

***GEORGIA
LABOR AND EMPLOYMENT LAWS***

A Summary For Georgia Employers

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Table of Contents

	Page
I. <u>INTRODUCTION</u>	6
II. <u>FEDERAL EMPLOYMENT LAW</u>	6
A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND RELATED LAWS.....	6
1. Title VII and Related Laws	6
2. Sexual Harassment	7
3. Dealing with the EEOC	10
B. AMERICANS WITH DISABILITIES ACT.....	11
C. FAMILY AND MEDICAL LEAVE ACT.....	13
D. AGE DISCRIMINATION IN EMPLOYMENT ACT.....	14
E. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT.....	16
F. FAIR LABOR STANDARDS ACT	18
1. New Standard Salary Test	18
2. The Executive Exemption	19
3. The Administrative Exemption	19
4. The Professional Exemption.....	19
5. Computer Employee Exemption	20
6. The Outside Sales Exemption	20
7. Highly Compensated Exemption.....	21
8. Blue Collar Workers.....	21
9. Salary Deductions for Exempt Employees.....	21
10. Employee Training	22
11. Eating Lunch On The Premises	23

12.	Donning And Doffing.....	24
G.	FAIR CREDIT REPORTING ACT	25
H.	IMMIGRATION LAWS	26
1.	Verification of Employment Eligibility.....	26
2.	Reverification	29
3.	Retention and Inspection of Forms I-9	30
4.	Practical Advice.....	30
5.	Discrimination Prohibited	31
I.	OCCUPATIONAL SAFETY AND HEALTH ACT	32
1.	Who is Covered	32
2.	Basic Provisions/Requirements	32
3.	OSHA Standards	32
4.	Employee Rights	33
5.	Voluntary Protection Programs	33
6.	Inspections and Citations.....	34
7.	Employer Preventive Measures	34
III.	<u>LABOR UNIONS AND APPLICABLE LAWS</u>	35
A.	UNION ORGANIZATION PROCESS	35
1.	Rights and Unfair Labor Practices.....	35
2.	The Representation Process.....	36
B.	STEPS EMPLOYERS CAN TAKE.....	39
IV.	GEORGIA STATE EMPLOYMENT LAWS.....	40
A.	AGE DISCRIMINATION.....	40
B.	ANTI-PICKETING	40
C.	ARBITRATION	41

D.	AT-WILL EMPLOYMENT	41
E.	CHILD LABOR	42
F.	CHILD SUPPORT	42
G.	COVENANTS NOT TO COMPETE	42
H.	CRIMINAL RECORDS	43
I.	DISABILITY ACT	44
J.	DRUG-FREE WORKPLACE PROGRAM	45
K.	EMPLOYMENT RECORDS	45
L.	EQUAL PAY ACT AND THE RIGHT TO ARBITRATE	45
M.	FELLOW-SERVANT RULE	46
N.	FIXED-PERIOD EMPLOYMENT	46
O.	GARNISHMENT	46
P.	HAZARDOUS CHEMICALS CONSENT	46
Q.	INTERFERENCE WITH EMPLOYMENT RIGHTS	46
R.	JURY DUTY AND SUMMONS	46
S.	LETTERS OF REFERENCE	47
T.	MILITARY LEAVE	47
U.	MINIMUM WAGE	48
V.	MULTIRACIAL CLASSIFICATIONS	49
W.	PUBLIC EMPLOYEE STRIKES	49
X.	RIGHT TO WORK	49
Y.	SAFETY & HEALTH LAWS	49
Z.	SHIELD LAW FOR EMPLOYERS PROVIDING REFERENCES	49
AA.	STRIKES	50
BB.	TRADE SECRETS ACT	50

CC.	UNEMPLOYMENT BENEFITS	51
DD.	UNLAWFUL ASSEMBLY	52
EE.	UNLAWFUL ENTICEMENT OF EMPLOYEES	52
FF.	VOTING LEAVE.....	52
GG.	WAGE PAYMENT.....	52
HH.	WITNESS DUTY.....	52
II.	WORKERS' COMPENSATION.....	52
V.	<u>EMPLOYMENT GUIDELINES FOR COMMENCING OPERATION IN</u> <u>GEORGIA</u>	54
A.	PREPARATION OF EMPLOYEE HANDBOOK	54
B.	HIRING PROCESS.....	56
1.	The Application	56
2.	Job Descriptions	57
3.	Points to consider if you intend to use pre-employment testing.	58
4.	Drug Testing.....	58
5.	Immigration Requirements.....	58
6.	Background Checks.....	58
C.	CRIMINAL BACKGROUND CHECKS	59
D.	MEDICAL EXAMS AND INQUIRIES	59
1.	Application Stage - Pre-offer.....	59
2.	Postoffer Stage.....	59
3.	Employment Stage.....	60
E.	SALTING	60
1.	What Is Salting?	60
2.	Salting Is Legal.....	60
3.	Employer Steps to Counteract Salting.....	61

VI. CONCLUSION61

I. INTRODUCTION

As you are aware, every state has its own laws regulating the conduct of businesses operating within its borders. Although federal laws such as Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act are dominant influences in the labor and employment field, many laws governing the employer-employee relationship are unique to each state and vary from state to state. Therefore, we have prepared a list and description of various federal and state labor and employment-related issues, case law, and statutes that Georgia employers should keep in mind when making employment decisions.

Some Georgia laws parallel federal laws but have different provisions.

Please keep in mind that this list is not intended as a substitute for sound legal advice and no list of laws can be comprehensive enough to cover every possible situation. Furthermore, because the outcome of labor and employment disputes generally hinges on the individual facts and circumstances of each case, we suggest you consult with members of the labor and employment practice group before making any critical employment decisions or adopting any policies.

