead, the analysis will vary depending on the agency and the law at issue. Generally, agencies look to the overall circumstances of the relationship, including:

1. Does the worker or the institution have the right to control how the job tasks required for providing the service or delivering the project are performed? (Stated another way, does the institution control more than the end results?)

2. Is the work being performed part of the institution's regular functions or activities?

3. Is the work performed on the grounds of the institution?

4. Is there a written contract governing the relationship?

5. Who supplies the material and equipment needed to perform the job?

6. Is the work schedule established by the institution, or does the worker control the schedule as needed to deliver the service or project in a timely manner?

7. Are there any special skills, training, or qualifications needed to perform the job?

8. Does the institution train the workers on how the job is to be performed?

9. Is the worker paid based on time worked, or for each project completed?

10. Is the worker engaged on behalf of a personally owned business?

11. How long has the worker been engaged on behalf of the institution?

12. How do the institution and the worker view the relationship?

If the institution's contract is with an outside company that supplies the workers, it has a stronger argument that the workers are true independent contractors. That fact alone, however, is not determinative. For example, an employer may contract with a temporary staffing agency when it needs additional help in a particular department. The staffing agency supplies workers to the employer, but the staffing agency retains the responsibility for payroll, workers' compensation, etc. The employer, however, supervises the temporary workers on a day-to-day basis. Since it is the employer that actually controls how the specific tasks are performed (see the first factor above), the workers may be able to claim that they are employed by both the staffing agency and the employer (typically referred to as "joint employment"). While they may not be considered as "employees" for some purposes, the worker could potentially bring claims (such as a discrimination claim) against the staffing agency, the university, or both. **Please refer to the Human Resources Administrative Process and Procedure Manual policy titled Determination of Status – Employee vs. Independent Contractor for more information or classifications.**

II. CONFLICTS OF INTEREST -- O.C.G.A. § 45-10-20 ET SEQ.

Georgia law limits contractual relationships between State agencies and public employees. These limitations do not, however, extend to county or municipal employees.

A full-time public employee may not transact any business with the agency for which the employee works, either as an individual or business representative, or for any business in which the public employee or a family member of the public employee owns a substantial interest.

"Substantial interest" means a direct or indirect ownership interest of more than 25 percent of the assets or stock of any business. "Transacting any business" means to sell or lease services, personal property, or real estate, or to purchase surplus personal property or real estate, either individually or on behalf of a third party.

"Full-time" public employees are those who work for the state 30 hours or more per week for more than 26 weeks per calendar year.

Part-time public employees are subject to the same limitations, except for business transactions that meet one of the following requirements:

1. The transaction takes place pursuant to sealed competitive bids;

2. Each transaction is $250.00 or less and the calendar year total for all such transactions is less than $9,000.00;

3. The transaction involves the lease of real estate and has been approved by the State Properties Commission or the Space Management Division of the Department of Administrative Services; or

4. The transaction involves the purchases of surplus state property at public auction.

There are a number of exceptions to the limitations discussed above. For example, these limitations do not apply to a family owned businesses if: (a) the public employee is not actively engaged in the day-to-day management of the business; (b) the public employee is a USG employee in a position below that of department head; and (c) the transaction is with a USG unit or department other than the one for which the employee works.[72]

Another exception involves transactions in which a chaplain, firefighter, licensed physician, dentist, psychologist, registered nurse, certified oral or manual interpreter for deaf person, or any person holding a master's or doctoral degree, is employed on a part-time basis by another State agency if:

1. The chief executive officer of the department desiring such a public employee's services certifies in writing the need for such services and why the State's interests will be served by obtaining such services in lieu of obtaining them from a non-State employee;

2. The chief executive officer of the department currently employing such a public employee certifies in writing the public employee's availability for such employment, and that such employment will not have a detrimental effect on the person's current employment and will be in the best interests of the state; and

3. The two agencies establish by agreement the procedures under which such an employee shall perform the additional services (e.g., as consultant or part-time employee, nature of compensation, etc.).[73]

Please refer to Sections 8.2.13, 8.2.15, 8.2.15.1, 8.2.15.2, 8.2.15.3 and 8.2.20 of the Policy Manual for more information on this exception. Additional exemptions are described in O.C.G.A. § 45-10-25.

[72] O.C.G.A. § 45-10-24.1.

[73] O.C.G.A. § 45-10-25(a)(8).

Public employees who violate Georgia's conflict of interest laws are subject to termination, civil fines up to $10,000.00, and repayment of any monetary benefits received from the prohibited transactions.

In addition, public employees who transact any business with the State of Georgia or its agencies, either individually or on behalf of a business, must make an annual disclosure of such transactions to the Secretary of State by January 31 each year. Public employees must also disclose such transactions by any business (family or otherwise) in which they own a substantial interest.

Refer to Sections 8.2.12. 8.2.13, 8.2.15 and 8.2.20 of the Policy Manual, and the Human Resources Administrative Process and Procedure Manual policy titled Conflict of Interest for more information on conflicts of interest.

CHAPTER 21

MILITARY LEAVE

I. OVERVIEW

Two laws govern the use of military leave; one federal and one state.

A. Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 et seq., is a federal law which requires re-employment of military personnel when: (1) the employee gives advance notice of the leave; (2) the absence does not exceed five years (computed on a cumulative basis); and (3) the employee submits a timely application for reemployment.

1. **Return to Work** - Notice given before reporting back to work depends on the length of military service. 20 C.F.R. §1002.115

    a. For service of less than 31 days, the employee must report to work no later than the beginning of the first scheduled work period that begins eight hours after the completion of military service, or as soon as possible.

    b. For service of more than 30 days and less than 181 days, the employee must submit an application for reemployment within 14 days after the completion of military service.

    c. For service of more than 180 days, the employee must submit an application for reemployment within 90 days after the completion of military service.

2. **Escalator Principle** – An employee cannot be penalized for military service with regard to rights and benefits of employment.

    a. An employee returning after less than 91 days of military service must be returned to the position (s)he would have attained if continuously employed, if qualified to perform the job. If the employee is not qualified, the employee returns to same job (s)he held before service. 29 C.F.R. § 1002.196.

    b. An employee returning after more than 90 days of service must be placed in the position (s)he would have attained if continuously employed, or a position of like seniority, status, and pay, if qualified to perform the job. Otherwise, the employee must be returned to the same job held before service, or a position of like seniority, status and pay. 20 C.F.R. § 1002.197.

c. If two or more employees return at same time from military service, the one who left first takes seniority. 20 C.F.R. § 1002.199.

3. **Job Protection** – An employee who returns from more than 180 days of service cannot be discharged, except for cause, for one year following the date of reemployment. An employee returning after more than 30 days but less than 181 days of service, cannot be discharged, except for cause, for 180 days following reemployment. 20 C.F.R. § 1002.247.

4. **Compensation** – Absent an institution's policy to the contrary, USG is not required by USERRA to compensate employees during military absence.

5. **Benefits** – Under federal law, if an employee is absent for less than 31 days due to military duty, employees must continue to receive group health benefits, assuming they continue paying their health premiums. If the employee is out on military duty for more than 31 days, the employee should be offered continued coverage through COBRA. However, if the institution has a practice or policy of maintaining an employee on coverage, this practice or policy should be followed. 20 C.F.R. § 1002.166, 1002.167.

B. Georgia Law

O.C.G.A. § 38-2-279 provides that a public employee's job is not abandoned while away on military service. Employment is not interrupted. An employee continues to receive the same seniority, vacation, holiday privileges, etc.

1. **Return to Work** – Georgia law is at least as favorable to employees who perform military service as is federal law. An employee is entitled to reemployment, reinstatement, and any transfer or promotion that would have occurred in the absence of military service.

2. **Compensation** – The employee must be paid for up to 18 days of compensation in any one fiscal year while on military leave. Thereafter, an employee is paid the difference between military pay and regular pay.

3. **Benefits** – Pension and retirement contributions are maintained. USG will deduct the cost from the pay described above and use it to fund the employee portion (if any). If a balance remains due, the employee will be offered the opportunity to fund the difference within five years of return.

4. **Limitations** – The Georgia statute does not apply to employees who are drafted or who are inducted into the regular armed forces (as opposed to the militia or a reserve component).

II. ADDITIONAL RESOURCES

Please refer to Section 8.2.7.5 of the Policy Manual, and the Human Resources Administrative Process and Procedure Manual policy entitled Military Leave for additional information.

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CHAPTER 22

FREEDOM OF ASSOCIATION

I. OVERVIEW

The rights of the First Amendment implicitly protect a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409 (1982); *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673 (1982). The freedom of association includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965).

The right to associate for expressive purposes is not absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms. *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 101 S. Ct. 1010 (1981). Workplace issues involving the freedom of association commonly arise in the areas of political affiliation and personal relationships.

A. Political Affiliation

The First Amendment protects the freedom of political beliefs and affiliation. However, some public employees' rights may be curtailed in order to prevent conflicts of interest, intrusion of partisan politics into governmental services and related problems. Generally, public employers may not take adverse employment actions against employees based on political beliefs and affiliation. *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980). In order to determine the employee's level of protection, courts focus on the powers inherent in a position, rather than the functions performed by the employee. *Id.* An impermissible adverse employment action based on political affiliation can include coercion to vote for a candidate or policy, retaliation after supporting a political candidate and discrimination for becoming a candidate for public office.

Political affiliation can be a permissible criterion for public employment if necessary for effective performance of a public office. Positions involving policy making, partisan political issues or confidential matters may require a particular political affiliation. However, political affiliation is not a requirement for most positions at USG institutions.

B. Personal Relationships

The freedom of association extends to an employee's right to form relationships with other individuals. The United States Supreme Court has indicated that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244 (1984). The United States Supreme Court has upheld the right to maintain certain familial

relationships, including association among members of an immediate family and association between grandchildren and grandparents. *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932 (1977); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625 (1923). The relevant factors that a court may look at in determining which relationships are protected are size, purpose, policies, selectivity, congeniality, and other characteristics related to the relationship at issue. Carefully tailored nepotism policies may be appropriate to address inappropriate employee relationships.

Additionally, monitoring an employee's personal relationships may also involve privacy issues. In disciplining employees for their private conduct, the same standards must apply to men and women, particularly in the areas of romantic and/or sexual conduct.

C. Romantic Relationships with Students

Although the First Amendment protects the freedom of association, the interests of the public employer can sometimes outweigh the interests of the employee. The courts are split on the constitutional protection afforded to various romantic relationships and the level of scrutiny under which these relationships are evaluated. The interests of an institution will not affect most employee relationships outside of the institution. However, in the case of an employee's inappropriate romantic relationship with a student, this association may not be protected. Furthermore, USG has instituted a policy prohibiting such a relationship.

Professors and other teaching personnel should be informed that any romantic relationship with a student is strictly prohibited. USG has determined that such a relationship is a violation of its nepotism policy and conflict of interest policy. Additionally, these relationships could lead to claims of sexual harassment or discrimination.

II. ADDITIONAL RESOURCES

Please refer to the Human Resources Administrative Process and Procedure Manual Policy titled Amorous Relationships and Conflict of Interest and Sections 8.2.3, 8.2.15.1, 8.2.15.3 and 8.2.16 of the Policy Manual for information relevant to the freedom of association.

CHAPTER 23

FREEDOM OF SPEECH

I. OVERVIEW

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech...." State governmental entities are equally prohibited from taking similar actions. The freedom of speech can also apply to "expressive conduct." Whether an activity is "expressive conduct" protected by the First Amendment depends on "the nature of the activity combined with the factual context and environment in which it was undertaken." *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727 (1974). Before taking any action that restrains an employee's freedom of speech, first determine whether the employee is speaking in an official capacity or as a private citizen.

A. Official Capacity

In the public sector, the employee's right to free speech depends on whether the employee is making the statement in furtherance of his or her official duties or as a private citizen speaking out about matters of public concern. Public sector employees who make statements as part of their official duties generally are not entitled to protection under the First Amendment. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). A public employer may lawfully discipline an employee for speaking out in his or her official capacity. *Id.*

The following recent Eleventh Circuit Court of Appeals cases provide examples of public employees who were not entitled to First Amendment protection because they were not speaking as private citizens on matters of public concern.

In *Berry v. Coleman*, 172 F. App'x 929 (11th Cir. 2006), an employee of the Georgia Department of Juvenile Justice (DJJ) asserted that he was terminated in violation of his free speech rights after he created a memorandum critical of DJJ's readiness to take over several Youth Development Campuses. The employee also refused to destroy the memorandum when directed to by his supervisors, and he consulted with the district attorney regarding the legality of destroying the document. The court determined that his speech was not protected because it was made as a public employee performing normal duties. Furthermore, his refusal to destroy the document was made at work and only before his supervisors. Additionally, his speech did not involve whistleblowing.

In *Battle v. Board of Regents*, 468 F.3d 755 (11th Cir. 2006), an employee in the Fort Valley State University Office of Financial Aid and Veterans Affairs office alleged that her contract was not renewed because she previously reported concerns about the submission of false and fraudulent claims by her co-workers to her supervisor. The court determined that her statements were made pursuant to her employment as a financial aid worker, not in her capacity as a private citizen about a matter of public concern.

Although professors and other teaching personnel have an expectation of academic freedom, this is not an absolute right. The institution has the right to establish reasonable time, place, and manner regulations. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294 (1972). Additionally, the institution has the right to make academic judgments as to how best to allocate scarce resources or "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203 (1957).

The First Amendment will not protect all classroom activities even if speech related. *Fowler v. Board of Education*, 819 F.2d 657 (6th Cir. 1987) (teacher discharged after showing movie with nudity to high school class; standard upheld for discharge was "conduct unbecoming"). However, employee discipline based on teaching or researching activities will be evaluated by First Amendment standards and should be reviewed by Legal Affairs prior to action being taken.

B. Private Citizen

A public sector employee may be protected by the First Amendment if he or she speaks out as a citizen on a matter of public concern. Matters of public concern may include speech that relates to a political, social, or community issue. *Chesser v. Sparks*, 248 F.3d 1117 (11th Cir. 2001); *Rodgers v. Banks*, 344 F.3d 587 (6th Cir. 2003). An employee may also be protected by the First Amendment if the speech informs the public about a government entity's potential wrongdoing or failure to perform. *Id.* **(See Chapter 17-Whistleblower Protection).** Whether the employee's speech is a matter of public concern depends on the time, place and context of the speech. *Chesser v. Sparks, supra*; *O'Brien v. City of Greers Ferry*, 873 F.2d 1115 (8th Cir. 1989). Courts evaluate "matters of public concern" on a case by case basis. Please contact Legal Affairs for guidance regarding specific situations.

C. Adverse Employment Actions Based on Speech

Depending on the circumstances, an employee could have a cause of action against a public employer for a violation of the First Amendment if he or she suffers an adverse employment action because of his or her speech as a private citizen on a matter of public concern. An adverse employment action can consist of a dismissal, retaliation, denial of promotion, transfer or refusal to hire. *Maples v. Martin*, 858 F.2d 1548 (11th Cir. 1988); *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002). A court will balance the interest of the government in promoting the efficiency of public service against the employee's interest, as a citizen in commenting on matters of public concern. *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968).

II. ADDITIONAL RESOURCES

Please refer to the Human Resources Administrative Process and Procedure Manual policy titled Disruptive Behavior and Sections 8.2.15.1, 8.2.15.2, and 8.2.15.3 of the Policy Manual for additional information relevant to freedom of speech.

CHAPTER 24

WORKPLACE PRIVACY

There are four variations of privacy claims under Georgia law: (1) intrusion upon a plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name and likeness. *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496 (1966). Workplace privacy issues commonly arise in the areas of searches, surveillance and computer use.

I. SEARCHES

The Fourth Amendment protects individuals from unreasonable searches and seizures. Searches and seizures by public employers or supervisors of their employees are subject to the restraints of the Fourth Amendment. *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (1987). A "search" occurs where there is an expectation of privacy that society considers reasonable and such privacy is infringed. A "seizure" occurs when there is some meaningful interference with an individual's possessory interests in his or her property. *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652 (1984). An employee's expectation of privacy must be addressed on a case-by-case basis by weighing the general societal expectation of privacy against the realities of the workplace. Courts will take in account institution policies and notices when determining whether a search was reasonable.

A. Workplace Searches

The workplace includes those areas and those items that are related to work and generally within an employer's control. These areas remain part of the workplace context even if the employee has placed personal items in them.

1. Searches of offices, desks and related areas

The expectation of privacy in the workplace is based upon societal expectations that have deep roots in the history of the Fourth Amendment. However, the operational realities of the workplace may make some public employees' expectations of privacy unreasonable when the intrusion is by a supervisor rather than law enforcement officer. Employees' offices and other areas may be continually entered throughout the day by co-workers, supervisors or the general public. The reasonableness of an employee's expectation of privacy in his or her office, desk and related areas must be evaluated on a case by case basis. However, generally speaking, an employee's desk, file cabinets, or other related items should not be searched without the employee's knowledge and approval, or without a search warrant.

2. Searches of personal items and body searches

The Fourth Amendment provides "protection to the owner of every container that conceals its contents from plain view." *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157 (1982). Searches and seizures by institutions of the private property and bodies of their

employees are subject to the restraints of the Fourth Amendment. *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (1987). Employees have an expectation of privacy in their body and personal possessions. Body searches are rarely used in the employment context. An improperly conducted search may result in an invasion of privacy, assault and battery or other claims. Please contact Legal Affairs before conducting a search of an employee's personal property or body.