II. FEDERAL EMPLOYMENT LAW

A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND RELATED LAWS

1. Title VII and Related Laws

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Damages available to a successful plaintiff are backpay, reinstatement (or front pay in lieu of reinstatement), and attorneys' fees. Title VII prohibits discrimination by disparate treatment or disparate impact. To establish a *prima facie* case of discrimination, a plaintiff may: (1) present direct evidence of discriminatory intent; (2) establish circumstantial evidence of discrimination; or (3) demonstrate a pattern of discrimination through statistics. See Early v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). Many plaintiffs rely on circumstantial evidence of discrimination in order to establish a *prima facie* case. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) sets forth the parameters for what constitutes a *prima facie* case of discrimination using circumstantial evidence. A plaintiff will succeed in showing a *prima facie* case of disparate treatment using circumstantial evidence if she shows: (1) she is a member of a protected class; (2) that she was subjected to adverse employment action; (3) that she was qualified to do the job; and (4) her employer treated similarly situated employees outside the protected class more favorably. See Green; see also Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

McDonnell Douglas sets forth the basic allocation of burdens in order of presentation of proof in the Title VII case alleging discriminatory treatment. Specifically, the plaintiff has the burden of proving by the preponderance of the evidence that a *prima facie* case of discrimination, supra, exists. If the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the

defendant to "articulate some legitimate, non-discriminatory reason for the employee rejection." If the defendant employer carries this burden, the plaintiff has an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant for its actions were not its true reasons but, instead, a pretext for discrimination. See McDonnell Douglas; see Texas Dept. of C'mty. Affairs v. Burdine, 450 U.S. 248, 252-253 (1981).

Disparate impact discrimination involves adopting a test or requirement (such as an experience requirement) that, while having nothing to do with race, color, religion, or national origin on its face, tends to exclude those of a particular protected class significantly more frequently than those not in that category. For example, a requirement that all applicants have three years of typing experience will be said to have a disparate impact if it can be proved to exclude five black applicants for every four white applicants excluded. If this degree of imbalance is shown by a particular practice or group of practices, then the employer must prove the requirement is job-related and consistent with business necessity. At that point, the employee challenging the requirement can still prevail if he proves that the employer's business goal accomplished by the challenged requirement could be accomplished at least as well by a less discriminatory alternative practice. Those who prevail on Title VII disparate impact claims can recover backpay for up to two years prior to the action, and attorneys' fees, and can receive court orders requiring hiring, promotion, reinstatement, or whatever else is necessary to remedy discriminatory treatment.

A second law that often is mentioned along with some race-based or national origin-based Title VII claims is a claim under 42 U.S.C. § 1981. Section 1981 covers disparate treatment discrimination against employees, independent contractors, and applicants based upon race (race here is defined broadly, and may include a suit by one of Scandinavian extraction against one of Anglo-Saxon extraction) or alien status. An employer with only one employee or independent contractor can be sued under § 1981; the person bringing suit has two years to file suit in court (there is no need to go through the EEOC) from the date of the discrimination. Backpay, attorney's fees, unlimited compensatory and punitive damages, and court orders respecting hiring, promotion, and reinstatement are among the available remedies.

Another law often associated with national origin and alien discrimination is the Immigration Reform and Control Act of 1986 ("IRCA"). In addition to requiring that all persons hired for work present certain credentials to their employer, IRCA prohibits discrimination by all employers against applicants and employees eligible to work because they are not United States citizens except in certain circumstances.

IRCA reaches only discrimination based on alien status or national origin, only to the extent the perpetrator of the latter is not covered by Title VII, and only to the extent the discrimination involves hiring and discharge (presumably, this includes covered harassment during employment that is sufficient to result in a constructive discharge). IRCA does not reach alien discrimination necessary to comply with federal, state, or local laws. IRCA allows an employer to prefer a U.S. citizen over an alien if their qualifications are equal.

2. Sexual Harassment

While many federal and state law claims are possible for sex harassment, there are essentially two that reoccur regularly-Title VII and state law invasion of privacy. Though a variety of theories are possible, there are two that reoccur-*quid pro quo* and “hostile environment.”

Sex harassment has five common elements:

1. The conduct is directed against the victim because of sex;
2. The conduct is unwelcome;
3. The conduct would be offensive to a reasonable person (**NOT** just to a reasonable woman);
4. The conduct affects some term or privilege of employment;
5. The employer is chargeable with the conduct.

Quid pro quo harassment occurs when:

1. A supervisor engaged in conduct;
2. The conduct is directed at a subordinate or co-employee because of his or her sex;
3. The conduct is unwanted;
4. The employee's reaction to the conduct affects tangible aspects of the employee's employment.

Hostile environment sex harassment occurs when:

1. One or more employees or supervisors engage in conduct;
2. The conduct is directed at a subordinate because of his or her sex;
3. The target employee did not invite the conduct;
4. A reasonable person in the target employee's position would regard the conduct as offensive **AND** the employee in fact so regards it;
5. The employer has notice of the conduct or fails to take reasonable precautions that would have put the employer on notice;
6. The conduct is sufficiently pervasive so as to create an abusive work environment or otherwise affects a term, condition, or privilege of employment.

Most litigation seems to center around the scope of the employer's responsibility:

1. The employer is **ALWAYS** responsible for the actions - whether those creating a hostile environment or for a *quid pro quo* promise of benefit or threat of reprisal - when the actor has a position in which he or she can be said to act for the employer within the scope of his or her agency.
2. The employer is responsible for the acts of fellow employees or supervisors whether or not within the scope of their employment if those acts create a hostile environment **AND** the employer **EITHER** has **ACTUAL NOTICE** or **SHOULD HAVE KNOWN** of the activity but failed to take precautions.

Sex harassment claims in most instances are won or lost before anything is ever filed with a court or agency. Proper preparation, while a guaranteed shield against neither *quid pro quo* or "hostile environment" claims, can go a long way toward winning either if it begins at the beginning. In ascertaining what must be done in response to a claim, therefore, it is important to divide the employer's response into pre-incident preparation and post-incident measures. Pre-incident measures include effective personnel practices of all kinds, thus helping identify irregularities; an effective policy respecting harassment, including a well-publicized prohibition, a well-publicized reporting procedure, and a prompt investigative and responsive mechanism; and a means for ascertaining employee concerns without the need of undergoing a formal procedure, a way for an employer to discover supervisory problems before they become pronounced.

Another problem that is common both to *quid pro quo* and "hostile environment" claims that can be addressed by nonspecific action has to do with control of communications. Allowing communications either of a sexual nature or those derogatory of a particular sex, like any other communications indicating that race, sex, age, religion, national origin, or disability played a role in an employment decision, can make it much more difficult to defend against employment discrimination lawsuits in general and sex harassment cases in particular. Such a statement by a supervisor with only some input into a promotion or discharge decision that is subsequently challenged can place the employer in the position of having to prove that it would have taken the same employment action without regard to the sex of the plaintiff, and, after the Civil Rights Act of 1991, will guarantee that the employer is subject to at least some liability even if the employer can prove an independent reason for the employment decision. Absent such comment, the employer would bear only the burden of articulation of a nondiscriminatory reason rather than the burden of disproving discrimination.