B. Seizure

A "seizure" occurs when there is some meaningful interference with an individual's possessory interests in his or her property. Workplace interactions can become "seizures" under the Fourth Amendment. *INS v. Delgado*, 466 U.S. 210, 104 S. Ct. 1758 (1984). A seizure may exist when a reasonable person believes that he or she is not free to leave. If property is seized, management should maintain any seized property in its original form.

II. SURVEILLANCE

Although surveillance may be lawful in a number of situations, please contact Legal Affairs before conducting any form of surveillance. Generally, employee consent should be obtained before conducting surveillance.

A. Telephone and Audio Surveillance

Georgia law prohibits an employer from secretly and intentionally eavesdropping, transmitting or recording the private conversation of an employee originating in a private place. O.C.G.A. § 16-11-62. However, any party to a communication may record and divulge its contents. O.C.G.A. § 16-11-66.

The Federal Wiretapping Act, as amended by the Electronic Communications Privacy Act (ECPA), prohibits the intentional interception of wire, oral or electronic communications, the use of the intercepted material, and the intentional disclosure of the contents of the communications. 18 U.S.C. § 2511.

The ECPA provides the following relevant exceptions:

1. Communications must "affect interstate commerce." Internal communications of a single state organization may be exempted.

2. The "business use exception" allows a provider of electronic or wire communications "whose facilities are used in the transmission of a wire or electronic communication [to] intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service." 18 U.S.C. § 2511(2)(A)(i).

3. One party to the communication can consent to the interception or disclosure. 18 U.S.C. § 2511(2)(A)(iii)(c).

4. A system provider may access its own electronic communications. 18 U.S.C. § 2511(2)(A)(ii).

5. The "business extension exception" allows monitoring of an employee's telephone extension for a legitimate business purpose. Generally, this exception should only be used when supervisors are monitoring an employee's phone calls for training and instruction on telephone technique. The employee must be aware of the monitoring. Some courts have interpreted this exception to permit an employer to monitor an extension telephone if it reasonably believes confidential information will be disclosed.[74]

B. Voicemail

The Stored Communication Act (SCA) prohibits unauthorized access to electronically stored wire and electronic communications while it is in electronic storage. 18 U.S.C. § 2701. "Electronic storage" includes any "temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission" and permanent storage by the system provider "for purposes of backup protection of such communication." The SCA generally provides exceptions for the user or provider of wire or electronic communications. Violations of the SCA can lead to civil and criminal penalties. Employees should be clearly informed that their voicemail may be monitored.

C. Video Surveillance

Video surveillance should not be conducted in areas where employees have a reasonable expectation of privacy (restrooms, locker rooms, etc.). Under Georgia law, an employer may not use a device, without the consent of all persons observed, "to observe, photograph, or record the activities of another which occur in any private place and out of public view." The statute provides exceptions for security purposes and crime detection. O.C.G.A. § 16-11-62.

Federal courts have recognized that video surveillance of public areas does not violate the federal right to privacy. *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174 (1st Cir. 1997). There is no legitimate expectation of privacy in objects exposed to plain view as long as the viewer's presence at the time of the vantage point is lawful. *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301 (1990). The Fourth Amendment does not preclude an employer from observing electronically what it may lawfully observe with the naked eye. However, if sound is recorded, state and federal wiretapping laws will apply. 18 U.S.C. § 2511; O.C.G.A. § 16-11-62. Additionally, if the camera is not easily viewed, a notice should be posted informing employees and other individuals of its presence.

[74] *Briggs v. Am. Air Filter Co., Inc.*, 630 F.2d 414 (5th Cir. 1980).

D. Surveillance As a Defense

Generally, courts have determined that an employer may conduct reasonable and unobtrusive surveillance to investigate or defend a personal injury suit or workers' compensation claim. *Pinkerton's, Inc. v. Ellenberg*, 130 Ga. App. 254 (1973). If any sound is recorded, then state and federal wiretapping laws will apply.

III. COMPUTERS

A. Computer and Internet Use

The reasonableness of an employee's expectation of privacy regarding computer use rests in part on the employer's practices and policies concerning workplace computers. An employee's use of the Internet to view inappropriate websites involving sexual content or other offensive material could lead to employer liability in sexual harassment or other claims. Like other workplace privacy issues, the institution's policy should clearly inform employees that Internet use may be monitored and that password protection does not create a privacy right. As one court found, there is no legitimate expectation of privacy in Internet use when the employer's known policy allowed monitoring of "all file transfers, all websites visited, and all e-mail messages." *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

B. E-mail

The ECPA also applies to e-mail. **(Please see Section II.A of this Chapter - Telephone and Audio Surveillance.)** The institution's policies should clearly inform employees that e-mail is for business purposes only and that it may be monitored. An employee's inappropriate use of electronic communications such as e-mail can subject an employer to liability for sexual harassment or other harassment claims.

IV. ADDITIONAL RESOURCES

Please refer to Section 8.2.20 of the Policy Manual.

CHAPTER 25

EMPLOYMENT CONTRACTS

I. OVERVIEW

The University System generally does not contract for employment relationships except for faculty and certain administrative employees. Any employment contract executed in the absence of express authority may be invalid and unenforceable. Previously, institutions did not have the authority to enter into contractual employment relations without prior approval from the Board of Regents. Currently, however, institution presidents have the authority to make decisions regarding appointments, promotions, salaries, transfers, suspensions, and dismissals for faculty members, administrative employees, members, or instructional, research, and extension staffs, as well as for all other employees of their institution. **See Sections 1.2 and 2.5 of the Policy Manual.** Please contact the Office of Legal Affairs for additional assistance.

A. At-Will Employment – In the absence of a written contract, the employment relationship is indefinite. It can be terminated by either party, at any time, for any reason. Except as otherwise provided by law, an employee may quit for any reason, and the employer may terminate for any reason.

Generally, a public employee has no vested right to employment. Absent a contract, the power to hire implies the power to fire. *Dixon v. Metropolitan Atlanta Rapid Transit Auth*., 242 Ga. App. 262, 529 S.E.2d 398 (2000).

B. Terms of Contract – regardless of whether employment is at-will, or for a fixed duration pursuant to a written agreement, three items are needed to make a valid employment contract: offer, acceptance, and consideration.

An offer is made when an applicant is invited to accept employment. The terms of an offer include the wages, job description, and other related matters. Acceptance occurs when the applicant agrees to an offer. A counter-offer is not acceptance. A counter-offer acts as a new offer that may be accepted or rejected. Consideration is the exchange of one thing by the applicant/employee (work, or quitting one job to take a new one) for another from the employer (money).

II. ADDITIONAL RESOURCES

Visit www.usg.edu/legal to find contacts for additional information.

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CHAPTER 26

GEORGIA EMPLOYMENT LAWS

This Chapter will briefly discuss various Georgia laws that will affect the employees of the University System of Georgia.

I. TIME OFF TO VOTE

Employees registered to vote are permitted to take up to two hours off from work in order to participate in any municipal, county, state, or federal political party primary or election. This provision excludes employees who start work at least two hours after the polls open or end work at least two hours before the polls close. The institution must be given reasonable notice for the time off, and the institution may specify the hours during which the employee may be absent from work to vote. O.C.G.A. § 21-2-404. **Refer to Section 8.2.7.7 of the Policy Manual and the Human Resources Administrative Process and Procedure Manual policy titled Voting Leave.**

II. JURY DUTY LEAVE

It is unlawful for any USG institution to discharge, discipline, threaten to discharge, or otherwise penalize an employee who is absent from work for the purpose of attending a judicial proceeding in response to a subpoena, summons for jury duty, or other court order or process. The law does not protect employees who are required to appear in court because they are charged with a crime, nor does it prohibit an institution from requiring an employee to abide by a policy that requires the employee to give the institution reasonable notice of the employee's absence because of a judicial proceeding. O.C.G.A. § 34-1-3. **Refer to Section 8.2.7.7 of the Policy Manual.**

III. DUTY TO MAINTAIN EMPLOYMENT RECORDS

All USG institutions must keep a true and accurate record of the name, address, and occupation of each employee and the daily and weekly hours worked by each person, as well as the wages paid to him or her during each pay period, for at least one year after the date of the record. O.C.G.A § 34-2-11. Refer to www.usg.edu/legal/links for specific recordkeeping guidelines.

IV. CONVICTION INFORMATION

The Georgia Crime Information Center (GCIC) makes records of the criminal convictions of applicants and employees available to public agencies for decisions regarding employment. The institutions must obtain the applicant's or employee's fingerprints or provide the GCIC with a signed and notarized consent form of the person whose records are requested. A person who suffers an adverse employment decision based on records obtained must be informed of the information provided and that the specifics of the record that affected the decision. Failure to provide this information to the applicant or employee shall be a misdemeanor. O.C.G.A. § 35-3-35(b). **Please also refer to the Fair Credit Reporting Act**

information in Chapter 4 and the Human Resources Administrative Process and Procedure Manual policy titled Background Investigation.

V. EMPLOYEE REFERENCES

A USG institution has a "conditional privilege" when it gives factual information to prospective employers about an employee or former employee's "job performance," any act which would be a violation of state law, or the employee's ability or lack of ability to carry out the duties of a job. Truth is always a valid defense to a charge of defamation stemming from a reference. Thus, so long as the institution ensures their references are objectively verifiable, then an ex-employee cannot allege defamation. An institution should only provide information that is not confidential; and it should avoid editorial comments in the references, stick to the facts, and be specific. O.C.G.A. § 34-1-4.

VI. BLOOD DONATIONS

An employee of a USG institution is allowed a leave of absence, without loss of pay, of not more than eight hours in each calendar year for the purpose of donating blood. This absence shall be computed at two hours per donation, up to four times per year. However, any such officer or employee who donates blood platelets or granulocytes through the plasmapheresis process shall be allowed a leave of absence, without loss of pay, of not more than 16 hours in each calendar year, which shall be computed at four hours per donation, up to four times per year. O.C.G.A. § 45-20-30.

VII. ORGAN DONATIONS

Each USG institution employee who serves as an organ donor for the purpose of transplantation shall receive a leave of absence, with pay, of 30 days; and such leave shall not be charged against or deducted from any annual or sick leave and shall be included as service in computing any retirement or pension benefits. The entitlement requires a statement from the doctor or hospital providing the procedure. O.C.G.A. § 45-20-31. **Refer to Section 8.2.7.7 of the Policy Manual.**

VIII. BONE MARROW DONATIONS

Each USG institution employee who serves as a bone marrow transplant donor shall receive a leave of absence, with pay, of seven days and such leave shall not be charged against or deducted from any annual or sick leave and shall be included as service in computing any retirement or pension benefits. The entitlement requires a statement from the doctor or hospital providing the procedure. O.C.G.A. § 45-20-31. **Refer to Section 8.2.7.7 of the Policy Manual.**

IX. BREAST-FEEDING

A USG institution may provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child. The institution should make reasonable efforts to provide a place so that this can be done in privacy. O.C.G.A. § 34-1-6. A mother may breast-feed her baby in any location where she and the baby are otherwise authorized to be. O.C.G.A. § 31-1-9.

X. GEORGIA SMOKEFREE AIR ACT OF 2005 – O.C.G.A. § 31-12A-1 ET SEQ.

Smoking is prohibited in all enclosed areas within the workplace. Institutions are required to communicate this law to all prospective employees on their applications for employment. Institutions may designate a "smoking area" within the following requirements:

1. The smoking area must be located in a non-work area where no employee is required to enter (except for custodial or maintenance work in the area when it is unoccupied);

2. Air handling systems from the smoking area must be separate from the main air handling system that serves all other areas of the building, and all air from the smoking area must be exhausted directly to the outside by an exhaust fan of sufficient size and capacity;

3. No air from the smoking area shall be recirculated through or infiltrate other parts of the building; and

4. The designated smoking area must be for the use of employees only.

Please refer to Human Resources Administrative Process and Procedure Manual policy titled Smoking for more information.

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CHAPTER 27

GEORGIA UNEMPLOYMENT COMPENSATION

I. OVERVIEW

Unemployment compensation operates via a dual system of federal and state laws whose basic purpose is to promote the financial security of workers and to reduce the state's burden of providing relief assistance to the poor.

II. ENTITLEMENT TO BENEFITS

A. Disqualification for Benefits - Claimants who seek unemployment benefits must be unemployed, physically able and available to work, actively seeking employment, registered and reporting to an employment office, and have sufficient wage credits to establish a valid claim for benefits. O.C.G.A. § 34-8-195. A claimant is not qualified for benefits if the individual left employment voluntarily and without a good cause connected to work or was discharged or suspended for failure to obey orders, rules, or instructions, or carry out duties. Examples include, theft, embezzlement, or violation of the drug/alcohol policy. O.C.G.A. § 34-8-194.

B. Discharged Employees Who Qualify for Benefits – Because most institutions do not terminate employees lightly, institutions usually have objectively reasonable bases for termination decisions. However, some reasons often given by institutions for their termination decisions, while nonetheless proper, will not defeat a subsequent unemployment compensation claim. For example, a discharged employee will not be disqualified from receiving unemployment compensation if:

1. The employee made a good-faith effort to perform his or her duties but was unable to do so.

2. The employee did not intentionally fail or consciously neglect to perform his or her job-related duties.

3. The employee was discharged because of absenteeism due to personal or family member illness.[75]

4. The employee was discharged because he or she violated one of the employer's rules of which the employee was not informed. Consistency of prior enforcement shall be taken into consideration, along with the reasonableness of the rule.

5. Except for an activity under paragraph 4, the employee was exercising a protected right to protest against wages, hours, working conditions, or job safety under the federal National Labor Relations Act or other laws. O.C.G.A. § 34-8-194.

[75] This exception will not apply if the employee, without justification, failed to notify the employer.

III. FILING PROCEDURES, HEARINGS, AND APPEALS

An institution must provide all discharged or laid-off employees with a separation notice (Form DOL-800). The employee can then file his or her claim with an unemployment insurance claims office. A claims examiner will notify the institution of the claim (Form DOL-403FF) and solicit information from the institution. The examiner will then make the initial determination concerning the validity of the claim and the benefit amount and duration. This determination is reported on form DOL-442A and mailed to the claimant and the institution. O.C.G.A. § 34-8-190.

USG institutions have the right to appeal an initial adverse determination within 15 days (Form DOL-423). This first appeal is a "de novo" proceeding in which both sides start with a clean slate and present evidence. The institution must present all of its evidence again in order to persuade the new fact finder. O.C.G.A. § 34-8-220.

Beyond the initial appeal, both sides also have the right to appeal to the Board of Review and then to the superior court of the county in which the employee was last employed. O.C.G.A. § 34-8-223.

IV. REQUIRED POSTINGS AND REPORTS

Institutions are required to display posters DOL-154 and DOL-810. These posters inform employees of their unemployment insurance coverage. Institutions also are required to submit a quarterly tax and wage report on Form DOL-4, which reports applicable wage and tax information.[76] The quarterly report is due at the end of the month following the end of each quarter. Any corrections to the quarterly report must be made on Form DOL-3C. Do not use Form DOL-4 to make corrections.

[76] The Department of Labor urges employers to report wage information on diskette in addition to the written information provided in DOL-4 if at all possible. The Department will provide the program at no cost to employers.

CHAPTER 28

GEORGIA WORKERS' COMPENSATION

I. GEORGIA WORKERS' COMPENSATION LAW

Workers' compensation is a system designed to quickly administer claims to injured workers in order to provide a more immediate source of income and medical treatment, all while protecting the employer from liability in tort. The primary goal of workers' compensation is to return injured workers to work, with or without restrictions, as quickly and as reasonably as possible. USG institutions are to return injured workers to suitable employment as soon as practicable. **Refer to Section 8.2 of the Policy Manual and Human Resources Administrative Process and Procedure Manual policy titled Workers' Compensation Benefits.**

A. Exclusive Remedy

The sole legal remedy for an employee who is injured on the job is through workers' compensation. As a general rule, the institution cannot be sued for any negligence which gives rise to a work injury. O.C.G.A. § 34-9-11. This immunity extends to co-workers as well. O.C.G.A. § 34-9-11(a). It should be noted, however, that there are some limited exceptions to the exclusive remedy provision of the Workers' Compensation Act, including actions taken for purely personal reasons, willful and intentional acts, and fraud.

B. Medical Records

Institutions are entitled to the medical records of its injured workers because the law states that, by submitting a workers' compensation claim, the employee has waived any privilege of confidentiality. O.C.G.A. § 34-9-207(a). The contractual relationship is between the doctor and institution. Therefore, the designated workers' compensation liaison can attend doctor's appointments with the injured worker, speak with medical providers, and meet with the doctor without the injured employee present. This is especially helpful when there is some doubt as to the validity of the injury or the employee's continued impairment and inability to return to work, as well as with the creation of suitable light duty jobs. Note that HIPAA, by its terms, does not apply to workers' compensation cases. 45 C.F.R. § 164.512(1).

C. Timing Requirements for Notice and for Filing a Claim

A USG employee or his representative must give the employer notice of the accident "as soon as practicable," but no later than 30 days from its occurrence. O.C.G.A. § 34-9-80. The employee or employee's estate must then file a formal notice of claim for workers' compensation benefits within one year of the date of the alleged injury, or in a death claim, within one year of the date of death. Otherwise, the claim may be barred by the statute of limitations. O.C.G.A. § 34-9-82(a). If weekly compensation benefits have been paid to the employee on account of the injury, there is a two-year period from the last payment of such benefits in which to file the claim. O.C.G.A. § 34-9-104(b). If the employee has received remedial medical treatment

furnished by the employer on account of the injury, then there is a one-year period from the date of the last remedial treatment in which to file the claim. O.C.G.A. § 34-9-82(a).