In the context of sex harassment, improper communications can include toleration of comments derogatory to a particular sex that may or may not themselves be sexual in nature, sexual comments that a reasonable person would find offensive (including pin-ups and bumper stickers) or comments that, while facially neutral, reflect a sexist stereotype.

We offer seven suggestions:

1. Observe official communications - Review official communications, such as press releases, advertisements, recruiting literature, and job opening information for race, sex, age, national origin, or religious overtones.

2. Establish employment action interviews - Prepare guidelines governing when hiring, investigative, disciplinary, and exit interviews are to be held.
3. Set employment action interview agenda - Prepare checklists governing matters to be covered at supervisory interviews with employees.
4. Keep employment action interview records - Require managers to keep notes of what is actually said at supervisory interviews of employees.
5. Prohibit communications outside employment action interviews - Establish a policy that supervisors are not to discuss employment action with employees except in designated interviews.
6. Prohibit stray remarks - Propound policies prohibiting employees from slurring fellow employees because of race, sex, age, national origin, religion or handicap.
7. Enforce - Audit compliance; punish violators.

It is important that each employee acknowledge both his or her obligation to refrain from behavior that would violate the harassment policy, and also to acknowledge his or her obligation to make complaints of such behavior in a manner consistent with the policy. The importance of this component of an effective harassment policy cannot be overemphasized. It not only has the advantage of making sure that all employees have notice of what behavior is prohibited, but also notifies employees of how such complaints are to be handled -- thereby calling into question the credibility of harassment charge that are not raised in accordance with the procedure. Hence, not only would an employee that otherwise might commit harassment be on notice of what is prohibited but an employee who might attempt to concoct a false harassment charge after being notified of an unfavorable employment decision would be less credible if he or she had not followed a procedure of which he or she was made aware. Finally, an effective sex harassment policy must make clear that complaints will be taken seriously and that disciplinary action up to and including discharge will be taken against offenders.

3. Dealing with the EEOC

In Georgia, a person claiming a violation of Title VII (or the ADA or ADEA, addressed below) must, within 180 days of the violation, file a charge with the Equal Employment Opportunity Commission ("EEOC"). If the EEOC finds after investigation that there is reasonable cause to believe that the charge is true, the EEOC will attempt to "conciliate" (or negotiate) with the employer, and may sue the employer on the charge-filer's behalf if negotiations are unsuccessful. Note that the filing of an EEOC charge does not stop the running of time within which the charging party may file a claim under 42 U.S.C. §1981.

The EEOC's investigation of a charge of discrimination may include having the charging party execute an affidavit and interviewing witnesses and obtaining their affidavits. Witnesses have the right to have counsel present during interviews. The employer may have its counsel present for interviews of individual members of management. The investigator will request a written position statement from the respondent employer and may request documents related to

the charge thereafter. The investigator may also conduct an on-site investigation, during which employees may be interviewed. Note that the EEOC has subpoena power to obtain testimony and documents.

Following an on-site inspection, the investigator will conduct a pre-determination interview so that all relevant information is obtained. In the interview, the investigator informs the employer of the scope of the investigation, summarizes the evidence on which a determination will be made, provides the opportunity to submit additional information, and notifies the employer that a determination will be made.

The EEOC will render a determination if the charging party has not requested a right-to-sue letter prior to the agency's finding. A "no cause" finding will be issued with a "right-to sue" letter enabling the party to file suit. A "cause" finding triggers the EEOC's duty to conciliate, and may result in the EEOC undertaking litigation.

If the EEOC does not find "cause," the employee's lawyer requests that the agency terminate its investigation before making a finding, or the agency finds cause but decides not to sue, the agency will issue the employee a right-to-sue letter. The charging employee or applicant has 90 days from receipt of this letter within which to file a suit under Title VII in state or federal court. A lawyer will be appointed for them if they cannot afford it.

B. AMERICANS WITH DISABILITIES ACT

The ADA prohibits discrimination against a "qualified individual with a disability because of the disability" with regard to terms, conditions, and privileges of employment. 42 U.S.C. §12112(a). A "qualified individual with a disability" is one "...who, with or without reasonable accommodation, can perform the essential functions of the job that such individual holds or desires." 42 U.S.C. §12111(8). "Disability" means one with "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of impairment; or (C) being regarded as having an impairment." 42 U.S.C. §12102(2). The "record of" provision is aimed at persons with a history of a physical or mental impairment substantially limiting a major life activity. The "regarded as" provision covers those with physical or mental impairments that do not limit a major life activity, but are treated by an employer as having such a limitation.

The term "disability" does not include an individual currently engaging in the illegal use of drugs where the employer acts on the basis of such use. Nor does the term include sexual preferences and disorders such as homosexuality, bisexuality, gender identification disorders, transvestitism, transsexualism, pedophilia, and antisocial behavior such as compulsive gambling, kleptomania, and pyromania.

The Supreme Court has held that "substantially" in the phrase "substantially limits" suggests 'considerable' or 'to a large degree.' Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 122 S.Ct. 681, 691 (2002). The Court concluded that "[t]he word 'substantial' thus clearly precludes impairments that interfere only in a minor way with the performance of manual tasks from qualifying as disabilities." Toyota Motor, 122 S.Ct. at 691.

Functions such as walking, seeing, hearing, learning, breathing, and performing manual tasks have been identified as major life activities. See 29 C.F.R. §1630.2(i). In Toyota Motor, the Supreme Court reiterated that “ ‘[m]ajor life activities’...refer to those activities that are of central importance to daily life.” 122 S.Ct. at 691. Such a category includes basic abilities like walking, seeing, and hearing. Toyota Motor, 122 S.Ct. at 691. The applicable regulations provide that a plaintiff’s limitation on her ability to work should only be considered if he is not “substantially limited with respect to any other major life activity.” 29 C.F.R. §1630, App. § 1630.2(j); see Llanes v. Sears Roebuck & Co., 46 F.Supp. 2d 1300, 1306 (S.D. Fla. 1997), aff’d, 141 F.3d 1189 (11th Cir. 1998). The Supreme Court clarified that “even assuming working is a major life activity, a claimant would be required to show an inability to work in a ‘broad range of jobs,’ rather than a specific job.” Toyota Motor, 122 S.Ct. at 693 (citing Sutton v. United Airlines, Inc., 527 U.S. 471, 492 (1999)).