II. INJURY AND BENEFITS AVAILABLE

In order for an injury to be compensable under the Workers' Compensation Act, the accident and injury must have arisen both out of, and in the course and scope of, the injured worker's employment. O.C.G.A. § 34-9-1(4). Injured workers with legitimate work-related injuries are entitled to receive both income and medical benefits.

Aggravation of pre-existing injuries or conditions may also be compensable on-the-job injuries, as well as repetitive-motion-type injuries.

There are three kinds of weekly benefits that an injured employee might be entitled to, depending upon the nature and extent of the injury or disability. The amount and duration of these weekly benefits depends upon what kind of benefits they are, as well as whether or not the employee's injury is designated as "catastrophic." O.C.G.A. § 34-9-261. Medical benefits for all reasonable and necessary treatment related to a compensable injury are available for the employee's life, with few limitations. O.C.G.A. § 34-9-200. Rehabilitation benefits are generally only available in the event of a catastrophic injury, by agreement of the parties, or if the date of accident preceded July 1, 1992. O.C.G.A. § 34-9-261.

A. Average Weekly Wage O.C.G.A. § 34-9-260

The calculation of the employee's specific benefits entitlement is based upon the average weekly wage (AWW). The institution must determine the AWW for the date of accident before income benefits can be accurately calculated. The AWW is determined by taking the average of all earnings paid to the employee during the 13 weeks immediately prior to the date of accident. Wages include overtime, bonuses, tips, and mileage. The wages for the week the employee was injured should not be included in the AWW calculation. If the employee did not work "substantially the whole" of the 13 weeks prior to the date of accident, then the AWW of a similarly situated employee must be used. If no such employee exists - or if no such employee exists who worked substantially the whole of the 13 weeks - then the AWW must be based upon the employee's full-time weekly wage. If the employee was hired to work full time, for example, then the AWW would be the employee's regular hourly rate times 40 hours per week.

B. Temporary Total Disability O.C.G.A. § 34-9-261

The maximum income benefit that an employee can be entitled to is called temporary total disability (TTD). The TTD rate is two-thirds of the AWW, computed by multiplying the AWW by .6667. The maximum amount an employee can receive for TTD benefits is determined by the date of injury. For all accidents occurring on or after July 1, 2008, the maximum is $500.00 per week. This amount may change annually, if the legislature so approves. An employee is entitled to payment of a maximum of 400 weeks of TTD benefits, calculated from the date of the accident. However, the employee's entitlement to benefits in this situation cease when he or she has returned to their pre-injury baseline statue. O.C.G.A. § 34-9-1(4).

C. Temporary Partial Disability O.C.G.A. § 34-9-262

Temporary Partial Disability (TPD) benefits are used to compensate the employee who returns to work with restrictions, but at a wage which is less than the pre-injury average weekly wage. TPD benefits are calculated by taking the difference between the AWW and the employee's weekly earnings after the injury, and then multiplying it by .6667. TPD may be calculated weekly, or it may be calculated the first week of the employee's return to work and paid weekly for 13 weeks, and then re-calculated every 13 weeks thereafter. For dates of accident on or after July 1, 2008, the maximum weekly amount of TPD benefits payable is $334.00. This amount is also subject to increase annually upon legislative approval. TPD benefits are only due to an employee if the economic loss is related to the work injury. The maximum period of time that an employee can receive TPD benefits is 350 weeks from the date of accident.

D. Permanent Partial Disability O.C.G. A. § 34-9-263

An injured employee is entitled to Permanent Partial Disability (PPD) benefits only if he or she suffers a permanent injury to the injured body part. This amount is payable above and beyond and TTD or TPD benefits and is meant to compensate an injured worker for the permanent loss of use of a body part. This rating is determined by a medical provider, after the employee has reached maximum medical improvement (MMI), in an examination typically called a functional capacity exam (FCE). The number of weeks of benefits payable to the injured employee for a PPD rating is set forth in the Georgia Code, O.C.G.A. § 34-9-263(c), based on the part of parts of the body affected. The rating translates to a specific dollar amount that is payable to the employee and is calculated using the AWW. The PPD rating is not payable to the employee if he or she is currently receiving either TTD or TPD benefits. It is also not payable to an employee who is designated as catastrophically injured, since he or she will receive TTD benefits for life.

E. Catastrophic Injury O.C.G.A. § 34-9-200.1

If an employee's injury qualifies as "catastrophic," then he or she has the potential to collect in come benefits for life, rather than for only 400 weeks from the date of accident. Whether or not an injury is catastrophic depends upon the specific nature of the injury. There are a number of injuries which are statutorily designated as catastrophic – for example, certain severe brain or closed head injuries; paralysis of an arm, leg, or the trunk; certain amputations; and total or industrial blindness. An injury can also be designated as catastrophic either by agreement of the parties or by order of the Board if it meets certain other criteria set forth in the Code. O.C.G.A. § 34-9-200.1. A catastrophically injured employee is also entitled to medical and/or rehabilitation services from the employer.

F. Death benefits O.C.G.A. § 34-9-265

In the case of a compensable death, the employer must pay the reasonable expenses of burial, not to exceed $7,500.00. If the employee has no dependents, then this is the only compensation due. A deceased employee's dependents (surviving children, surviving spouse [if

truly dependent], and any other true dependents) may also be entitled to the payment of income benefits.

III. MANAGING THE INJURED EMPLOYEE

A. Panel of Physicians O.C.G.A. § 34-9-201

The only medical providers that an injured worker is entitled to see for care are contained on the panel of physicians posted in the workplace (See Appendix). The physician chosen from the panel by the employee is called the authorized treating physician (ATP). As a practical matter, the employee should initial the panel and circle the doctor chosen to document who is serving as the ATP. This panel should also be maintained in the employee's file in the event of litigation.

If one of the facilities on the panel is not open after hours, and the injury occurs after hours, the employee should go to the nearest emergency room for treatment. The function of the panel of physicians is to limit the employee's choices of medical providers and to allow some control of the medical costs by the institution. As set forth above, the institution is entitled to receive copies of the medical records.

A panel of physicians is only effective when it is valid, is posted, and is explained to employees. The panel of physicians must always be posted in a conspicuous place on a sheet provided by the State Board of Workers' Compensation. Generally, a valid panel consists of six unaffiliated members, one of whom is a minority and at least one whom is an orthopedic surgeon. It must not contain more than two industrial clinics. It should be shown and explained to an employee both at the time of hire and, more importantly, at the time an injury is reported. Every effort must be made to assist the employee in obtaining medical treatment from the panel.

In the event an employee is not happy with a panel provider, he or she has the right to a one-time change of ATP to any other provider on the panel. Again, this choice should be documented in the personnel file. Any other or subsequent change of ATP must either be by agreement with the institution or by order of the Board.

B. Light Duty Plans

The most crucial role of the institution in any workers' compensation claim is to return the injured employee to work. Light duty is a mechanism to facilitate the injured employee's speedy return to work. The light duty plan not only helps keep costs down, but it also aids in the overall recovery of the employee and raises his or her morale. Light duty jobs can be jobs that, by their very nature, are physically limited and involve no heavy lifting, stooping, pushing, pulling, climbing, and the like. Or, they can be regular duty jobs that have been modified to the specific limitations of the employee, so that they have the assistance of another employee for any tasks that the treating physician states are not suitable. They can also be temporally limited – for example, the employee does their normal job but limits his or her time on the job to four hours a day, rather than eight.

The employee should be made aware that the light duty job is a temporary position and that the injured worker is only being asked to do the job pending a return to full work, rather than on a permanent basis. The employer should make every effort to fit the light duty job to the employee's skills and training. It should be noted that, if an injured work is absent for reasons other than the on-the-job injury, the institution does not owe income benefits.

C. Returning to Work O.C.G.A.§ 34-9-240

For an employee who will not voluntarily return to work and who is already receiving TTD benefits, it may be necessary to make a formal job offer, referred to as a "WC-240 offer." Other than waiting for the 400- or 350-week cap on income benefits to run, this is one of the few ways that the institution can suspend income benefits unilaterally, or without a hearing, when an employee has not chosen to return to work.

In order to make the WC-240 job offer, a job description or a Form WC-240(a) is provided to and signed by the authorized treating physician. This approved job description or Form WC-240(a), along with a Form WC-240, is then mailed to the employee and the employee's attorney, if he or she is represented. If the employee then fails to return to work and attempt the light duty job, then the employee's income benefits may be suspended without a hearing or an order of the Board. If the employee returns to work and attempts to perform the light duty job, but is unable to do so for more than 15 scheduled work days, then income benefits must continue, but the institution will have the right to submit a motion to suspend benefits and to request a hearing seeking an order suspending benefits.

IV. AFFIRMATIVE DEFENSES

Although workers inevitability get hurt, there are defenses to certain injuries. Below is a list of common defenses that institutions can use to deny the employee's alleged workers' compensation claim and entitlement to income benefits or medical treatment.

A. Drugs and Alcohol O.C.G.A. § 34-9-17

O.C.G.A. § 34-9-17 provides for a defense to the claim if the injured worker tests positive for drugs (illegal drugs or prescription drugs not taken in accordance with the prescription) or for alcohol. The employer must test for drugs within eight hours of the alleged accident, and for alcohol within three hours of the time of the alleged accident. If there is a positive test result, then the employer has a rebuttable presumption that the accident was caused by a controlled substance or by alcohol. This presumption can be rebutted by the employee, in which case the employer must then present additional evidence to show that the accident and injury were caused by the intoxication or drug use. If the defense is successful, it operates as a total bar to the employee's recovery of all workers' compensation benefits.

B. Not Arising Out of or Within the Scope and Course of Employment

Two other common defenses to a claim of injury are that the accident and injury either did not arise out of the employment, or that it was not sustained in the course and scope of employment. Some examples of these defenses are set below:

1. The employee was on a detour from his job assignment/duty. For example, a university courier carrier leaves his route and goes to the grocery store to pick up a personal prescription.

2. The employee was injured while fighting over a personal issue with a co-worker, while playing practical jokes on co-workers, or while engaged in horseplay on the job. For example, a bartender makes a flaming rum drink to tease a cocktail waitress and accidentally sets himself on fire.

3. The injury was caused by an assault by a third party that was not related to a work dispute and the employment status did not reasonably place him or her in the peculiar position of being subject to such an assault. For example - a hotel receptionist is attacked by her jealous ex-boyfriend while she is on the job.

4. The employee was off the clock, free to do as he or she pleased, and was engaged in a purely personal activity. For example – a line worker clocks out and heads to the lunchroom for an informal book club meeting with a friend and slips and falls on the way there.

C. The Rycroft Defense[77]

Many times, the institution will hire an employee who has previously been injured. If the employee is asked about prior injuries that may impair his/her ability to perform the essential functions of the job, and he or she lies about a pre-existing condition, the institution may have a "Rycroft" defense if the employee injures the same part of the body. This defense is available if the employer can show that there was a deliberate misrepresentation by the employee, that the employee's representations were a substantial factor in the hiring of the employee, and that the employer would not have placed the employee in the job if it had been made aware of the pre-existing injury. If successfully asserted, Rycroft acts as a complete bar to recovery.

V. CONTROLLING MEDICAL COSTS

A. Prompt Payment and Fee Scheduling O.C.G.A. § 34-9-205

Medical bills should be paid promptly so that late payment penalties are not owed. When medical bills are submitted for payment, they must be paid within 30 days from the receipt of the bills. However, the bills must be properly submitted, with supporting medical records and forms, or they can be rejected for payment. A request should be promptly sent to the billing party for

[77] *Georgia Elec. Co. v. Rycroft*, 259 Ga. 155 (1989).

the underlying medical documentation and forms so that payment can be made. If payment is not made within 30 days of proper submission of a bill, a 10 percent penalty on the amount due is owed. After 60 days, the penalty begins to increase.

The State Board of Workers' Compensation has adopted limitations on the amount the institution must pay for medical expenses. Most "codes" for services are listed in the Fee Schedule, and the medical provider is obligated to take the payment assigned by the Fee Schedule and to write off the difference. The medical provider cannot seek the difference from the injured worker.

B. Peer Review of Medical Procedures O.C.G.A. § 34-9-205(b) and (c)

If a procedure is not listed in the Fee Schedule or if the procedure/treatment appears excessive, then the institution can send the medical bill with the medical records to Peer Review to determine the appropriate amount of the bill to be paid. The institution must send such a package to Peer Review within 30 days of the proper submission of the medical bill. An institution should contact the Board to find out who has been designated to perform this function. The institution cannot contract privately with some other company to perform this service. If Peer Review determines that a bill should be reduced, then the institution can deduct the cost of Peer Review from the amount to be paid to the medical provider.

C. Change of Physician O.C.G.A. § 34-9-201

Both an institution and an employee can seek a change of physician. The employee is automatically entitled to a one-time change from one panel physician to another panel physician of his or her choice. A change of physician can also be accomplished if the parties agree, or by request from the Board. An institution can request a change of physician from the Board under the following circumstances, standing alone or cumulatively: proximity of the physician's office to the employee's residence; accessibility of the physician to the employee; excessive/redundant performance of medical procedures; necessity for specialized medical care; language barriers; referral by the authorized physician; noncompliance by the physician with Board rules and procedures; panel of physicians; duration of treatment without appreciable improvement; number of prior treating physicians; prior requests for change of physician/treatment; release of the employee to normal duty work by the current authorized treating physician; and/or indication by the current physician that he or she has nothing more to offer. If the parties cannot reach a decision between themselves, the change of physician issue will be decided by an Administrative Law Judge.

D. Recovery from Other Sources O.C.G.A. § 34-9-11.1

The institution may have a right to subrogation for any and all medical treatment paid on behalf of an injured employee if the worker was injured by the negligence of a third party. O.C.G.A. § 34-9-11.1. However, the institution can only recover income and medical benefits actually paid to or on behalf of the employee, and it can only recover on its subrogation lien if the injured worker has been "fully and completely compensated" for all economic and non-economic losses. O.C.G.A. § 34-9-11.1(b). It is the employer/insurer who must prove that there

has been full compensation, and doing so is very difficult and results in a case-by-case showing to the jury or judge sitting as jury. As a practical matter, then, and due to the gradual erosion by the courts of the right to subrogation, obtaining any meaningful reimbursement of a subrogation lien is very difficult.

Appendix

Federal Forms

Fair Labor Standard Act (FLSA) (Including Minimum Wage)……...1

Family and Medical Leave Act of 1993 (Poster and Forms)……..……2

Equal Employment Opportunity……..3

Uniformed Services Employment and Reemployment Right Act……...4

Occupational Safety and Health Administration (OSHA)……...5

All federal forms are available at **http://www.dol.gov/osbp/sbrefa/poster/matrix.htm**

Georgia Forms

Unemployment Insurance……..…….6

Vacation Unemployment……..……..7

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Workers' Compensation Official Notice…….9

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EMPLOYEE RIGHTS

UNDER THE FAIR LABOR STANDARDS ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

FEDERAL MINIMUM WAGE

$7.25 PER HOUR

BEGINNING JULY 24, 2009

OVERTIME PAY At least 1½ times your regular rate of pay for all hours worked over 40 in a workweek.

CHILD LABOR An employee must be at least **16** years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor.

Youths **14** and **15** years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under the following conditions:

No more than

- **3** hours on a school day or **18** hours in a school week;
- **8** hours on a non-school day or **40** hours in a non-school week.

Also, work may not begin before **7 a.m.** or end after **7 p.m.**, except from June 1 through Labor Day, when evening hours are extended to **9 p.m.** Different rules apply in agricultural employment.

TIP CREDIT Employers of "tipped employees" must pay a cash wage of at least $2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee's tips combined with the employer's cash wage of at least $2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference. Certain other conditions must also be met.

ENFORCEMENT The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action.

Employers may be assessed civil money penalties of up to $1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law and up to $11,000 for each employee who is the subject of a violation of the Act's child labor provisions. In addition, a civil money penalty of up to $50,000 may be assessed for each child labor violation that causes the death or serious injury of any minor employee, and such assessments may be doubled, up to $100,000, when the violations are determined to be willful or repeated. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Act.

ADDITIONAL INFORMATION

- Certain occupations and establishments are exempt from the minimum wage and/or overtime pay provisions.
- Special provisions apply to workers in American Samoa and the Commonwealth of the Northern Mariana Islands.
- Some state laws provide greater employee protections; employers must comply with both.
- The law requires employers to display this poster where employees can readily see it.
- Employees under 20 years of age may be paid $4.25 per hour during their first 90 consecutive calendar days of employment with an employer.
- Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.

For additional information:

1-866-4-USWAGE

(1-866-487-9243) TTY: 1-877-889-5627

U.S. Wage and Hour Division

WWW.WAGEHOUR.DOL.GOV

DERECHOS DEL EMPLEADO

BAJO LA LEY DE NORMAS JUSTAS DE TRABAJO

SECCIÓN DE HORAS Y SUELDOS DEL DEPARTAMENTO DE TRABAJO DE EEUU

SALARIO MÍNIMO FEDERAL

$7.25 POR HORA

A PARTIR DEL 24 DE JULIO DE 2009

PAGO DE SOBRETIEMPO

Por lo menos tiempo y medio (1½) de su tasa regular de pago por todas las horas trabajadas en exceso de 40 en una semana laboral.