In determining whether a qualified individual with a disability can perform the “essential functions” of a job she holds or desires, essential function has been defined by applicable ADA regulations as being those that are essential, not marginal. A function will be considered essential if the position exists to perform the function (as in the case of reading for a proofreader position), the number of employees available to perform the function are limited, and/or the function involves a high degree of specialty that the incumbent is hired for his or her expertise. A job description completed by an employer prior to the challenged decision is *prima facie* evidence of what the essential functions actually are. Other evidence of what constitutes essential functions include the amount of time spent performing the function, the consequences of not requiring the incumbent employee to perform, the collective bargaining agreement, the work experience of past incumbents in the same job, and the work experience of current employees in similar jobs. Most caselaw takes the position that regular attendance is an essential function.

An employer may be required to provide reasonable accommodation to a qualified individual with a disability. “Reasonable accommodation” is defined as including “any modification or adjustment to a job application process that enables a qualified individual with a disability to be considered for the position,” “modifications or adjustments to the work environment, or, to the manner or circumstances under which the position...is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position,” or “modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment” as others. An employer must provide accommodation when:

1. the employee or applicant has a disability;
2. the disability causes restrictions;
3. the employer knows or has reason to know that there is a disability causing restrictions;
4. the restrictions prevent the employee from performing the essential functions of the job;
5. the employee has not declined the accommodation;

6. the accommodation would enable the employee to perform the essential functions of the job that he or she cannot perform due to the restrictions caused by the disability; and
7. the accommodation does not cause the employer “undue hardship.”

An employer need not reassign or eliminate essential functions to enable an employee with a disability to perform a job.

The Eleventh Circuit has consistently held that to establish a *prima facie* case of discrimination under the ADA, plaintiff must prove that (1) she had a disability; (2) she is a qualified individual; and (3) she was subjected to unlawful discrimination because of her disability. Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002); Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907, 910 (11th Cir. 1996); Morisky v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996). The burden of establishing a *prima facie* case under the ADA remains at all times on the plaintiff. Gordon, 100 F.3d at 915 (reversing jury verdict on grounds that plaintiff presented insufficient evidence to support his *prima facie* case).

In addition to prohibiting discrimination against a qualified individual with a disability, the ADA prohibits unlawful medical inquiries. Prior to extending a conditional offer of employment to an applicant, an employer may not ask questions concerning a disability or medical history, including the following:

- Do you require accommodation to perform the essential functions of the job?
- Have you ever been treated for the following conditions or diseases?
- Have you ever been hospitalized?
- Have you had a major illness in the past five years?
- Are you taking any prescribed drugs?
- Have you ever made a claim for workers’ compensation?

At the preoffer stage, an employer may lawfully administer a test for illegal drugs and may inquire as to whether the employee needs reasonable accommodation in the hiring process. After a conditional offer of employment has been made, the employer may make any medical inquiry (including questions about workers’ compensation) so long as the inquiry is made of all individuals receiving a conditional offer and the criteria used to evaluate the responses is job-related and consistent with business necessity. When an offerree becomes an employee, the employer may make only those medical inquiries that are job-related and consistent with business necessity, and medical records obtained must be segregated from the employee’s personnel file.

C. FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act (“FMLA”) covers employers that employ “50 or more employees for each working day during 20 or more calendar workweeks in the current or preceding calendar year.” The FMLA provides eligible employees (those who have worked at least 12 months for the employer at any time and at least 1,250 hours in the previous 12-month period) with up to 12 weeks of unpaid leave per year to be taken for child arrival, birth, or adoption, care of a parent, child or spouse with a serious health condition, or when the employee’s own serious health condition prevents performance of the essential functions of the job.. The employee is entitled to continuation of health insurance during the leave, restoration to the same or equivalent job upon return from leave, and protection against discrimination because of leave.

FMLA leave need not be paid, but employees may be required to expend, or allowed to utilize, certain types of paid leave in certain circumstances. These leaves may run concurrently with FMLA leave. The employee must explain the reasons for leave in sufficient detail as to allow the employer to determine if the request qualifies as FMLA leave, or the leave may be denied. The employer has the responsibility for designating leave as qualifying or not qualifying as FMLA leave and for determining whether to require or allow the employee to substitute paid leave. The employee is expected to give thirty days’ prior notice when the leave is foreseeable; when the need for leave is not foreseeable, the employee is responsible for giving notice as soon as practicable, usually within two business days of when the employee becomes aware of the need for leave.

The employer may require the employee to provide certification of the need for leave from a health care provider when the leave is for the employee’s relative’s or the employee’s own serious health condition. An employer that has reason to doubt the validity of the certification may not request additional information from the employee’s health care provider but instead, with the employee’s permission, may ask its own health care provider to contact the employee’s health care provider “for purposes of clarification and authenticity of the medical certification.” The employer may also seek a second opinion at its own cost from another health care provider; if the second opinion differs from the initial opinion, the employer may require at its own expense the employee to obtain the opinion of a third health care provider; this opinion is final and binding.

The FMLA also prohibits the employer from interfering with, restraining, or denying the exercise of or the attempt to exercise an FMLA right. Nor may an employer discharge or in any other manner discriminate against any individual opposing any practice made unlawful by the FMLA. “Discriminate” can include an employer requiring written notice or certification of an employee seeking to use paid leave for FMLA purposes if the employer does not otherwise require written notice or certification from users of paid leave, denying full benefits to one on FMLA leave, or using the taking of FMLA leave as a negative factor in hiring, promotion, or disciplinary actions.

D. AGE DISCRIMINATION IN EMPLOYMENT ACT

Under the Age Discrimination in Employment Act of 1967 (“ADEA”), it is unlawful for an employer...to fail or refuse to hire or to 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." 29 U.S.C. §623(a)(1). The ADEA limits its protections to those who are over age 40. 29 U.S.C. §621(b). "When a plaintiff alleges disparate treatment, 'liability depends on whether [age] actually motivated the employer's decision.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000). "That is, the plaintiff's age must have actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome." Reeves, 530 U.S. at 141.

To establish a *prima facie* case of age discrimination using circumstantial evidence when claiming disparate treatment, a plaintiff must show that he (1) was a member of the protected age group, (2) was subjected to an adverse employment action, (3) was qualified to do the job, and (4) was replaced or otherwise lost a position to a younger individual. See Chapman v. AI Transport, 229 F.3d 1012, 1024 (11th Cir. 2000). If the plaintiff establishes a prima facie case, the employer has the burden of articulating a legitimate, nondiscriminatory reason for the challenged employment action. Plaintiff may then come forward with evidence that the proffered reason for the employer's action is a pretext for discrimination.

The ADEA, like Title VII, authorizes claims based on disparate treatment and disparate impact. In 2004, the Supreme Court held that the ADEA authorizes disparate impact claims, in addition to disparate treatment claims. In Smith v. City of Jackson, Mississippi, 125 S.Ct. 1536 (Mar. 30, 2005), the Court compared the ADEA to Title VII and held that both prohibited actions that "deprive any individual of employment opportunities or *otherwise adversely* affect his status as an employee." The Court held that the disparate impact theory is more narrow under the ADEA than under Title VII. Under the disparate impact theory, a plaintiff "need not prove intent to discriminate, but the plaintiff *must* identify specific *facially neutral* employment practices that are allegedly responsible for statistical disparities." Davis v. Valley Hosp. Svcs., Inc., 372 F.Supp.2d 641, 655 (M.D. Ga. 2005).

A successful plaintiff in an ADEA action is entitled to recover backpay, attorneys' fees, liquidated damages (only when the violation is deemed willful), front pay (where reinstatement is not practicable), and injunctive relief. Settling ADEA claims is different from settling other types of discrimination claims. It is important to know about these differences before trying to get an employee to waive his or her right to sue for age discrimination, whether this waiver is part of a termination agreement, a reduction in force, an "early out" package, or otherwise. All such waivers must have six essential parts:

1. the waiver must be part of a written agreement in ordinary English;
2. the waiver must mention specifically rights or claims arising under the ADEA;
3. the waiver must be made in return for consideration over and above what the employee is otherwise entitled to receive;
4. the employee must be advised in writing to consult an attorney before signing;
5. the employee recites that he or she had 21 days to consider the agreement before signing; and
6. the employee has 7 days after signing to revoke the agreement.

E. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

The Uniformed Services Employment and Reemployment Rights Act (“USERRA”) (1) prohibits employers from discriminating against individuals because of their past, present, or future military service; (2) preserves the benefits of employees called to active duty during their leave and upon reemployment; and (3) requires employers to reemploy employees at the conclusion of their service if certain conditions are met.

USERRA protects from discrimination any person “who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service,” 38 U.S.C. §4311(a), and includes those in the Armed Forces, Army National Guard, and Air National Guard. USERRA protection terminates if the person is dismissed with a dishonorable discharge or under other than honorable conditions. Discrimination includes denial of initial employment or reemployment; failure to promote, and denial of any benefit of employment to a protected person. Benefits of employment include rights under health plans, bonuses, severance pay, vacation time, and a regular work schedule. An employer will be deemed to have engaged in discrimination if the employee’s protected status served as a “motivating factor” in the denial of a benefit of employment. See 38 U.S.C. §4311(c)(1).

An employer may not terminate an employee on military leave. While on military leave, eligible employees are entitled to those same non-seniority benefits that accrue with other comparable forms of leave. Employees must be given the option, under COBRA, to continue health insurance coverage for up to 24 months at their own cost. Note that the Department of Labor has held that an employee’s hours worked for the purpose of meeting FMLA eligibility requirements continue to accrue while that employee is performing uniformed service.

Employers have the obligation to promptly reemploy an eligible employee who: (1) was absent for services in the uniformed services; (2) gave advance notice to the employer absent preclusion by military necessity (note that obtaining the employer’s permission is not required); (3) was not absent for more than five years due to military service; and (4) applied for employment within the designated time period (which differs depending upon the length of the leave). The employee must be reemployed in the escalator position—that position which he or she would have attained with reasonable certainty but for the absence for service in the uniformed services. 38 U.S.C. §4313(a)(1)(A), or, if not qualified for such a position, a position equivalent to the one held prior to the leave. An employer is not required to reemploy an individual protected by USERRA where its circumstances have changed in such a way to make reemployment impossible or unreasonable, where reemployment would impose an undue hardship due to the returning employee’s disability, and where a temporary employee, whose employment was brief and nonrecurrent with no expectation of a continuing relationship, seeks reemployment.

Employers now have an obligation to display a poster informing employees of their rights and benefits under USERRA. The poster is available at <http://www.dol.gov/vets/programs/USERRA/poster.pdf>. No regulations interpreted USERRA prior to September 30, 2004, when the Department of Labor, Veterans’ Employment and

Training Service, issued proposed regulations. The regulations were made available for public comment, and, on December 20, 2005, were issued in their final form. Some of the major provisions of the new regulations are:

- Section 1002.37 makes clear that the “joint employment” concept from Title VII and other anti-discrimination laws applies to USERRA. The regulations provide that an employer includes not only the person or entity that pays the employee’s salary or wages, but also includes a person or entity that has control over his or her employment opportunities. The regulations give the example of an employee who works for a security company and reports both to the company and to the owner of the site to which he is assigned. In that case, both employers share responsibility for compliance with USERRA.
- Military fitness examinations fall under the definition of “service in the uniformed services” which is protected by USERRA, as is funeral honors duty performed by members of the uniformed service.
- Section 1002.73 provides that service in the uniformed services does not have to be the employee’s sole reason for leave in order for that employee to be entitled to re-employment under the statute. For example, if an employee is required to report to an out-of-state location for military training and he spends off-duty time moonlighting as a security guard or visiting relatives, he will not lose reemployment rights.
- The five-year limit on military service protected by USERRA includes only the time that the employee actually spends performing service in the uniformed services. The regulations state that a period of absence from employment before or after performing military service does not count towards the five-year limit. Some types of service do not count towards the five-year limit, including, but not limited to, service that is required beyond five years to complete an initial period of service, service when an employee is unable to obtain orders releasing him by no fault of his own, and service performed to fulfill periodic National Guard and reserve training requirements.
- An employer may not refuse to reemploy an employee or delay that employee’s reemployment solely because the employee does not have requisite documentation readily available which establishes his entitlement to reemployment. If the employer receives documentation which shows that the employee is ineligible for reemployment (for example, a document reflecting dishonorable discharge), then the employer may terminate the employee without violating USERRA.
- An employer must provide an employee with “prompt reemployment,” meaning as soon as practicable under the circumstances of the case. The regulation provides that reemployment must occur within two weeks of the application for reemployment, unless there are unusual circumstances.