EMPLEO DE MENORES DE EDAD

El empleado ha de tener por lo menos **16** años de edad para trabajar en la mayoría de los trabajos no agrícolas y por lo menos tener **18** años para trabajar en trabajos no agrícolas declarados arriesgados por el/la Secretario(a) de Trabajo.

Jóvenes de **14** y **15** años de edad pueden trabajar fuera de horas escolares en varios trabajos que no sean en fabricación, minería, o arriesgados, bajo las siguientes condiciones:

No más de

- **3** horas en un día escolar o **18** horas en una semana escolar;
- **8** horas en un día no escolar o **40** horas en una semana no escolar.

Además, el trabajo no puede empezar antes de las **7 de la mañana** o terminar después de las **7 de la tarde** salvo del primero de junio hasta el Día de Labor, cuando las horas de la tarde se extienden hasta las **9 de la noche**. Se aplican reglas distintas al empleo agrícola.

CRÉDITO POR PROPINAS

Empresarios de empleados que reciben propinas han de pagar un salario en efectivo de por lo menos $2.13 por hora si declaran un crédito por propina contra sus obligaciones hacia el salario mínimo. Si las propinas del empleado combinadas con el salario en efectivo que paga el empresario de por lo menos $2.13 por hora no equivalen al salario mínimo por hora, el empresario ha de suplir la diferencia. También se tiene que cumplir con otras condiciones.

CUMPLIMIENTO

El Departamento de Trabajo puede recuperar salarios atrasados administrativamente o mediante acción legal en los tribunales, para empleados a los cuales se les haya pagado por debajo y en violación de la ley.

A los empresarios se les puede imponer penas pecuniarias civiles de hasta $1,100 por cada infracción intencional o repetida de las provisiones de la ley del pago del salario mínimo y del pago de sobretiempo y hasta $11,000 por cada empleado que sea empleado en violación de las provisiones de la ley sobre el empleo de menores. Adicionalmente, se puede imponer una pena pecuniaria civil de hasta $50,000 por cada infracción de las provisiones sobre el empleo de menores si causa la muerte o una lesión seria de un empleado menor de edad, y se pueden doblar dichas avaluaciones, hasta $100,000, cuando se determinan que las infracciones son intencionales o repetidas. La ley también prohíbe la discriminación o el despido del trabajador por haber presentado una denuncia o por participar en cualquier procedimiento bajo la Ley.

INFORMACIÓN ADICIONAL

- Ciertas ocupaciones y ciertos establecimientos están exentos de las provisiones de pago de salario mínimo y de sobretiempo.
- Se aplican provisiones especiales a trabajadores de Samoa Americana y de la Comunidad de las Islas Marianas del Norte.
- Algunas leyes estatales proveen más protecciones al empleado; el empresario ha de cumplir con ambas.
- La ley exige que los empresarios pongan este cartel donde los empleados lo puedan ver fácilmente.
- A los empleados menores de 20 años de edad se les puede pagar menos de $4.25 por hora durante los primeros 90 días civiles consecutivos de empleo con un empresario.
- Se les puede pagar menos del salario mínimo bajo ciertos certificados especiales emitidos por el Departamento de Trabajo a ciertos estudiantes de tiempo completo, estudiantes aprendices y a trabajadores con impedimentos.

Para información adicional:

1-866-4-USWAGE

(1-866-487-9243) TTY: 1-877-889-5627

U.S. Wage and Hour Division

WWW.WAGEHOUR.DOL.GOV

EMPLOYEE RIGHTS AND RESPONSIBILITIES
UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement
FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements
Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Benefits and Protections
During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements
Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Definition of Serious Health Condition
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave
An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave
Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities
Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities
Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers
FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement
An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.

DERECHOS Y RESPONSABILIDADES DEL EMPLEADO BAJO LA LEY DE AUSENCIA FAMILIAR Y MÉDICA

Derechos Básicos de Ausencia
La Ley de Ausencia Familiar y Médica (FMLA-en sus siglas en inglés) exige que todo empresario sujeto a la Ley provea a sus empleados elegibles hasta 12 semanas de ausencia del trabajo, no pagadas y con protección del puesto, por las siguientes razones:

- Por incapacidad causada por embarazo, atención médica prenatal o parto;
- Para atender a un hijo del empleado después de su nacimiento, o su colocación para adopción o crianza;
- Para atender a un cónyuge, hijo(a), o padres del/de la empleado(a), el/la cual padezca de una condición de salud seria; o
- A causa de una condición de salud seria que le impida al empleado desempeñar su puesto.

Derechos de Ausencia Para Familias Militares
Empleados elegibles con un cónyuge, hijo, hija, o padre que esté en servicio activo o se le haya avisado de una llamada a estado de servicio activo en la Guardia Nacional o las Reservas para respaldar una operación contingente, pueden usar su derecho de ausencia de 12 semanas para atender ciertas exigencias calificadoras. Las exigencias calificadoras pueden incluir la asistencia a ciertos eventos militares, la fijación del cuido alternativo de hijos, para atender ciertos arreglos financieros y legales, para asistir a ciertas consultas con consejeros, y para asistir a sesiones de intrucción posdespliegue de reintegración.

FMLA también incluye un derecho especial de ausencia que concede a empleados elegibles ausentarse del trabajo hasta 26 semanas para atender a un miembro del servicio militar bajo el alcance de la Ley durante un período único de 12 meses. Un miembro del servicio militar bajo el alcance de la Ley es un miembro actual de las Fuerzas Armadas, inclusive un miembro de la Guardia Nacional o las Reservas, que padece de una lesión o enfermedad grave sufrida en cumplimiento del deber en el servicio activo que puede incapacitar, por razones médicas, al miembro del servicio militar para desempeñar sus deberes y por la cual recibe tratamientos médicos, recuperación, o terapia; o está en estado de paciente no hospitalizado; o aparece en la lista de jubilados temporalmente por minusvalidez.

Beneficios y Protecciones
Durante una ausencia bajo FMLA, el empresario ha de mantener en vigor el seguro de salud del empleado bajo cualquier "plan de seguro colectivo de salud" con los mismos términos como si el empleado hubiese seguido trabajando. Al regresar de una ausencia de FMLA, a la mayoría de los empleados se le ha de restaurar a su puesto original o puesto equivalente con sueldo, beneficios y otros términos de empleo equivalentes.

El tomar una ausencia bajo FMLA no puede resultar en la pérdida de ningún beneficio de empleo acumulado antes de que el empleado comenzara la ausencia.

Requisitos Para Elegibilidad
El empleado es elegible si ha trabajado para el empresario bajo el alcance de la Ley por lo menos por un año, por 1,250 horas durante los previos 12 meses, y si el empresario emplea por lo menos 50 empleados dentro de un área de 75 millas.

Definición de una Condición de Salud Seria
Una condición de salud seria es una enfermedad, lesión, impedimento, o condición física o mental que involucra o una pernoctación en un establecimiento de atención médica, o el tratamiento continuo bajo un servidor de atención médica que, o le impide al empleado desempeñar las funciones de su puesto, o impide al miembro de la familia que califica participar en actividades escolares o en otras actividades diarias.

Dependiendo de ciertas condiciones, se puede cumplir con el requisito de tratamiento continuo con un período de incapacidad de más de 3 días civiles consecutivos en combinación con por lo menos dos visitas a un servidor de atención médica o una visita y un régimen de tratamiento continuo, o incapacidad a causa de un embarazo, o incapacidad a causa de una condición crónica. Otras condiciones pueden satisfacer la definición de un tratamiento continuo.

Uso de la Ausencia
El empleado no necesita usar este derecho de ausencia todo de una vez. La ausencia se puede tomar intermitentemente o según un horario de

ausencia reducido cuando sea médicamente necesario. El empleado ha de esforzarse razonablemente cuando hace citas para tratamientos médicos planificados para no interrumpir indebidamente las operaciones del empresario. Ausencias causadas por exigencias calificadoras también pueden tomarse intermitentemente.

Substitución de Ausencia Pagada por Ausencia No Pagada

El empleado puede escoger o el empresario puede exigir el uso de ausencias pagadas acumuladas mientras se toma ausencia bajo FMLA. Para poder usar ausencias pagadas cuando toma FMLA, el empleado ha de cumplir con la política normal del empresario que rija las ausencias pagadas.

Responsabilidades del Empleado

El empleado ha de proveer un aviso con 30 días de anticipación cuando necesita ausentarse bajo FMLA cuando la necesidad es previsible. Cuando no sea posible proveer un aviso con 30 días de anticipación, el empleado ha de proveer aviso en cuanto sea factible y, en general, ha de cumplir con los procedimientos normales del empresario en cuanto a llamar para reporter su ausencia.

El empleado ha de proporcionar suficiente información para que el empresario determine si la ausencia califica para la protección de FMLA, con la fecha y la duración anticipadas de la ausencia. Suficiente información puede incluir que el empleado no puede desempeñar las funciones del puesto, que el miembro de la familia no puede desempeñar las actividades diarias, la necesidad de ser hospitalizado o de seguir un régimen continuo bajo un servidor de atención médica, o circunstancias que exijan una necesidad de ausencia familiar militar. Además, el empleado ha de informar al empresario si la ausencia solicitada es por una razón por la cual se había previamente tomado o certificado FMLA. También se le puede exigir al empleado que provea certificación y recertificación periódicamente constatando la necesidad para la ausencia.

Responsabilidades del Empresario

Los empresarios bajo el alcance de FMLA han de informar a los empleados solicitando ausencia si son o no elegibles bajo FMLA. Si lo son, el aviso ha de especificar cualquier otra información exigida tanto como los derechos y las responsabilidades del empleado. Si no son elegibles, el empresario ha de proveer una razón por la inelegibilidad.
Los empresarios bajo el alcance de la Ley han de informar a los empleados si la ausencia se va a designar protegida por FMLA y la cantidad de tiempo de la ausencia que se va a contar contra el derecho del empleado para ausentarse. Si el empresario determina que la ausencia no es protegida por FMLA, el empresario ha de notificar al empleado de esto.

Actos Ilegales Por Parte del Empresario

La ley FMLA le prohíbe a todo empresario:

- que interfiera con, limite, o niegue el ejercicio de cualquier derecho estipulado por FMLA;
- que se despida a, o se discrimine en contra de, alguien que se oponga a una práctica prohibida por FMLA o porque se involucre en cualquier procedimiento bajo o relacionado a FMLA.

Cumplimiento

El empleado puede presentar una denuncia con el Departamento de Trabajo de EEUU o puede presentar un pleito particular contra el empresario.

FMLA no afecta ninguna otra ley federal o estatal que prohíbe la discriminación, o invalida ninguna ley estatal o local o ninguna negociación colectiva que provea derechos superiores familiares o médicos.

La Sección 109 de FMLA (29 U.S.C. § 2619) exige que todo empresario bajo el alcance de FMLA exhiba el texto de este aviso. Los Reglamentos 29 C.F.R. § 825.300(a) pueden exigir divulgaciones adicionales.

Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c)**.**

[Part A – NOTICE OF ELIGIBILITY]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition;

_____ Because you are needed to care for your ____ spouse; _____child; _____ parent due to his/her serious health condition.

_____ Because of a qualifying exigency arising out of the fact that your ____ spouse; _____son or daughter; _____ parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserves.

Because you are the ____ spouse; _____ son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

_____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

_____ Are **not** eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):

_____ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately ___ months towards this requirement.
_____ You have not met the FMLA's 1,250-hours-worked requirement.
_____ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact _____ or view the FMLA poster located in _____.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request **is**/ **is not** enclosed.

Sufficient documentation to establish the required relationship between you and your family member.

____ Other information needed: _____

_____

_____

No additional information requested

If your leave does qualify as FMLA leave you will have the following **responsibilities** while on FMLA leave (only checked blanks apply):

____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

You will be required to use your available paid _____ **sick**, _____ **vacation**, and/or _____**other leave** during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

____ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We **have**/ **have not** determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following **rights** while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:

  _____ the calendar year (January – December).

  a fixed leave year based on _____.

  the 12-month period measured forward from the date of your first FMLA leave usage.

  a "rolling" 12-month period measured backward from the date of any FMLA leave usage.

- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have **____ sick, vacation,** and/or ___ **other leave** run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

  ____For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____.

  ____Applicable conditions for use of paid leave:_____

  _____

  _____

  _____

  _____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

_____at _____.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Designation Notice (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

To: _____

Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on _____ and decided:

_____ **Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.**

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

_____ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____

_____ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

_____ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

_____ We are requiring you to substitute or use paid leave during your FMLA leave.

_____ You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ☐ **is** ☐ **is not** attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

_____ **Additional information is needed to determine if your FMLA leave request can be approved:**

_____ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than _____, unless it is not
(Provide at least seven calendar days)
practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

_____
(Specify information needed to make the certification complete and sufficient)

_____

_____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

_____ Your FMLA Leave request is Not Approved.
_____ The FMLA does not apply to your leave request.
_____ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 – 30 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

_____

Check if job description is attached: .

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: _____
First Middle Last

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____) _____ Fax:(_____) _____

CONTINUED ON NEXT PAGE

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Mark below as applicable:
   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   No ___Yes. If so, dates of admission:

   _____

   Date(s) you treated the patient for condition:

   _____

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ___ Yes.

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

   Is the employee unable to perform any of his/her job functions due to the condition: ____ No ____ Yes.

   If so, identify the job functions the employee is unable to perform:

   _____

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

   _____

   _____

   _____

   _____

   _____

   _____

   _____

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of incapacity: _____

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Estimate the part-time or reduced work schedule the employee needs, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ____No ____Yes.

   Is it medically necessary for the employee to be absent from work during the flare-ups? ____ No ____ Yes. If so, explain:

   _____

   _____

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

Certification of Health Care Provider for Family Member's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

_____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: _____
First Middle Last

Name of family member for whom you will provide care:_____
First Middle Last

Relationship of family member to you: _____

If family member is your son or daughter, date of birth:_____

Describe care you will provide to your family member and estimate leave needed to provide care:

_____

_____

_____

_____ _____
Employee Signature Date

CONTINUED ON NEXT PAGE

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address:_____

Type of practice / Medical specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No Yes. If so, dates of admission: _____

   Date(s) you treated the patient for condition: _____

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ____ Yes

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____ No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

_____

_____

_____

_____

PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ___No ___Yes.

   Estimate the beginning and ending dates for the period of incapacity: _____

   During this time, will the patient need care? __ No __ Yes.

   Explain the care needed by the patient and why such care is medically necessary:

   _____

   _____

   _____

   _____

   _____

5. Will the patient require follow-up treatments, including any time for recovery? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? No __ Yes.

   Estimate the hours the patient needs care on an intermittent basis, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

   Explain the care needed by the patient, and why such care is medically necessary:

   _____

   _____

   _____

   _____

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____No ____Yes.

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

   Does the patient need care during these flare-ups? ____ No . Yes.

   Explain the care needed by the patient, and why such care is medically necessary: _____

_____

_____

_____

_____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

_____ _____

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.
DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

Certification of Qualifying Exigency For Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a qualifying exigency to submit a certification. Please complete Section I before giving this form to your employee. Your response is voluntary, and while you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.309.

Employer name: _____

Contact Information: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 C.F.R. § 825.310. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: _____
First Middle Last

Name of covered military member on active duty or call to active duty status in support of a contingency operation:

_____
First Middle Last

Relationship of covered military member to you: _____

Period of covered military member's active duty: _____

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a covered military member's active duty or call to active duty status in support of a contingency operation. Please check one of the following:

- ☐ A copy of the covered military member's active duty orders is attached.
- ☐ Other documentation from the military certifying that the covered military member is on active duty (or has been notified of an impending call to active duty) in support of a contingency operation is attached.
- ☐ I have previously provided my employer with sufficient written documentation confirming the covered military member's active duty or call to active duty status in support of a contingency operation.

CONTINUED ON NEXT PAGE

PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

_____

_____

_____

_____

_____

_____

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached. ☐ Yes ☐ No ☐ None Available

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: _____

   Probable duration of exigency: _____

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency? ☐ No ☐ Yes.

   If so, estimate the beginning and ending dates for the period of absence:

   _____.

3. Will you need to be absent from work periodically to address this qualifying exigency? ☐ No ☐ Yes.

   Estimate schedule of leave, including the dates of any scheduled meetings or appointments:_____

   _____

   _____

   _____

   Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours ___ day(s) per event.

CONTINUED ON NEXT PAGE

PART C:

If leave is requested to meet with a third party (such as to arrange for childcare, to attend counseling, to attend meetings with school or childcare providers, to make financial or legal arrangements, to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: _____ Title: _____

Organization: _____

Address: _____

Telephone: (_____) _____ Fax: (_____) _____

Email: _____

Describe nature of meeting: _____

_____

_____

_____

_____

_____

_____

_____

_____

PART D:

I certify that the information I provided above is true and correct.

_____ _____

Signature of Employee Date

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYER.**

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

Notice to the EMPLOYER INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a covered servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave INSTRUCTIONS to the EMPLOYEE or COVERED SERVICEMEMBER: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a covered servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 C.F.R. § 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a covered servicemember's serious injury or illness includes written documentation confirming that the covered servicemember's injury or illness was incurred in the line of duty on active duty and that the covered servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave.

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave: (This section must be completed first before any of the below sections can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for covered servicemember):

_____

Name of Employee Requesting Leave to Care for Covered Servicemember:

_____
First Middle Last

Name of Covered Servicemember (for whom employee is requesting leave to care):

_____
First Middle Last

Relationship of Employee to Covered Servicemember Requesting Leave to Care:
☐ Spouse ☐ Parent ☐ Son ☐ Daughter ☐ Next of Kin

Part B: COVERED SERVICEMEMBER INFORMATION

(1) Is the Covered Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves? ☐ Yes ☐ No

If yes, please provide the covered servicemember's military branch, rank and unit currently assigned to:

_____

Is the covered servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)? ☐ Yes ☐ No If yes, please provide the name of the medical treatment facility or unit:

_____

(2) Is the Covered Servicemember on the Temporary Disability Retired List (TDRL)? ☐ Yes ☐ No

Part C: CARE TO BE PROVIDED TO THE COVERED SERVICEMEMBER

Describe the Care to Be Provided to the Covered Servicemember and an Estimate of the Leave Needed to Provide the Care:

_____

SECTION II: For Completion by a United States Department of Defense ("DOD") Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator). (Please ensure that Section I above has been completed before completing this section.) Please be sure to sign the form on the last page.

Part A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name and Business Address:

_____

Type of Practice/Medical Specialty: _____

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider: _____

Telephone: ( ) _____ Fax: ( ) _____ Email: _____

PART B: MEDICAL STATUS

(1) Covered Servicemember's medical condition is classified as (Check One of the Appropriate Boxes):

☐ **(VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **(SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating.

☐ **NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a "serious health condition" under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380 or an employer-provided form seeking the same information.)

(2) Was the condition for which the Covered Service member is being treated incurred in line of duty on active duty in the armed forces? ☐ Yes ☐ No

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

(5) Is the covered servicemember undergoing medical treatment, recuperation, or therapy? ☐ Yes ☐ No. If yes, please describe medical treatment, recuperation or therapy:

PART C: COVERED SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER

(1) Will the covered servicemember need care for a single continuous period of time, including any time for treatment and recovery? ☐ Yes ☐ No
If yes, estimate the beginning and ending dates for this period of time: _____

(2) Will the covered servicemember require periodic follow-up treatment appointments?
☐ Yes ☐ No If yes, estimate the treatment schedule: _____

(3) Is there a medical necessity for the covered servicemember to have periodic care for these follow-up treatment appointments? ☐ Yes ☐ No

(4) Is there a medical necessity for the covered servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? ☐ Yes ☐ No If yes, please estimate the frequency and duration of the periodic care:

_____

_____

Signature of Health Care Provider: _____ Date: _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.**

Equal Employment Opportunity is

THE LAW

Private Employers, State and Local Governments, Educational Institutions, Employment Agencies and Labor Organizations

Applicants to and employees of most private employers, state and local governments, educational institutions, employment agencies and labor organizations are protected under Federal law from discrimination on the following bases:

RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN

Title VII of the Civil Rights Act of 1964, as amended, protects applicants and employees from discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment, on the basis of race, color, religion, sex (including pregnancy), or national origin. Religious discrimination includes failing to reasonably accommodate an employee's religious practices where the accommodation does not impose undue hardship.

DISABILITY

Title I and Title V of the Americans with Disabilities Act of 1990, as amended, protect qualified individuals from discrimination on the basis of disability in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. Disability discrimination includes not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, barring undue hardship.

AGE

The Age Discrimination in Employment Act of 1967, as amended, protects applicants and employees 40 years of age or older from discrimination based on age in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment.

SEX (WAGES)

In addition to sex discrimination prohibited by Title VII of the Civil Rights Act, as amended, the Equal Pay Act of 1963, as amended, prohibits sex discrimination in the payment of wages to women and men performing substantially equal work, in jobs that require equal skill, effort, and responsibility, under similar working conditions, in the same establishment.

GENETICS

Title II of the Genetic Information Nondiscrimination Act of 2008 protects applicants and employees from discrimination based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. GINA also restricts employers' acquisition of genetic information and strictly limits disclosure of genetic information. Genetic information includes information about genetic tests of applicants, employees, or their family members; the manifestation of diseases or disorders in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members.

RETALIATION

All of these Federal laws prohibit covered entities from retaliating against a person who files a charge of discrimination, participates in a discrimination proceeding, or otherwise opposes an unlawful employment practice.

WHAT TO DO IF YOU BELIEVE DISCRIMINATION HAS OCCURRED

There are strict time limits for filing charges of employment discrimination. To preserve the ability of EEOC to act on your behalf and to protect your right to file a private lawsuit, should you ultimately need to, you should contact EEOC promptly when discrimination is suspected:

The U.S. Equal Employment Opportunity Commission (EEOC), 1-800-669-4000 (toll-free) or 1-800-669-6820 (toll-free TTY number for individuals with hearing impairments). EEOC field office information is available at www.eeoc.gov or in most telephone directories in the U.S. Government or Federal Government section. Additional information about EEOC, including information about charge filing, is available at www.eeoc.gov.

Employers Holding Federal Contracts or Subcontracts

Applicants to and employees of companies with a Federal government contract or subcontract are protected under Federal law from discrimination on the following bases:

RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN

Executive Order 11246, as amended, prohibits job discrimination on the basis of race, color, religion, sex or national origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

INDIVIDUALS WITH DISABILITIES

Section 503 of the Rehabilitation Act of 1973, as amended, protects qualified individuals from discrimination on the basis of disability in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. Disability discrimination includes not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, barring undue hardship. Section 503 also requires that Federal contractors take affirmative action to employ and advance in employment qualified individuals with disabilities at all levels of employment, including the executive level.

DISABLED, RECENTLY SEPARATED, OTHER PROTECTED, AND ARMED FORCES SERVICE MEDAL VETERANS

The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, prohibits job discrimination and requires affirmative action to employ and advance in employment disabled veterans, recently separated veterans (within three years of discharge or release from active duty), other protected veterans (veterans who served during a war or in a campaign or expedition for which a campaign badge has been authorized), and Armed Forces service medal veterans (veterans who, while on active duty, participated in a U.S. military operation for which an Armed Forces service medal was awarded).

RETALIATION

Retaliation is prohibited against a person who files a complaint of discrimination, participates in an OFCCP proceeding, or otherwise opposes discrimination under these Federal laws.

Any person who believes a contractor has violated its nondiscrimination or affirmative action obligations under the authorities above should contact immediately:

The Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, 1-800-397-6251 (toll-free) or (202) 693-1337 (TTY). OFCCP may also be contacted by e-mail at OFCCP-Public@dol.gov, or by calling an OFCCP regional or district office, listed in most telephone directories under U.S. Government, Department of Labor.

Programs or Activities Receiving Federal Financial Assistance

RACE, COLOR, NATIONAL ORIGIN, SEX

In addition to the protections of Title VII of the Civil Rights Act of 1964, as amended, Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color or national origin in programs or activities receiving Federal financial assistance. Employment discrimination is covered by Title VI if the primary objective of the financial assistance is provision of employment, or where employment discrimination causes or may cause discrimination in providing services under such programs. Title IX of the Education Amendments of 1972 prohibits employment discrimination on the basis of sex in educational programs or activities which receive Federal financial assistance.

INDIVIDUALS WITH DISABILITIES

Section 504 of the Rehabilitation Act of 1973, as amended, prohibits employment discrimination on the basis of disability in any program or activity which receives Federal financial assistance. Discrimination is prohibited in all aspects of employment against persons with disabilities who, with or without reasonable accommodation, can perform the essential functions of the job.

If you believe you have been discriminated against in a program of any institution which receives Federal financial assistance, you should immediately contact the Federal agency providing such assistance.

LA IGUALDAD DE OPORTUNIDADES DE EMPLEO ES LA LEY

Empleadores que tienen contratos o subcontratos con el Gobierno Federal
Los empleados o postulantes a empleos de compañías que tienen contratos o subcontratos del gobierno federal gozan de la protección otorgada por las siguientes instituciones federales:

RAZA, COLOR, RELIGIÓN, SEXO, NACIONALIDAD
El Decreto 11246 (Executive Order 11246), con sus modificaciones, prohíbe la discriminación laboral en razón de raza, color de piel, religión, sexo o nacionalidad, y requiere la acción afirmativa para garantizar la igualdad de oportunidades en todos los aspectos laborales.

PERSONAS CON DISCAPACIDADES

El Artículo 503 de la Ley de Rehabilitación de 1973(The Rehabilitation Act of 1973), con sus modificaciones, prohíbe la discriminación laboral por discapacidad y requiere la acción afirmativa de emplear y avanzar en el empleo de personas discapacitadas idóneas que, mediante una adaptación razonable, puedan llevar a cabo las funciones esenciales de un trabajo.

VETERANOS DE VIETNAM CON DISCAPACIDADES ESPECIALES, RECIENTEMENTE RETIRADOS Y OTROS VETERANOS BAJO PROTECCIÓN

La Ley de Asistencia a la Readaptación de Veteranos de Vietnam de 1974 (The Vietnam Era Vererans' Readjustment Assistance Act of 1974), y sus modificaciones, 38 U.S.C., 4212, prohíbe toda discriminación laboral y requiere la acción afirmativa de emplear y avanzar en el empleo de veteranos de Vietnam idóneos, veteranos idóneos con discapacidades especiales, veteranos recientemente retirados y otros veteranos bajo protección. Un veterano recientemente retirado es todo veterano durante el período de tres años a partir de la fecha en que fue dado de baja o dejó el servicio activo en el Ejército, la Marina o la Fuerza Aérea de los EE. UU.

REPRESALIA
Queda prohibida toda represalia contra una persona que presenta un cargo de discriminación, participa en un procedimiento del Programa OFCCP o, de alguna otra manera, se opone a la discriminación de conformidad con las leyes federales.

Toda persona que cree que un contratista ha violado sus obligaciones de no discriminación o acción afirmativa, según las fuentes anteriores, debe ponerse en contacto de inmediato con:

La Oficina de Programas de Cumplimiento de Contratos Federales (The Office of Federal Contract Compliance Programs-OFCCP), Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, DC 20210, (202) 693-0101 o llamar a una oficina de la OFCCP regional o de distrito consignada en la mayor parte de los directorios telefónicos en U.S. Government, Department of Labor (Gobierno de los EE.UU., Departamento de Trabajo). Para personas con discapacidad auditiva, el número TTY de la OFCCP es (202) 693-1337.

Empleo privado, gobiernos estatales y locales, instituciones educativas, agencias de empleo y organizaciones laborales

Los empleados y postulantes a empleos de la mayor parte de los empleadores privados, gobiernos estatales y locales, instituciones educativas, agencias de empleo y organizaciones laborales gozan de la protección otorgada por las siguientes leyes federales:

RAZA, COLOR, RELIGIÓN, SEXO, NACIONALIDAD
La Ley de Derechos Civiles de 1964, Título VII (The Civil Rights Act of 1990), y sus modificaciones, prohíbe toda discriminación en relación con la contratación, ascenso, despido, remuneración, compensaciones adicionales, capacitación, clasificación, referencias, y otros aspectos laborales, en razón de la raza, el color de la piel, la religión, el sexo (incluidos embarazo y acoso sexual) o la nacionalidad. Por discriminación religiosa se entiende, entre otros, la falta de adaptación razonable para las prácticas religiosas de un empleado siempre que la adaptación no provoque una dificultad económica excesiva.

DISCAPACIDAD

La ley de Estadounidenses con Discapacidades de 1990 (The Americans with Disabilities Act of 1990-ADA), Títulos I y V, con sus modificaciones, protege a empleados y postulantes idóneos con discapacidades contra la discriminación en relación con la contratación, ascenso, despido, remuneración, capacitación, beneficios adicionales, clasificación, referencias y otros aspectos laborales en razón de la discapacidad.

La ley también requiere que las entidades contempladas provean las adaptaciones razonables que necesiten los empleados y postulantes con discapacidades, a menos que esas adaptaciones causen una dificultad económica excesiva al empleador.

EDAD
La Ley de Discriminación Laboral por Edad de 1967 (The Age Discrimination in Employment Act of 1967), con sus modificaciones, protege a los empleados y postulantes de 40 años o más contra la discriminación por edad en relación con la contratación, ascenso, despido, compensaciones, condiciones o privilegios laborales.

SEXO (SALARIOS)
Además de la discriminación sexual prohibida por la Ley de Derechos Civiles de 1964, Título VII, y sus modificaciones, la Ley de Igualdad en las Remuneraciones de 1963, con sus modificaciones, prohíbe la discriminación sexual en el pago de salarios a mujeres y hombres que básicamente realicen igual trabajo, en empleos que requieren igual capacidad, esfuerzo y responsabilidad, en condiciones laborales similares y en el mismo establecimiento.

REPRESALIA
Queda prohibida toda represalia contra una persona que presenta un cargo de discriminación, participa en un procedimiento de contra la discriminación o, de alguna otra manera, se opone a la discriminación de conformidad con las leyes federales.

Si cree que ha sufrido alguna discriminación, de conformidad con algunas de las leyes anteriores, y para garantizar que cumple con los estrictos cronogramas procesales a fin de preservar la capacidad de la EEOC para investigar su queja y para proteger su derecho a iniciar una demanda privada, debe ponerse en contacto de inmediato con:

La Comisión Federal de Igualdad de Oportunidades de Empleo de los EE.UU. (The US Equal Employment Opportunity Commission-EEOC), Washington, DC 20507 ó con una oficina de la EEOC telefónicamente a la línea gratuita (1-800) 669-4000. Para las personas con discapacidad auditiva, la línea gratuita TTY de la EEOC es 1-800 669-6820.

Programas o actividades que reciben apoyo financiero federal

RAZA, COLOR, SEXO, NACIONALIDAD
Además del Título VII de la Ley de Derechos Civiles de 1964, con sus modificaciones, el Título VI de la misma ley prohíbe la discriminación por raza, color de piel o nacionalidad en programas y actividades que reciben apoyo financiero federal. La discriminación laboral está contemplada en el Título VI si el objetivo principal del apoyo financiero es la provisión de empleo, o siempre que la discriminación laboral cause, o pueda causar, discriminación en la provisión de servicios en el marco de esos programas.

El Titulo IX de las Modificaciones de 1972 a la Ley de Educación (Education Amendments of 1972) prohíbe la discriminación laboral en razón de sexo en los programas o actividades educativas que reciben apoyo federal.

PERSONAS CON DISCAPACIDADES

El Artículo 504 de la Ley de Rehabilitación de 1973 , con sus modificaciones, prohíbe la discriminación laboral por discapacidad en todo programa o actividad que recibe apoyo financiero federal en el gobierno federal y las agencias públicas o privadas. Queda prohibida la discriminación en todos los aspectos laborales contra personas con discapacidades que puedan realizar las tareas esenciales relacionadas con ese puesto, sin perjuicio de que resulte o no necesario efectuar una adaptación razonable

Si cree que ha sufrido discriminación en relación con un programa de cualquier institución que reciba apoyo federal, debe contactarse de inmediato con la agencia federal que brinda ese apoyo.

Publicación OFCCP 1420
Se revisó en agosto de 2008

FOR USE BY PRIVATE SECTOR AND STATE GOVERNMENT EMPLOYERS

YOUR RIGHTS UNDER USERRA

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

REEMPLOYMENT RIGHTS

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- ☆ you ensure that your employer receives advance written or verbal notice of your service;
- ☆ you have five years or less of cumulative service in the uniformed services while with that particular employer;
- ☆ you return to work or apply for reemployment in a timely manner after conclusion of service; and
- ☆ you have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

RIGHT TO BE FREE FROM DISCRIMINATION AND RETALIATION

If you:

- ☆ are a past or present member of the uniformed service;
- ☆ have applied for membership in the uniformed service; or
- ☆ are obligated to serve in the uniformed service;

then an employer may not deny you:

- ☆ initial employment;
- ☆ reemployment;
- ☆ retention in employment;
- ☆ promotion; or
- ☆ any benefit of employment

because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

HEALTH INSURANCE PROTECTION

- ☆ If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.

- ☆ Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

ENFORCEMENT

- ☆ The U.S. Department of Labor, Veterans Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.

- ☆ For assistance in filing a complaint, or for any other information on USERRA, contact VETS at **1-866-4-USA-DOL** or visit its **website at http://www.dol.gov/vets**. An interactive online USERRA Advisor can be viewed at **http://www.dol.gov/elaws/userra.htm**.

- ☆ If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice for representation.

- ☆ You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. This notice was prepared by VETS, and may be viewed on the internet at this address: http://www.dol.gov/vets/programs/userra/poster.htm. Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying this notice where they customarily place notices for employees.

U.S. Department of Justice

U.S. Department of Labor
1-866-487-2365

1-800-336-4590

Publication Date—January 2006

Job Safety and Health

It's the law!

OSHA

Occupational Safety and Health Administration
U.S. Department of Labor

EMPLOYEES:

- You have the right to notify your employer or OSHA about workplace hazards. You may ask OSHA to keep your name confidential.
- You have the right to request an OSHA inspection if you believe that there are unsafe and unhealthful conditions in your workplace. You or your representative may participate in that inspection.
- You can file a complaint with OSHA within 30 days of retaliation or discrimination by your employer for making safety and health complaints or for exercising your rights under the *OSH Act*.
- You have the right to see OSHA citations issued to your employer. Your employer must post the citations at or near the place of the alleged violations.
- Your employer must correct workplace hazards by the date indicated on the citation and must certify that these hazards have been reduced or eliminated.
- You have the right to copies of your medical records and records of your exposures to toxic and harmful substances or conditions.
- Your employer must post this notice in your workplace.
- You must comply with all occupational safety and health standards issued under the *OSH Act* that apply to your own actions and conduct on the job.

EMPLOYERS:

- You must furnish your employees a place of employment free from recognized hazards.
- You must comply with the occupational safety and health standards issued under the *OSH Act*.