- Section 1002.311 of the regulations state that USERRA does not have a statute of limitations for claims brought under the statute and recognize that USERRA prohibits application of state law statutes of limitations. At least one federal court in Georgia has applied the four-year statute of limitations.

F. FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (“FLSA”) requires employers to pay its employees overtime at the rate of time and one-half for any hours an employee works over forty hours in a single workweek; however, there are exceptions to this general rule. An employer does not have to pay an employee overtime if the employee is “exempt” from this provision under the FLSA. The Department of Labor has implemented regulations defining these exemptions. Recently, however, the U.S. Department of Labor (“DOL”) has modified these exemptions.¹ These new regulations will directly affect which employees are eligible for overtime.² According to the Secretary of Labor, the new 2004 rules should eliminate overtime for only 100,000 workers but make as many as 1.6 million previously exempt workers now eligible for overtime. This article provides a basic overview of the new overtime regulations and the impact they will have on employers and employees.

1. New Standard Salary Test

Under the previous regulations, the “long” and “short” tests could be applied to determine whether an employee was exempt under the FLSA depending upon the employee's salary level. The application of the “long” test was reserved for employees who earn less money (\$155-250 per week) and thus needed to satisfy more criteria to qualify for exemption under the FLSA. The “short test,” on the other hand, was employed for those earning over \$250 per week and consisted of significantly less criteria. The new regulations retain the current “short test,” but effectively do away with the “long test” and the confusing duties tests, including the requirement that an exempt employee can spend no more than 20 percent of his/her time (or 40 percent in retail or service establishments) performing nonexempt work.

The new simplified regulations also raise the minimum salary level for qualifying for an exemption under the FLSA to \$455 per week (\$23,600 per year)³. Thus, any employee who makes less than \$23,600 per year is automatically eligible for overtime under the FLSA, no

¹ The last significant changes to the regulations were implemented in 1949 and have remained largely unchanged (except for increasing the minimum salary levels in 1975).

² The changes, first proposed March 31, 2003, were published in the Federal Register as final rules April 23, 2004, and will become effective as codified at 29 C.F.R. pt. 541, on August 23, 2004.

³ Under the previous regulations, an employee earning only \$8,060 per year, or at least \$155 per week, could be classified as “executive” or “administrative” and denied overtime pay. Thus, the final rule nearly triples the per week minimum salary level required for exempt status.

matter what duties the employee performs. For employees with an annual salary of \$23,600, section 13(a)(1) of the FLSA still provides an exemption from both minimum wage and overtime pay regulations for employees who primarily perform exempt work.⁴

2. The Executive Exemption

The executive exemption is one of several exemptions that will render an employee ineligible for overtime under the FLSA. Under the executive exemption, an employee will be exempt from the overtime provisions if: (1) the employee is compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week; (2) the employee's primary duty is managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; (3) the employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and (4) the employee has the authority to hire or fire other employees, or the employee's recommendations as to the hiring, firing, and other changes in status are at least considered. The new regulations added the requirements that an employee must be able to hire and terminate other employees (or, at the very least, their recommendations for placement must be given weight⁵) and also that an employee must customarily and regularly supervise at least two full-time employees.

3. The Administrative Exemption

The new rules also update the test for the administrative exemption. To qualify for the administrative employee exemption, the employee must meet the following test: (1) the employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week; (2) the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. The changes to the administrative exemption appear to be relatively consistent with the previous regulations.

Employers may be disappointed to note that the ambiguous "discretion and independent judgment" language remains in the final regulations despite its absence from the proposed revisions in March 2003. However, the good news for employers is that the final rule is somewhat more clear in that it does provide a more detailed description of the duties that will satisfy this requirement.

4. The Professional Exemption

⁴ For FLSA exemptions, an employee's "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 upon all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

⁵ See 29 CFR §541. 105.

Like the previous regulations, the 2004 version also provides for a professional exemption. The changes to this exemption were also relatively minimal. There are two subsets to the professional exemption--the learned professional exemption and the creative professional exemption. To qualify for the learned professional employee exemption, the employee must meet the following criteria: (1) the employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week; (2) the employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; (3) the advanced knowledge must be in a field of science or learning; and (4) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. An employee may likewise be exempt from the overtime provisions under the creative professional exemption. In this case, the employee must meet the general salary requirement of \$455 per week and must primarily perform work that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

5. Computer Employee Exemption

Under the new regulations, there is also a computer employee exemption.⁶ To qualify for this exemption, the employee must meet the following elements: (1) the employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour; (2) the employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below; (3) the employee's primary duty must consist of one of the following: (a) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (b) 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; (c) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (d) a combination of the duties mentioned above.

6. The Outside Sales Exemption

The new regulations also provide an exemption for employees who perform outside sales⁷ and eliminates the confusing 20 percent test, which forced employers to compare the work and time of outside sales persons to that of the employer's nonexempt employees. To qualify for this exemption the employee must meet the following two-part test: (1) the employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (2) the employee must be customarily and regularly engaged away from the employer's place or

⁶ Computer employees were exempt under the previous regulations, but the new regulations cover this type of employee in their own section.

⁷ The new regulations do not add an exemption for inside sales employees.

places of business. Notably, the 2004 regulations do not limit the time an employee may spend on non-outside sales activities as do the previous regulations.

7. Highly Compensated Exemption

In addition to the above-mentioned specific exemptions, the new rules continue to exempt from overtime any highly compensated individual. In the 2004 version of the regulations, highly compensated individuals are defined as those making more than \$100,000 annually. The previous regulations set the salary much lower. The effect of this exemption is to increase the likelihood that employees making less than \$100,000 annually (and performing at least one exempt duty) receive overtime pay.

8. Blue Collar Workers

Additionally, the new regulations specifically grant overtime eligibility to "blue collar" workers, no matter how much the worker is paid. Employees who perform "manual labor" are considered blue collar workers and must be paid overtime. These include many construction-related workers, such as carpenters, electricians, craftsmen, plumbers, iron workers, and laborers. In addition, the exemptions provided by FLSA Section 13(a)(1) do not apply to "first responders" such as police officers, fire fighters, inspectors, park rangers, paramedics, and hazardous materials workers, regardless of whether they manage others.⁸

9. Salary Deductions for Exempt Employees

The final rules also provide more guidance to employers with respect to permissible deductions for exempt employees.⁹ The final rules contain seven circumstances for permissible deductions to the salary of otherwise exempt employees:

1. Absence from work for one or more days for personal reasons other than sickness or disability;
2. Absence from work for one or more full days due to sickness or disability of the deductions are made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences;

⁸ The exemptions do not apply to first responders because their primary duty is not management or the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. Furthermore, they are not exempt learned professionals because their primary duty is not the performance of work requiring knowledge of advanced type in a field customarily acquired through prolonged study of specialized intellectual instruction. Although some first responders have college degrees, a specialized academic degree is not a standard requirement for employment.

⁹ The previous regulations only allow full day deductions for unpaid suspensions for violating major safety rules, and full week deductions for unpaid suspensions for violations of other conduct rules.

3. Offset for any amounts received as payment for jury fees, witness fees or military pay;
4. Penalties imposed in good faith for violating safety rules of "major significance;"
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules;
6. Proportionate rate of salary for time worked in the first and last weeks of employment; and
7. Unpaid leave taken pursuant to Family and Medical Leave Act.

Finally, the new rules also provide a "safe harbor" that acts to preserve an employee's exempt status in the event impermissible deductions are made. Basically, a "safe harbor" is a relatively brief period of time in which employers have the opportunity to correct any improper deductions it may have made from the salary of an exempt employee. An exempt employee's salary basis will not be defeated if the employer: a) has a "clearly communicated" policy prohibiting improper deductions; b) reimburses employees for any improper deductions; and c) makes a good faith commitment to comply in the future. However, this safe harbor is not available if an employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

10. Employee Training

One important FLSA issue that employers are often faced with is determining what is compensable employee training time. The FLSA sets up regulations as to what is compensable training time in 5 CFR §551.423. The FLSA regulations set up four factors that must be satisfied for attendance at lectures, meetings, training programs, and seminar activities not to be counted as working time:

- attendance is **outside the employee's regular working hours;**
- attendance is in fact **voluntary;**
- the course lecture or meeting **isn't directly related to the employee's job;** and
- the employee **doesn't perform any productive work while attending the activity.**

(a) Outside Regular Working Hours

Time spent in apprenticeship or other entry-level training **outside regular working hours** is not considered hours of work, provided no productive work is performed during such periods. However, time spent in training **during regular working hours** is considered hours of work. The regulations clarify that, for purposes of part 551, "regular working hours" means the days and hours of an employee's regularly scheduled administrative workweek. The phrase "regularly scheduled administrative workweek" is defined in 5 CFR §610.102 as the period

within an administrative workweek within which an employee is regularly scheduled to work. Also, see the definition of "regularly scheduled work" in 5 CFR §610.102, which hinges on whether the work was scheduled in advance of the administrative workweek.

(b) Attendance Is Voluntary

Attendance, of course, will not be considered voluntary if it is required. Furthermore, under the FLSA regulations, attendance is not considered voluntary if the employee is given to understand or led to believe that his or her present working conditions or the continuance of his or her employment would be adversely affected by not attending.

However, things may be different if the employer tells a job applicant about mandatory training *before* he or she is hired. In that situation, a federal court recently ruled that mandatory training was "voluntary" under FLSA regulations because the applicant chose to continue the application process and accept employment, knowing completion of the certification process was required.¹⁰ Of course, this "voluntary" training would still need to meet the other three prongs of the test.

(c) Training Is Not Job-Related

For training to be directly job-related, it must ordinarily be designed to make the employee handle his or her job more effectively, as distinguished from training him or her for another job for a new or additional skill. For example, a construction worker who is given instruction in pouring concrete is engaged in an activity to make him a better construction worker. Thus, the time devoted to such instruction is clearly job-related and therefore is on the clock.

(d) Trade School Or College Courses

Employees who voluntarily attend courses at independent schools, colleges, or trade schools outside their regular working hours are not engaged in compensable working time, even if the instructional program is related to their current job. Similarly, voluntary attendance by employees outside working hours at an employer sponsored course that corresponds to courses offered by independent learning institutions does not constitute hours worked, even if the courses are job-related.

11. Eating Lunch On The Premises

"Bona fide" lunch or meal periods are not work time. According to the regulations, for a meal period to be bona fide, it ordinarily must last at least 30 minutes, and the employee must be completely relieved from duty, both active and inactive.

An employee may be required to respond to emergency calls and still be considered to enjoy an uninterrupted meal period, provided that the interruptions to the meal period are minimal. "If, however, the employee is actually relieved of all duties for the meal period, except

¹⁰ *Chao v. Tradesmen Intern., Inc.*, 310 F.3d 904 (6th Cir. 2002).

for rare and infrequent emergency calls, the meal period can be excluded from hours worked except when the meal period is actually interrupted."¹¹

12. Donning And Doffing

(a) Generally

Under some circumstances, an employer may be required to compensate employees for time spent donning and doffing certain safety equipment or uniforms. Generally, the donning and doffing of clothing and standard safety equipment is noncompensable. Examples of noncompensable donning and doffing activities include putting on safety glasses, safety shoes, earplugs, hard hats, and other minor items. Putting on safety equipment is not for the benefit of the employer, but rather the employee; therefore, the time is not compensable. The changing of clothes at the workplace is not compensable if it is not required by the employer. Where the changing of clothes is not required by the employer, the activity is not performed for the benefit of the employer and is therefore noncompensable time.

When an employee dons or doffs heavy equipment, special protective gear, or personal safety equipment, he or she should be compensated for the time spent as hours worked under the FLSA. Donning and doffing such items satisfies the FLSA's general concept of work, as properly donning and doffing these items requires physical or mental exertion, time, and concentration. Where an employer has specific control over the requirements for donning and doffing of equipment, the employer will be required to compensate employees for the time spent. Even where the donning and doffing of equipment is found to be compensable, the employer will not be required to pay compensation where the activity is *de minimis*. Compensable working time is involved only when an employee is required to give up a substantial measure of his time and effort. If the compensable activity only involves a few minutes of work beyond the scheduled working hours, then the activity is likely *de minimis*. Under the FLSA, the following factors will be considered in determining whether an activity is *de minimis*: (1) the amount of daily time spent on additional work; (2) the administrative difficulty in recognizing the time; (3) the size of the aggregate claim; and (4) the regularity of the work.