This free poster available from OSHA –
The Best Resource for Safety and Health

Free assistance in identifying and correcting hazards or complying with standards is available to employers, without citation or penalty, through OSHA-supported consultation programs in each state.

1-800-321-OSHA
www.osha.gov

OSHA 3165-12-06R

Seguridad y Salud en el Trabajo

¡Es la Ley!

OSHA

Administración de Seguridad y Salud Ocupacional

Departamento del Trabajo de los Estados Unidos

EMPLEADOS:

- Usted tiene el derecho de notificar a su empleador o a la OSHA sobre peligros en el lugar de trabajo. Usted también puede pedir que la OSHA no revele su nombre.
- Usted tiene el derecho de pedir a la OSHA que realize una inspección si usted piensa que en su trabajo existen condiciones peligrosas o poco saludables. Usted o su representante pueden participar en esa inspección.
- Usted tiene 30 días para presentar una queja ante la OSHA si su empleador llega a tomar represalias o discriminar en su contra por haber denunciado la condición de seguridad o salud o por ejercer los derechos consagrados bajo la Ley OSH.
- Usted tiene el derecho de ver las citaciones enviadas por la OSHA a su empleador. Su empleador debe colocar las citaciones en el lugar donde se encontraron las supuestas infracciones o cerca del mismo.
- Su empleador debe corregir los peligros en el lugar de trabajo para la fecha indicada en la citación y debe certificar que dichos peligros se hayan reducido o desaparecido.
- Usted tiene derecho de recibir copias de su historial o registro médico y el registro de su exposición a sustancias o condiciones tóxicas o dañinas.
- Su empleador debe colocar este aviso en su lugar de trabajo.
- Usted debe cumplir con todas las normas de seguridad y salud ocupacionales expedidas conforme a la Ley OSH que sean aplicables a sus propias acciones y conducta en el trabajo.

EMPLEADORES:

- Usted debe proporcionar a sus empleados un lugar de empleo libre de peligros conocidos.
- Usted debe cumplir con las normas de seguridad y salud ocupacionales expedidas conforme a la Ley OSH.

Los empleadores pueden obtener ayuda gratis para identificar y corregir las fuentes de peligro y para cumplir con las normas, sin citación ni multa, por medio de programas de consulta respaldados por la OSHA en cada estado del país.

1-800-321-OSHA

www.osha.gov

OSHA 3167-01-07R

UNEMPLOYMENT INSURANCE

FOR

EMPLOYEES

Your job with this employer is covered by the Employment Security Law. You may be able to establish a claim for Unemployment Insurance if you become TOTALLY or PARTIALLY unemployed and comply with all requirements.

IMPORTANT: YOU MAY FILE A CLAIM FOR BENEFITS AT ANY OFFICE OF THE GEORGIA DEPARTMENT OF LABOR LISTED BELOW. PLEASE BRING YOUR SEPARATION NOTICE, IF ONE WAS FURNISHED BY YOUR EMPLOYER.

THE EMPLOYMENT SECURITY LAW SAYS THAT FOR EACH WEEK YOU CLAIM INSURANCE FOR TOTAL UNEMPLOYMENT,

YOU MUST: **Register for employment services with the Georgia Department of Labor.**

BE: **UNEMPLOYED, ABLE to work, AVAILABLE for work, ACTIVELY SEEKING WORK, and be willing to immediately accept suitable work.**

YOU MUST: **Report all earnings each week.**
Report any job refusal.

NOTICE

No amount of money is deducted from your wages to pay the unemployment insurance tax. Georgia employers pay this tax into a trust fund.

OFFICES WHERE UNEMPLOYMENT INSURANCE CLAIMS MAY BE FILED

ALBANY
AMERICUS
ATHENS
AUGUSTA
BAINBRIDGE
BLAIRSVILLE
BLUE RIDGE
BRUNSWICK
CAIRO
CAMILLA
CARROLLTON
CARTERSVILLE
CEDARTOWN
CLAYTON COUNTY
COBB/CHEROKEE
COLUMBUS
CORDELE
COVINGTON
DALTON
DEKALB COUNTY
DOUGLAS
DUBLIN
EASTMAN
ELBERTON
GAINESVILLE
GRIFFIN
GWINNETT COUNTY
HABERSHAM
HINESVILLE
HOUSTON COUNTY
JESUP
KINGS BAY
LAFAYETTE
LAGRANGE
MACON
MILLEDGEVILLE
MONROE
MOULTRIE
NEWNAN
NORTH METRO-ATLANTA
NORTHWEST GEORGIA-
(FT. OGLETHORPE)
ROME
SAVANNAH
SOUTH METRO-ATLANTA
STATESBORO
SYLVESTER
THOMASVILLE
THOMSON
TIFTON
TOCCOA
VALDOSTA
VIDALIA
WAYCROSS

GEORGIA DEPARTMENT OF LABOR

Equal Opportunity Employer/Program ● Auxiliary Aids & Services Are Available Upon Request To Individuals With Disabilities

DOL-810 (R-01/01)

SEGURO DE DESEMPLEO
PARA
EMPLEADOS

Su trabajo con este empleador está amparado por la Ley de Seguro de Desempleo. Es posible que usted pueda establecer una solicitud de seguro de desempleo si queda TOTAL o PARCIALMENTE desempleado y cumple todos los requisitos.

IMPORTANTE: PUEDE PRESENTAR UNA SOLICITUD DE BENEFICIOS EN CUALQUIER OFICINA DEL DEPARTAMENTO DE TRABAJO DE GEORGIA QUE SE INDICAN A CONTINUACIÓN. TRAIGA SU AVISO DE SEPARACIÓN, SI SU EMPLEADOR SE LO PROPORCIONÓ.

LA LEY DE SEGURIDAD LABORAL ESTABLECE QUE POR CADA SEMANA PARA LA QUE RECLAME EL SEGURO POR DESEMPLEO TOTAL,

USTED DEBE: **Registrarse en los servicios de empleo del Departamento de Trabajo de Georgia.**

ESTAR: **DESEMPLEADO, CAPAZ de trabajar, DISPONIBLE para trabajar, BUSCANDO TRABAJO ACTIVAMENTE y desear aceptar inmediatamente un trabajo adecuado.**

USTED DEBE: **Informar las ganancias de cada semana.**
Los rechazos de empleos.

AVISO

No se deduce ningún importe de sus salarios para pagar el impuesto del seguro de desempleo. Los empleados de Georgia pagan este impuesto a un fondo fiduciario.

OFICINAS DONDE SE PUEDE PRESENTAR LAS SOLICITUDES DE SEGURO DE DESEMPLEO

ALBANY	CARTERSVILLE	EASTMAN	LAGRANGE	SOUTH METRO-ATLANTA
AMERICUS	CEDARTOWN	ELBERTON	MACON	STATESBORO
ATHENS	CLAYTON COUNTY	GAINESVILLE	MILLEDGEVILLE	SYLVESTER
AUGUSTA	COBB/CHEROKEE	GRIFFIN	MONROE	THOMASVILLE
BAINBRIDGE	COLUMBUS	GWINNETT COUNTY	MOULTRIE	THOMSON
BLAIRSVILLE	CORDELE	HABERSHAM	NEWNAN	TIFTON
BLUE RIDGE	COVINGTON	HINESVILLE	NORTH METRO-ATLANTA	TOCCOA
BRUNSWICK	DALTON	HOUSTON COUNTY	NORTHWEST GEORGIA-	VALDOSTA
CAIRO	DEKALB COUNTY	JESUP	(FT. OGLETHORPE)	VIDALIA
CAMILLA	DOUGLAS	KINGS BAY	ROME	WAYCROSS
CARROLLTON	DUBLIN	LAFAYETTE	SAVANNAH	

DEPARTAMENTO DE TRABAJO DE GEORGIA

Empleador/programa con igualdad de oportunidades • Se dispone de ayudas y servicios auxiliares a pedido para personas con discapacidades

DOL-810 SP (R-01/01)

VACATION

UNEMPLOYMENT INSURANCE IS

NOT PAYABLE

WHEN YOU ARE ON

- **LEAVE OF ABSENCE at your own request**
- **PAID VACATION**
- **UNPAID VACATION, up to two weeks in a calendar year if provided by**

  EMPLOYMENT CONTRACT, or by

  ESTABLISHED EMPLOYER CUSTOM, PRACTICE OR POLICY

PARAGRAPH (a)(3) OF OCGA SECTION 34-8-195

GEORGIA DEPARTMENT OF LABOR

DOL-154 (R-1/92)

VACACIONES

SEGURO DE DESEMPLEO

NO SE PAGA

CUANDO USTED ESTA EN:

- **AUSENCIA AUTORIZADA, QUE Vd. HA SOLICITADO.**
- **VACACIONES PAGAS**
- **VACACIONES SIN PAGA, hasta por dos (2) semanas en el Año de calendario de acuerdo a un CONTRATO DE TRABAJO, o por COSTUMBRE, PRACTICA O REGLAMENTO ESTABLECIDOS POR SU EMPLEADOR.**

PARAGRAFO (a)(3) SECCION 34-8-195 de OCGA

GEORGIA DEPARTMENT OF LABOR
DEPARTMENTO DE TRABAJO DE GEORGIA

DOL-154SP (10/99)

EQUAL PAY FOR EQUAL WORK ACT

POLICY

The General Assembly of Georgia hereby declares that the practice of discriminating on the basis of sex by paying wages to employees of one sex at a lesser rate than the rate paid to employees of the opposite sex for comparable work on jobs which require the same or essentially the same knowledge, skill, effort and responsibility unjustly discriminates against the person receiving the lesser rate:

> It is hereby declared to be the policy of the State of Georgia through the exercise of the police power of this State to correct and, as rapidly as possible, to eliminate discriminatory wage practices based on sex.

PROHIBITION OF DISCRIMINATION

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages at a rate less than the rate paid to the opposite sex, EXCEPT WHERE SUCH PAYMENT IS MADE PURSUANT TO:

1. A seniority system;

2. A merit system;

3. A system which measures earnings by quantity or quality of production, or

4. A differential based on any other factor other than SEX: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

It shall also be unlawful for any person to cause or attempt to cause an employer to discriminate against any employee in violation of the provisions of this Chapter.

It shall be unlawful for any person to discharge or in any other manner discriminate against any employee covered by this Chapter because such employee has made a complaint against the employer or any other person or has instituted or caused to be instituted any proceeding under or related to this Chapter or has testified or is about to testify in any such proceedings. Any person who violates any provision of this Code section shall, upon conviction thereof, be punished by a fine not to exceed $100.00. (OCGA Section 34-5-3.)

FOR INFORMATION ON EQUAL PAY FOR EQUAL WORK ACT CONTACT:

Georgia Department of Labor
Office of Equal Opportunity
148 Andrew Young International Blvd., N. E.
Atlanta, Georgia 30303-1751

FOR ADDITIONAL POSTERS PHONE: (404) 232-3392

POST IN PROMINENT PLACE AS REQUIRED BY LAW

Georgia Department of Labor
Michael L. Thurmond, Commissioner

An Equal Opportunity Employer/Program

DOL-4107 (R-12/03)

ACTA DE IGUAL PAGO POR IGUAL TRABAJO

DECLARACION

La Asamblea General de Georgia por esta Acta declara que la práctica de discriminación basada en sexo mediante el pago de menor salario a miembros de un sexo que el pagado a miembros del sexo opuesto por trabajo similar y que requiera el mismo, o esencialmente igual conocimiento, destreza, esfuerzo y responsabilidad, injustamente discrimina hacia la persona quien recibe el menor salario.

Se declara aqui que será la práctica del Estado de Georgia mediante el ejercicio de los poderes de vigilancia de este
Estado, el corregir y tan rápidamente como sea posible, eliminar la discriminación de salario basado en sexo.

PROHIBICION DE DISCRIMINACION

Ningun Empleador quien tiene empleados sujetos a cualquier provision de esta sección podra discriminar, dentro de cualquier establecimiento donde tales trabajadores están empleados, hacia trabajadores con base en sexo mediante el pago de sueldos menores que los pagados a miembros del sexo opuesto, EXCEPTO CUANDO TALES PAGOS SE HACEN DE ACUERDO A :

1. Un sistema de antiguedad en el empleo. (Señorío).

2. Un sistema de Servicio Civil (Merit System)

3. Un sistema de salario basado en cantidad o cualidad de producción, o

4. Una diferencia en salario basada en cualuier otro factor que no sea SEXO, siempre que el Empleador que se encuentre pagando una diferencia de salario en violación de esta sub-sección no reduzca el salario básico del empleado para dar cumplimiento.

Asimismo es ilegal que alguna persona cause o atente a causar que un Empleador discrimine hacia un empleado en violación de las disposiciones de este Capítulo.

Es ilegal el que una persona despida o discrimine en cualquier otra forma hacia una persona cubierta por este Capítulo porque el empleado haya reclamado contra el empleador o cualquier otra persona o haya iniciado o tomado parte en la iniciación de algun proceso relacionado con este Capitulo o ha sido testigo o esté a punto de atestiguar en tales procesos. La persona que viole cualquier estipulación de este Código será, previa convicción, sancionado con una multa máxima de $100.00. (OCGA Sección 34-5-3)

PARA INFORMACION DE IGUAL PAGO POR IGUAL TRABAJO, DIRIJASE A:

Georgia Department of Labor
Office of Equal Opportunity
148 Andrew Young International Blvd., N.E.
Atlanta, Georgia 30303-1751

PARA CARTELES ADICIONALES LLAME AL TELEFONO: (404) 232-3392

DEBE EXHIBIRSE EN LUGAR VISIBLE DE ACUERDO CON LA LEY

GEORGIA DEPARTMENT OF LABOR
(Departamento del Trabajo de Georgia)

An Equal Opportunity Employer
(Empleador con Igualdad de Oportunidades)

DOL-4107SP (12/03)

(This notice must be posted in a conspicuous place readily accessible to the employee at all times.)

OFFICIAL NOTICE

This business operates under the Georgia Workers' Compensation Law.

WORKERS MUST REPORT ALL ACCIDENTS IMMEDIATELY TO THE EMPLOYER BY ADVISING THE EMPLOYER PERSONALLY, AN AGENT, REPRESENTATIVE, BOSS, SUPERVISOR, OR FOREMAN.

If a worker is injured at work, the employer shall pay medical and rehabilitation expenses within the limits of the law. In some cases the employer will also pay a part of the worker's lost wages.

Work injuries and occupational diseases should be reported in writing whenever possible. The worker may lose the right to receive compensation if an accident is not reported within 30 days (see O.C.G.A. § 34-9-80).

The employer will supply free of charge, upon request, a form for reporting accidents and will also furnish, free of charge, information about workers' compensation. The employer will also furnish to the employee, upon request, copies of board forms on file with the employer pertaining to an employee's claim.

A worker injured on the job must select a doctor from the list below. The minimum panel shall consist of at least six physicians, including an orthopedic surgeon with no more than two physicians from industrial clinics (see O.C.G.A. § 34-9-201). Further, this panel shall include one minority physician, whenever feasible (see Rule 201 for definition of minority physician). The Board may grant exceptions to the required size of the panel where it is demonstrated that more than four physicians are not reasonably accessible. One change to another doctor from the list may be made without permission. Further changes require the permission of the employer or the State Board of Workers' Compensation.

State Board of Workers' Compensation
270 Peachtree Street, N.W.
Atlanta, Georgia 30303-1299
404-656-3818
or 1-800-533-0682
http://www.sbwc.georgia.gov

_____	_____	_____
name/address/phone	name/address/phone	name/address/phone
_____	_____	_____
name/address/phone	name/address/phone	name/address/phone

(Additional doctors may be added on a separate sheet)
The insurance company providing coverage for this business under the Workers' Compensation Law is:

_____
Name

_____
address phone

IF YOU HAVE QUESTIONS PLEASE CONTACT THE STATE BOARD OF WORKERS' COMPENSATION AT 404-656-3818 OR 1-800-533-0682 OR VISIT http://www.sbwc.georgia.gov

Willfully making a false statement for the purpose of obtaining or denying benefits is a crime subject to penalties of up to $10,000.00 per violation (O.C.G.A. §34-9-18 and §34-9-19).

WC-P1 (7/2006)

(Este aviso debe ser puesto en un lugar accesible al empleado todo el tiempo.)

AVISO OFICIAL

Esta compañía opera bajo las Leyes de Compensación de Trabajadores de Georgia

LOS TRABAJADORES DEBEN REPORTAR TODOS LOS ACCIDENTES INMEDIATAMENTE AL EMPLEADOR Y AVISAR AL EMPLEADOR PERSONALMENTE, UN AGENTE, PREPRESENTANTE, PATRON, SUPERVISOR O CAPATAZ.

Si un trabajador es lesionado en el trabajo el empleador debe pagar gastos médicos y rehabilitación dentro de los limites de la ley. En algunos casos el empleador también pagara una parte de los salarios perdidos de los empleados.

Lesiones de trabajo y enfermedades ocupacionales deben ser reportados por escrito cuando sea posible. El trabajador puede perder el derecho a recibir compensación si un accidente no es reportado dentro de 30 días (referencia O.C.G.A. § 34-9-80).

El empleador ofrecerá sin costo alguno, si es pedido, un formulario para reportar accidentes y también debe suministrar, sin costo alguno, información acerca de compensación de trabajadores. El empleador también debe suministrar al empleado, cuando sea pedido, copias de formularios de la Junta archivados con el empleador pertenecientes a reclamos de los empleados.

Un trabajador lesionado en el trabajo debe seleccionar un doctor de la lista abajo. El panel mínimo debe consistir de por lo menos seis médicos, incluyendo un cirujano ortopédico con no más de dos médicos de clínicas indústriales (referencia O.C.G.A. § 34-9-201). Además, este panel debe incluir un medico minoritario, cuando sea posible (vea la regla 201 de definición de médicos minoritarios.) La Junta puede otorgar excepciones al tamaño requerido del panel donde se demuestre que más de cuatro médicos no son razonablemente accesibles. Un tambio de un doctor a otro en la lista se puede hacer fin permiso. Cambios adicionales requieren el permiso del empleador o de la Junta Estatal de Compensación de Trabajadores.

Junta Estatal de Compensación de Trabajadores
270 Peachtree Street, N.W.
Atlanta, Georgia 30303-1299
404-656-3818
o 1-800-533-0682
http://www.sbwc.georgia.gov

_____	_____	_____
nombre /dirección /teléfono	nombre /dirección /teléfono	nombre /dirección /teléfono
_____	_____	_____
nombre /dirección /teléfono	nombre /dirección /teléfono	nombre /dirección /teléfono

(Médicos adicionales pueden ser agregados en una hoja separada.)

La compañia de seguro que provee cobertura para esta Empresa bajo la ley de Compensación de Trabajadores es:

_____
Nombre

_____
dirección teléfono

SI USTED TIENE PREGUNTAS LLAME AL (404) 656-3818 o 1-800-533-0682 o VISITA SITIO WEB: http://www.sbwc.georgia.gov

HACER FALSOS TESTIMONIOS VOLUNTARIAMENTE CON EL PROPÓSITO DE OBTENER O NEGAR BENEFICIOS ES UN CRIMEN SUJETO A PENALIDADES DE HASTA 10,000.00 POR VIOLACIÓN (O.C.G.A. §34-9-18 Y §34-9-19)

WC-P1 (7/2006)

GEORGIA STATE BOARD OF WORKERS' COMPENSATION

BILL OF RIGHTS FOR THE INJURED WORKER

As required by law, O.C.G.A. §34-9-81.1, this is a summary of your rights and responsibilities. The Workers' Compensation Law provides you, as a worker in the State of Georgia, with certain rights and responsibilities should you be injured on the job. The Workers' Compensation Law provides you coverage for a work-related injury even if an injury occurs on the first day on the job. In addition to rights, you also have certain responsibilities. Your rights and responsibilities are described below.

Employee's Rights

1. If you are injured on the job, you may receive medical rehabilitation and income benefits. These benefits are provided to help you return to work. Your dependents may also receive benefits if you die as a result of a job-related injury.

2. Your employer is required to post a list of at least six doctors or the name of the certified WC/MCO that provides medical care, unless the Board has granted an exception. You may choose a doctor from the list and make one change to another doctor on the list without the permission of your employer. However, in an emergency, you may get temporary medical care from any doctor until the emergency is over, then you must get treatment from a doctor on the posted list.

3. Your authorized doctor bills, hospital bills, rehabilitation in some cases, physical therapy, prescriptions, and necessary travel expenses will be paid if injury was caused by an accident on the job.

4. You are entitled to weekly income benefits if you have more than seven days of lost time due to an injury. Your first check should be mailed to you within 21 days after the first day you missed work. If you are out more than 21 consecutive days due to your injury, you will be paid for the first week.

5. Accidents are classified as being either catastrophic or non-catastrophic. Catastrophic injuries are those involving amputations, severe paralysis, severe head injuries, severe burns, blindness, or of a nature and severity that prevents the employee from being able to perform his or her prior work and any work available in substantial numbers within the national economy. In catastrophic cases, you are entitled to receive two-thirds of your average weekly wage but not more than $500 per week for a job-related injury for as long as you are unable to return to work. You also are entitled to receive medical and vocational rehabilitation benefits to help in recovering from your injury. If you need help in this area call the State Board of Workers' Compensation at (404) 656-3818.

6. In all other cases (non-catastrophic), you are entitled to receive two-thirds of your average weekly wage but not more than $500 per week for a job related injury. You will receive these weekly benefits as long as you are totally disabled, but no longer than 400 weeks. If you are not working and it is determined that you have been capable of performing work with restrictions for 52 consecutive weeks or 78 aggregate weeks, your weekly income benefits will be reduced to two-thirds of your average weekly wage but no more than $334 per week, not to exceed 350 weeks.

7. 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 $334 per week for no longer than 350 weeks.

8. Your dependent(s), in the event you die as a result of an on-the-job accident, will receive burial expenses up to $7,500 and two-thirds of your average weekly wage, but not more than $500 per week. A widowed spouse with no children will be paid a maximum of $150,000. Benefits continue until he/she remarries or openly cohabits with a person of the opposite sex.

9. If you do not receive benefits when due, the insurance carrier/employer must pay a penalty, which will be added to your payments.

Employee's Responsibilities

1. You should follow written rules of safety and other reasonable policies and procedures of the employer.

2. You must report any accident immediately, but not later than 30 days after the accident, to your employer, your employer's representative, your foreman or immediate supervisor. Failure to do so may result in the loss of the benefits.

3. An employee has a continuing obligation to cooperate with medical providers in the course of their treatment for work related injuries. You must accept reasonable medical treatment and rehabilitation services when ordered by the State Board of Workers' Compensation or the Board may suspend your benefits.

4. No compensation shall be allowed for an injury or death due to the employee's willful misconduct.

5. You must notify the insurance carrier/employer of your address when you move to a new location. You should notify the insurance carrier/employer when you are able to return to full-time or part-time work and report the amount of your weekly earnings because you may be entitled to some income benefits even though you have returned to work.

6. A dependent spouse of a deceased employee shall notify the insurance carrier/employer upon change of address or remarriage.

7. You must attempt a job approved by the authorized treating physician even if the pay is lower than the job you had when you were injured. If you do not attempt the job, your benefits may be suspended.

8. If you believe you are due benefits and your insurance carrier/employer denies these benefits, you must file a claim within one year after the date of last authorized medical treatment or within two years of your last payment of weekly benefits or you will lose your right to these benefits.

9. If your dependent(s) do not receive allowable benefit payments, the dependent(s) must file a claim with the State Board of Workers' Compensation within one year after your death or lose the right to these benefits.

10. Any request for reimbursement to you for mileage or other expenses related to medical care must be submitted to the insurance carrier/employer within one year of the date the expense was incurred.

11. If an employee unjustifiably refuses to submit to a drug test following an on-the-job injury, there shall be a presumption that the accident and injury were caused by alcohol or drugs. If the presumption is not overcome by other evidence, any claim for workers' compensation benefits would be denied.

12. You shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $10,000.00 or imprisonment, up to 12 months, or both, for making false or misleading statements when claiming benefits. Also, any false statements or false evidence given under oath during the course of any administrative or appellate division hearing is perjury.

The State Board of Workers' Compensation will provide you with information regarding how to file a claim and will answer any other questions regarding your rights under the law. If you are calling in the Atlanta area the telephone number is (404) 656-3818, outside the metro Atlanta area call 1-800-533-0682, or write the State Board of Workers' Compensation at: 270 Peachtree Street, N.W., Atlanta, Georgia 30303-1299 or visit our website: http://www.sbwc.georgia.gov. A lawyer is not needed to file a claim with the Board; however, if you think you need a lawyer and do not have your own personal lawyer, you may contact the Lawyer Referral Service at (404) 521-0777 or 1-800-237-2629.

(7/2007)

JUNTA ESTATAL DE COMPENSACIÓN DE TRABAJADORES DE GEORGIA

DECLARACIÓN DE DERECHOS PARA EL TRABAJADOR LESIONADO

Según lo requiere la Ley O.C.G.A. §34-9-81.1, esto es un recuento de sus derechos y responsabilidades. La Ley de Compensación de Trabajadores le provee a usted, como trabajador en el Estado de Georgia, ciertos derechos y responsabilidades si usted se lesiona en el trabajo. La Ley de Compensación de Trabajador lo provee a usted con cobertura de lesiones relacionadas con el trabajo aunque su lesión sea en el primer día de trabajo. Además de sus derechos, usted también tiene ciertas responsabilidades. Sus derechos y responsabilidades están descritos abajo.

Derechos de los Empleados

1. Si usted se lesiona en el trabajo, usted puede recibir rehabilitación médica y beneficios de ingresos. Estos beneficios son proveídos para ayudarlo a regresar al trabajo. También sus dependientes pueden recibir beneficios si usted muere como resultado de lesiones recibidas en el trabajo.

2. Se le requiere a su empleador que anuncie una lista de seis doctores o por lo menos el nombre de un WC/ MCO certificado que provee cuidados médicos, al menos que la Junta halla otorgado una excepción. Usted puede escoger un doctor de la lista sin el permiso de su empleador. Sin embargo, en una emergencia, usted puede recibir asistencia medica temporaria de cualquier otro medico hasta que la emergencia termine después usted debe recibir tratamiento de los médicos que se anuncian en la lista.

3. Sus cuentas médicas autorizadas, cuentas de hospital, rehabilitación en algunos casos, terapia física, recetas y gastos de transporte serán pagados si la lesión fue ocasionada por un accidente en el trabajo.

4. Usted tiene derecho a recibir beneficios de ingresos semanales si usted ha perdido tiempo por más de siete días debido a una lesión. Su primer cheque debe ser enviado a usted dentro de 21 días, después del primer día que falto al trabajo. Si esta fuera más de 21 días consecutivos debido a su lesión, se le pagara la primera semana.

5. Los accidentes son clasificados ya sea catastróficos o no catastróficos. Lesiones catastróficas son las que envuelven amputación, parálisis severas, lesiones severas de la cabeza, quemaduras severas, ceguera que prevenga al empleado a que pueda realizar el o ella su trabajo anterior o cualquier otro trabajo disponible en numero considerable dentro de la economía nacional. En casos catastróficos usted tiene derecho a recibir un promedio de dos terceras partes de su ingreso semanal pero no más de $500 por semana por una lesión relacionada con el trabajo durante todo el tiempo que usted no pueda regresar a su trabajo. Usted también tiene derecho a recibir beneficios médicos y de rehabilitación. Si usted necesita ayuda en esta área llame a la Junta Estatal de Compensación de Trabajadores al (404) 656-3818.

6. En todos los otros casos (no catastróficos) usted tiene el derecho a recibir dos terceras partes de su sueldo promedio semanal pero no mas de $500 por semana de una lesión relacionada de trabajo, usted recibirá estos beneficios mientras usted este incapacitado. Pero no más de 400 semanas si no esta trabajando y se determina que usted esta capacitado a desempeñar con restricción por 52 semanas consecutivas o 78 semanas agregadas sus ingresos semanales serán reducidos a dos terceras partes de su sueldo promedio pero no más de $334 por semana, que no excedan 350 semanas.

7. Cuando usted pueda regresar a trabajar pero solo pueda conseguir empleo de salario bajo como resultado de su lesión usted tiene derecho a un beneficio semanal de no mas de $334 por semana pero no más de 350 semanas.

8. En caso de que usted muera como resultado de un accidente en el trabajo, su dependiente (s) recibirán para gastos de entierro $7,500 y dos terceras partes de su sueldo promedio semanal, pero no más de $500 por semana. Una esposa viuda sin niños se le pagara un máximo de $150,000 en beneficios continuos hasta que EL/ELLA se vuelva a casar o abiertamente cohabite con una persona del sexo opuesto.

9. Si usted no recibe beneficios cuando sea debido, la compañía de seguro/empleador debe de pagar penalidades, que se agregaran a sus pagos.

Responsabilidades de los Empleados

1. Usted debe de seguir las reglas escritas de seguridad y otras pólizas razonables y procedimientos del empleador.

2. Usted debe reportar cualquier accidente inmediatamente, pero no más tarde de 30 días después del accidente, a su empleador, los representantes del empleador, su capataz o supervisor inmediato. Fallar en hacerlo puede resultar en la perdida de sus beneficios.

3. Un empleado tiene la continua obligación de cooperar con proveedores médicos en el curso de su tratamiento relacionado con lesiones de trabajo. Usted debe aceptar tratamientos médicos razonables y servicios de rehabilitación cuando sean ordenados por la Junta Estatal de Compensación de Trabajadores o la Junta puede suspender sus beneficios.

4. No se permitirá compensación por una lesión o muerte debido a una conducta mal intencionada de los empleados.

5. Debe de notificar a la compañía de seguro/empleador de su dirección cuando se mude a un nuevo lugar. Usted debe notificar a la compañía de seguros/empleador cuando usted halla regresado a trabajar de tiempo completo o medio tiempo y reportar la cantidad de su salario semanal porque usted puede tener derecho a algún beneficio de ingreso aun así halla regresado al trabajo.

6. Una esposa dependiente de un empleado difunto debe notificar a la compañía de seguro/ empleador de cambios de dirección o nuevo matrimonio.

7. Usted debe intentar un trabajo aprobado por su medico autorizado aunque el pago sea mas bajo que en el trabajo que usted tenia cuando se lesionó, si usted no intenta el trabajo sus beneficios pueden ser suspendidos.

8. Si usted cree que debe recibir beneficios y su compañía de seguros/empleador niega estos beneficios. Usted debe de hacer un reclamo dentro de un año después del ultimo tratamiento medico o dentro de dos años de su último pago de beneficios semanales o usted perderá sus derechos a estos beneficios.

9. Si su (s) dependiente (s) no reciben beneficio de pagos permitidos. El dependiente debe hacer un reclamo con la Junta Estatal de Compensación de Trabajadores dentro de un año después de su muerte o perderán los derechos a estos beneficios.

10. Algún pedido de reembolso a usted por millas o otros gastos relacionados con tratamiento medico debe ser sometidos a la compañía de seguros/empleador dentro de un año del día que los gastos fueron incurridos.

11. Si un empleado injustificadamente rehúsa a someterse a una prueba de droga después de una lesión en el trabajo habrá una presunción de que el accidente y lesión fueran causados por droga o alcohol. Si la presunción no se sobrepone por otras evidencias, algún reclamo hecho para beneficios de compensación de Trabajador serán negados.

12. Usted será culpable de un delito menor y una vez convicto debe ser castigado con una multa de no más de $10,000.00 o encarcelamiento de hasta 12 meses o las dos, por hacer declaraciones falsas o engañosos testimonios cuando reclame beneficios. También cualquier declaración falsa o evidencia falsa dadas bajo juramento durante el curso de alguna audiencia de división de apelación o administración es perjurio.

La Junta de Compensación de Trabajadores le proporcionará la información relativa a la manera de presentar una reclamación y responderá a cualquier preguntas adicionales sobre sus derechos en virtud de la ley. Si usted llama en la zona de Atlanta, el teléfono es el (404) 656-3818 y fuera de la zona metropolitana de Atlanta, llame al 1-800-533-0682, o escriba a la Junta Estatal de Compensación de Trabajadores a 270 Peachtree Street, NW, Atlanta, Georgia 30303-1299 o visita sitio web: http://www.sbwc.georgia.gov. No es necesario tener un abogado para presentar una reclamación a la Junta; sin embargo, si usted cree que necesita los servicios de un abogado y no tiene uno propio, usted puede ponerse en contacto con el Servicio de Referencia de Abogados (Lawyers Referral Service) al teléfono (404) 521-0777 o al 1-800-237-2629.

OUTLINE OF FEDERAL EMPLOYMENT LAW RECORDKEEPING REQUIREMENTS

Constangy, Brooks & Smith, LLP

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
1. PERSONNEL RECORDS:	Applications, resumes, and other forms of employment inquiries, job advertisements, documents related to hiring, firing, transfer, assignment, demotions, promotions, layoffs, payroll records, rates of pay or other terms of compensation, job descriptions, employment handbooks, selection for training or apprenticeship programs, employee evaluations, requests for reasonable accommodation	• **4 years generally recommended**[*]	None specified	For compliance with the following statutes, these records should be retained for 1 year from date decision was made not to hire individual, the date of the personnel action or date record is made (whichever is later), or the date of involuntary termination[±] • Title VII, Civil Rights Act of 1964[a]; 29 CFR §§ 1602.14, 1602.20, 1602.21, 1602.7 • Civil Rights Act of 1866[b]; 42 U.S.C. § 1981 • Americans with Disabilities Act Amendments Act (ADAAA)[a]; 42 U.S.C. § 12117(a), • Age Discrimination In Employment Act (ADEA)[c]; 29 CFR §§ 1627.2, 1627.3, 1627.4, 1627.5 • Executive Order 11246[d]; 41 CFR §§ 60-1.3, 60-1.7, 60-1.12 • Rehabilitation Act of 1973[e];41 CFR § 60-741.80 • Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA)[f]; 41 CFR §§ 60-250.2, 60-250.10, 60-250.80

[*] **NOTE: All employers are subject to the Civil Rights Act of 1866, 42 U.S.C. § 1981, as amended. Constangy recommends that <u>all employment records</u> be maintained for a <u>minimum of four years</u>, although some other applicable statutes have shorter limitations and record retention periods. *See* endnote b below. * Furthermore, in light of the Lily Ledbetter Fair Pay Act, an especially cautious course of action would be to retain all employment records in some format indefinitely.**

[±] Government contracts or subcontractors with 150 or more employees OR a government contract of $150,000 or more must keep records for 2 years.

OUTLINE OF FEDERAL EMPLOYMENT LAW RECORDKEEPING REQUIREMENTS

Constangy, Brooks & Smith, LLP

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
2. RECORDS RELATING TO EMPLOYMENT TESTS, EMPLOYMENT OPPORTUNITIES:	Personnel records relating to job orders submitted to employment agency or labor organization, test papers and documents related to employer-administered aptitude tests or other employment tests, physical examination results, interview notes, notices regarding openings, promotions, training programs, and opportunities for overtime work	• **4 years generally recommended**[*]	None specified – Physical exam results should be maintained in separate files and Treated as confidential medical records	For compliance with the following statutes, these records should be retained for 1 year from date of personnel action to which record relates[±] • ADEA; Rehabilitation Act; VEVRAA; Executive Order 11246
3. ONLINE/ INTERNET APPLICATION RECORDS:	Any and all expressions of interest through the Internet or related technologies as to which the employer or government contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying applicants contacted about their interest in a particular position • If utilizing INTERNAL RESUME DATABASE, must maintain a record of each resume added to the database, the date added, the position for which each search of the database was made, and for each such search, the search criteria and date • If utilizing EXTERNAL RESUME DATABASE, must maintain a record of the position for which each search of the database was made, and for each search, the search criteria, the date of the search, and the resumes of the job seekers who met basic position qualifications	• 1 year from date of personnel action to which record relates[±]	None specified	• Executive Order 11246

[±] Government contracts or subcontractors with 150 or more employees OR a government contract of $150,000 or more must keep records for 2 years.

OUTLINE OF FEDERAL EMPLOYMENT LAW RECORDKEEPING REQUIREMENTS

Constangy, Brooks & Smith, LLP

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
4. APPRENTICE PROGRAMS:	A chronological listing of the names, addresses, dates of application, gender, and minority group identification of all applicants for an apprenticeship program, including any test papers and interview notes; alternatively written applications which contain the required information will suffice	• **4 years generally recommended**[*]	None specified but report EEO-2 must be filed.	For compliance with Title VII these records should be maintained for 2 years or program length, whichever is greater
5. PAYROLL RECORDS:	Records that contain name, address, Social Security number, date of birth, date of hire, and date of termination, gender and occupation, and rate of pay, basis on which wages are paid (hourly, commission, piecemeal), total weekly earnings broken out by straight time and overtime premium, wages paid during each pay period, dates of payment and pay period covered	• 3 years from termination of employment	No form is specified but if microfilm is used, employer must make any required transcripts; must be made available upon 72 hours' notice	• Fair Labor Standards Act (FLSA)[g]; 29 CFR §§ 516.2, 516.3, 516.4, 516.5, 516.6, 516.7, 570.6 • ADEA; Family Medical Leave Act FMLA[h]; 5 CFR § 630.1211; 20 CFR § 825.500
6. TIME CARDS AND SCHEDULES:	Records showing time each workday began and ended, total hours worked in each day and each week, wage rate tables, work schedules, amount of and reason for each deduction from or addition to wages, and daily output of an employee not paid on an elapsed time basis	• 2 years from termination of employment	None specified; must be made available upon 72 hours' notice	• FLSA • FMLA
7. WAGE DIFFERENTIAL:	Records explaining any wage differential between sexes and substantiating documents	• 2 years	None specified	• Equal Pay Act[g]; 29 CFR § 1620.32; 20 CFR Part 516

OUTLINE OF FEDERAL EMPLOYMENT LAW RECORDKEEPING REQUIREMENTS

Constangy, Brooks & Smith, LLP

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
8. GENERAL BUSINESS RECORDS:	• Records showing total dollar volume of sales or business and total volume of goods purchased or received	• 3 years	As maintained in the ordinary course of business; must be made available upon 72 hours' notice	• FLSA
	• Records of customer orders or invoices, incoming or outgoing shipping or delivery records, bills of lading and billings to customers (not individual sales slips or cash register tapes)	• 2 years		
9. MINOR EMPLOYEES:	Certificates of age that include name, address, date of birth, place of birth, signature, and gender of minor, name and address of employer, industry of employer, occupation of minor, signature of issuing officer, date and place of issuance, and name and address of minor's parent or person standing in that position	• 3 years from termination of employment	Certificates of age must be kept on file at the minor's place of work; when minor terminates employment, employer must give certificate to minor	• FLSA
10. FEDERAL CONTRACTORS & SUBCONTRACTORS OF FEDERAL SERVICE CONTRACTS:	For each employee working on service contract, records showing name, address, work classification, Social Security number, rate of monetary wages and fringe benefits provided (or payments in lieu of benefits), total daily and weekly compensation, deductions from wages, daily and weekly hours worked, list of wages and benefits for those classes of service employees not included in wage determination for each contract, and list of predecessor contractor's employees furnished to the contractor	• 3 years from completion of contract	None specified	• McNamara-O'Hara Service Contract of 1965[i]; 29 CFR § 4.6(g)

OUTLINE OF FEDERAL EMPLOYMENT LAW RECORDKEEPING REQUIREMENTS

Constangy, Brooks & Smith, LLP

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
11. GOVERNMENT REPORTS:	• EEO-1 Reports • Government contractors with 50 or more employees and a single contract, subcontract, or purchase order amounting to $50,000 or more • All other employers with 100 or more employees	• 1 year	Records containing racial or ethnic identity should be kept separate from employee's basic personnel records that are available to those responsible for personnel decisions	• Executive Order 11246
	• VETS-100 Reports	• 1 year		• VEVRAA
12. MISC. DOCUMENTS, INCLUDING AGREEMENTS, CONTRACTS, CERTIFICATES, BENEFITS:	Written records relating to employee benefits plans, collective bargaining agreements, seniority and/or merit systems, plans, trusts, individual employment contracts, written FLSA agreements, certificates authorizing payment at less than minimum wage	• 3 years from end of plan or system	None specified	• FLSA • Equal Pay Act

OUTLINE OF FEDERAL EMPLOYMENT LAW RECORDKEEPING REQUIREMENTS

Constangy, Brooks & Smith, LLP

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
13. AFFIRMATIVE ACTION EMPLOYERS:†	• Applications for employment if employer has more than 150 employees, including where possible, the gender, race, and ethnicity of applicants and Internet applicants	• 2 years from the date of filling the position	Records containing racial or ethnic identity should be kept separate from employee's basic personnel records that are available to those responsible for personnel decisions	• Executive Order 11246 • Rehabilitation Act • VEVRAA
	• Applications for employment if employer has less than 150 employees or federal contracts of less than $150,000, including where possible, the gender, race, and ethnicity of applicants and Internet applicants	• 1 year from the date of filling the position		
	• Written affirmative action plans including supporting documentation, analyses, and related records or raw data, tests given to employees including documents on their use and validation studies;	• 2 years		
	• Personnel or employment records, including gender, race, and ethnicity	• 2 years from the date of the making of the record or personnel action		
	• Internal complaints and termination information for individuals with disabilities, disabled veterans, and veterans of the Vietnam era, includes all records concerning the actions taken and responses to such complaints and actions	• 1 year from termination of employment		

† These requirements apply to government contractors or subcontractors with more than 50 employees or a single contract in the amount of $50,000 or more. Any federal depository is also subject to these requirements.

OUTLINE OF FEDERAL EMPLOYMENT LAW RECORDKEEPING REQUIREMENTS

Constangy, Brooks & Smith, LLP

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
14. FAMILY AND MEDICAL LEAVE ACT RECORDS:	Medical certifications and related medical information, type of leave taken, dates or hours of leave taken, name, position, and pay rate of person on leave, copies of all notices given to or received from employee, documents describing employee benefits or employer policies and practices regarding paid and unpaid leave, premium payments of employee benefits, and status, beginning and ending date of employee's 12-month period, and records of any dispute between employer and employee	• 3 years from the date the leave ended	None specified; may be microfilm or computerized if made available upon request; medical records must be maintained in separate files and treated as confidential medical records	• FMLA
15. IMMIGRATION RECORDS:	Employment Eligibility Verification Form I-9	• 3 years from the date of completion • OR 1 year from termination of employment, whichever is later	I-9 Form. Recommended that I-9 forms are kept separate from regular personnel documents to ensure no discrimination and easily distinguishable access to files if audited.	• Immigration Reform and Control Act (IRCA)[j]
16. RECORDS OF SELF-IDENTIFYING VETERANS AND INDIVIDUALS WITH DISABILITIES:	Government contractors must keep a separate file on applicants and employees that self-identify as disabled veterans or Vietnam-Era veterans, or individuals with disabilities	• 2 years	None specified	• Rehabilitation Act • VEVRAA
17. EMPLOYEE BENEFITS RECORDS:	Benefit plan documents, disclosure of plan description, annual reports and summary of annual reports, summary plan descriptions,	• Generally 6 years from filing (or date would have been	None specified; electronic record-keeping is	• Employment Retirement Income Security Act (ERISA)[k]; 29 USC §

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
	all recorded information used in compiling required reports (such as vouchers, worksheets, receipts, applicable resolutions, and participants' elections and deferrals), copies of COBRA notices, acknowledgments that COBRA notices were received, documents relating to any instance in which COBRA is not offered due to gross misconduct, and COBRA-related correspondence‡	filed but for exemption or simplified reporting requirement) • Every employer must maintain records concerning employees' benefits that are sufficient to determine the benefits due or which may become due to the employees	satisfactory if system has controls to ensure the integrity, accuracy, authenticity, and reliability of the records, the records are kept in reasonable order and may be readily inspected and searched and records management practices are established (such as labeling, back-up, and storage of retained records), and records are easily legible and readable on video terminal and when reproduced on paper Paper records may be destroyed once records are converted to an electronic recordkeeping	1027; 29 CFR § 2520.107-1 • Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)

‡ COBRA regulations do not specify a recordkeeping period. However, as COBRA amended ERISA, it is recommended that records be maintained for six years from the date of the record. Employers who sponsor group health plans or are otherwise not subject to ERISA should review the record keeping requirements of the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. § 1320d-1 – d-8. Generally, employers subject to HIPAA must keep records relating to their privacy policies, procedures, and notifications, disclosures of protected health information, authorizations, documentation concerning complaints, records of sanctions, and business associate contracts for a period of six years. *See generally* 45 C.F.R. § 164.530(j).

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
			system that satisfies all requirements	
18. OSHA RECORDS:	• OSHA Form 300 and 300-A: Record employee's injuries or illnesses if they result in death, one or more days away from work, restriction of work or motion, loss of consciousness, transfer to another job or medical treatment and work-related cases of cancer, chronic irreversible disease, fractured or cracked bone, or punctured eardrum when diagnosed by physician, include employee's name (or confidential number), job title, date of injury or onset of illness, description of injury or illness, parts of body affected, object or substance that caused injury or illness, number of calendar days away from work, on restricted duty, and fatalities	• 5 years following end of year to which records relate.	• Entries must be made within 7 calendar days • Records may be computerized	Occupational Safety and Health Act (OSHA)[1]; 29 USC §§ 657-58; 29 CFR §§ 1904.7, 1904.29, 1904.32, 1904.44
	• OSHA Form 301: Record injured or ill employee's name, address, age, and gender, name and address of physician or other health care provider who provided treatment, indicate whether employee was treated in an emergency room or hospitalized, the date, time and description of injury or illness, how injury occurred, and what employee was doing just before incident	• 5 years following end of year to which records relate	• Entries must be made within 7 calendar days	
	• Employee medical records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical	• Duration of employment, plus	• None specified	

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
	agents	30 years		
	• Employee exposure records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical agents (includes records of any personal or area monitoring of occupational exposure to hazardous materials)	• 30 years	• None specified	
19. RECORDS RELATING TO CHARGE, COMPLAINT, ENFORCEMENT ACTION, OR COMPLIANCE REVIEW:	Personnel or employment records relating to aggrieved person and to all other employees holding positions similar to that held by aggrieved person, including application forms and test papers completed by aggrieved person and all other persons applying for same position as aggrieved person	Until final disposition of the charge, complaint, review, or action	None specified	• Title VII • ADEA • ADAAA • Rehabilitation Act • Executive Order 11246 • VEVRAA
20. POLYGRAPH RESULTS:	A copy of the statement concerning the activity or incident under investigation and basis for testing particular employee, all opinions, reports, charts, written questions, lists, or other records relating to the test furnished by the examiner, records identifying the loss or injury and the access of the examinee to the loss or injury, identity of persons examined, copy of the written statement of time and place of examination and the examinee's right to consult counsel, notice to examiner of persons to be examined, and a record of the number of exams conducted each day as well as duration of examinations	3 years from date of exam (or from date examination requested if no exam is conducted)	Must be kept safe and accessible upon 72 hours' notice	• Employee Polygraph Protection Act of 1988[m]; 29 CFR § 801.30

OUTLINE OF FEDERAL EMPLOYMENT LAW RECORDKEEPING REQUIREMENTS

Constangy, Brooks & Smith, LLP

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
21. DRUG TESTING RECORDS:	DOT drug testing records for employees in safety-sensitive transportation positions in aviation, trucking, railroads, mass transit, pipelines and other transportation industries:[§]			• Omnibus Transportation Employee Testing Act of 1991[n]; 14 CFR Part 121, App. I; 14 CFR Part 121 App. J; 49 CFR § 382.401; 49 CFR § 219.901; 49 CFR § 219.903; 49 CFR § 655.71; 49 CFR § 199.227; 46 CFR § 16.260
	• Negative test results and alcohol tests results less than .02	• 1 year from test date (2 years for railroad)		
	• Records related to the alcohol and drug collection process, random selection process, documents relating to decision to administer reasonable suspicion testing, and relating to post-accident testing	• 2 years		
	• Education and training records	• Maintain while individual is performing the function + 2 years after individual leaves function		
	• Records from previous employers concerning drug and alcohol testing results of employees	• 3 years from receiving records from previous employers		

[§] The retention requirements provided here are generally appropriate for all federally-mandated drug and alcohol testing for employees, however some variations exist between specific industries for some employees, specifically railroad employees, airline pilots, and pipeline employees. Additional review of industry-specific regulations should be conducted to determine an employer's obligations if engaged in those industries.

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
	• Verified positive test results, documentation of refusal to submit to required tests, employee evaluations and referrals, controlled substance testing program administration, and annual MIS reports	• 5 years from making of record		

[a] Title VII and the ADAAA apply to all employers engaged in interstate commerce with 15 or more employees.

[b] NOTE: All employers are subject to the Civil Rights Act of 1866, 42 U.S.C. § 1981, as amended, which, in pertinent part, says that all citizens will have the same right to make and enforce contracts as white citizens. In 1991, Congress amended Section 1981 to provide that "make and enforce contracts" included certain conduct that occurred after the formation of the contract. In the context of the employment relationship, the 1991 amendment means that post-hire conduct such as harassment or termination is encompassed within Section 1981. Section 1981 has been applied to cases of race, color, and national origin discrimination in employment. The statute of limitations on Section 1981 claims was the most-analogous state statute of limitations, which was normally the particular state's statute of limitations for negligence actions (usually approximately three years). *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S. Ct. 2617 (1987). In 1990, Congress enacted a four-year "catchall" statute of limitations that applied to federal statutes that were enacted after December 1990 and that did not contain their own specific statutes of limitations. *See* 28 U.S.C. Section 1658(a). The U.S. Supreme Court in *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 124 S. Ct. 1836 (2004), held that the four-year statute of limitations in 28 U.S.C. Section 1658(a) applied to claims under Section 1981 if they could not have been brought but for the amendments to Section 1981 that were enacted in 1991. This would include claims for harassment and discriminatory termination. Otherwise, the most-analogous applicable state statute of limitations (often, but not always, three years) would apply to claims that would have been cognizable before the 1991 amendments, such as discriminatory failure to hire. Based on the above, Constangy recommends that all employment records be maintained for a minimum of four years, although some other applicable statutes have shorter limitations and record retention periods. Constangy also recommends that employers check the statutes of limitations in their relevant states that would apply to Section 1981 actions and ensure that they are retaining records for that period if it is longer than four years.

[c] The ADEA applies to employers engaged in interstate commerce with 20 or more employees.

[d] Executive Order 11246 applies to employers who are government contractors with an annual contract of $10,000 or more. The recordkeeping requirements of Executive Order 11246 are applicable to government contractors with more than 50 employees and a single government contract in excess of $50,000.

[e] The Rehabilitation Act applies to employers with government contracts in excess of $10,000.

[f] VEVRAA applies to employers with government contracts of $25,000 or more.

[g] The FLSA and Equal Pay Act apply generally to employers with 2 or more employees handling goods that have moved in commerce.

[h] The FMLA applies to employers with 50 or more employees.

[i] The McNamara-O'Hara Service Contract Act applies to employers with federal government contracts greater than $2,500 involving the use of service employees.

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[j] The Immigration Reform and Control Act applies to all private employers with respect to prohibition on hiring unauthorized aliens; only employers with more than 3 employees covered with respect to prohibitions against national original and citizenship discrimination.

[k] ERISA applies to all administrators of any pension or welfare benefit plan, including health, life, severance, disability, scholarship and apprenticeship plans.

[l] OSHA requirements concerning Forms 300 and 301 apply to employers of 11 or more employees (except employers in certain low hazard retail, service, finance, insurance or real estate industries as specified at 29 CFR § 1904.2). OSHA requirements concerning retention of medical records and employee exposure records apply to all employers.

[m] The Employee Polygraph Protection Act applies to all private sector employers engaged in or affecting commerce or in the production of goods for commerce.

[n] The Omnibus Transportation Employee Testing Act applies to employers covered under Department of Transportation drug and alcohol testing regulations, including employers engaged in the following industries: airlines, motor carrier, railroad, transit, pipelines, and maritime transportation.

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