(b) Walking And Waiting Time

In the consolidated case *IBP, Inc. v. Alvarez*, 126 S.Ct. 514 (Nov. 8, 2005), the Supreme Court recently addressed the compensability of employee walking and waiting time under the FLSA. However, rather than addressing the "hot button" issue of which types of clothing changes are compensable, the Supreme Court instead merely affirmed existing law regarding whether the time employees spend walking between changing areas where they put on and take off protective gear and the production area is compensable time under the FLSA. The Supreme Court also clarified whether the time employees spend waiting to put on this protective gear is compensable.

¹¹ Opinion Letter, Fair Labor Standards Act, Wage and Hour Division, U.S. Dep't of Labor, 1997 WL 998005.

The Supreme Court first considered whether the time employees spend donning and doffing protective gear and walking between the changing area and the production floor before and after their assigned shifts is compensable. Affirming its previous holding in *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Court reiterated that the donning and doffing of "protective gear" is an activity that is "integral and indispensable" to the "principal activity" the employee is employed to perform. The Court found that the time employees spend walking between the changing area and the production floor is similar to time spent walking between two different locations on an assembly line, which is considered compensable time spent walking from one "principal activity" to another. The Court held that during a continuous workday, the walking time that occurs after the beginning of the employee's first "principal activity" and before the end of the employee's last "principal activity" is compensable time under the FLSA. Therefore the time it takes employees to walk from the place where they put on protective gear to another area in the plant and to return to the changing area is compensable under the FLSA.

The Supreme Court next considered whether the time employees spend waiting to put on protective gear is compensable under the FLSA. The Court held that such waiting time is not a "principal activity", noting that 29 C.F.R. § 790.7 characterizes the time employees spend waiting to check in or waiting to receive their paychecks is generally a "preliminary activity" that is not compensable under the FLSA. Accordingly, the Court held that the time employees spend waiting to put on protective gear, which the Court emphasized is two steps removed from the employee's productive activity on the assembly line, is not "integral and indispensable" to a "principal activity" and is therefore not compensable under the FLSA. The Court noted, however, that this holding would not apply if an employer required its employees to arrive at work at a particular time or to report to a changing area at a particular time, only to have to wait to put on the protective gear.

Although *IBP, Inc. v. Alvarez* does not represent a substantial change in the existing law, employers should be reminded that the time employees spend traveling to and from locker rooms or other places where they put on or take off protective gear and the plant floor is compensable time under the FLSA. However, as this case makes clear, the time employees spend waiting to put on protective gear is not compensable time under the FLSA.

G. FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act provides the framework within which background checks of any kind can be performed on employees or applicants for employment. Under the statute, a "consumer report" is specifically defined at 15 § U.S.C. § 1681a(d)(1). It states, in pertinent part:

The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, ***character, general reputation, personal characteristics***, or mode of living which 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...

(B) employment purposes....

At 15 U.S.C. § 1681a(f) the statute broadly defines "consumer reporting agency" to include:

any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information *or other information* on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

The result is that any report requested for employment purposes from a third party for a fee that involves a person's character, general reputation or personal characteristics becomes a "consumer report" under the FCRA. Employers that use background checks to consider applicants for employment or current employees for promotion must fashion the investigation in a manner that is FCRA compliant. The scope is not limited to credit reports on prospective employees. It extends to criminal background checks and reference checks that a third party consumer reporting agency conducts. The FCRA is an important, but often unknown, legal issue for employers to consider that use outside firms or agencies to review an applicant's history.

The Federal Trade Commission ("FTC") has been given authority to promulgate and enforce regulations concerning the FCRA. It has stated that "employment purposes" is intended to include "reports used for evaluating a consumer for employment, promotion, reassignment or retention as an employee." FTC Commentary, CCH Consumer Credit Guide ¶ 25,050. Any report generated or requested so that the employer can use the individual's background as a factor in any hiring, firing, promoting or transferring decision is done for "employment purposes" under the FCRA. The staff opinion letters that the FTC has issued make clear that it interprets criminal background checks, and even mere reference checks as subject to the FCRA safeguards.

To obtain a report (credit or otherwise) on a consumer (employee) to use for employment purposes, the employer must disclose in writing to the employee that his consumer report may be obtained for employment purposes and the employee must authorize the employer to obtain that report. Before taking any adverse action against the employee based in whole or in part on the consumer report, the employer must provide to the employee a copy of the report and a description of the employee's rights under the FCRA. Employers can be civilly liable for whether its failure to comply with the FCRA was willful or negligent.

H. IMMIGRATION LAWS

1. Verification of Employment Eligibility

(a) In General

Employers are strictly prohibited by federal law from hiring, recruiting, and/or retaining foreign workers who the employer knows or has reason to believe are not authorized to work in the United States. 8 U.S.C. § 1324a(a)(1)(A). Employers are required to verify that all employees are eligible to work. 8 U.S.C. §1324a(a)(1)(B). To do so, employers are required to inspect documents produced by the prospective employee to verify the employee's identity and

the employee's status as eligible to work. 8 U.S.C. § 1324a(b). Employers are required to complete a Form I-9 for each employee hired.¹² 8 C.F.R. § 274a.2(a). This form requires both the employer inspecting an employee's verification documents and the employee to attest under the penalty of perjury the employee is eligible to work.

Employers are expected to adhere to certain guidelines in completing the I-9 form. Section 1, "Employee Information and Verification," must be completed by the employee by the end of his first day of work. The employee may receive assistance from a translator or a preparer if he has difficulty understanding how to complete the form.¹³ The employee must sign the form and attest that the information he provides in Section 1 is true and that he is eligible to work in the U.S. 8 C.F.R. § 274a(b)(1)(i)(A).

The employer must complete Section 2, "Employer Review and Verification," of the Form I-9 within three business days of the employee's hiring.¹⁴ 8 C.F.R. § 274a(b)(1)(ii). This section requires the employer to inspect documents provided by the employee that verify the individual's identity and eligibility to work in the U.S. Id. When inspecting the documents, the employer must decide whether they appear to be genuine and whether they relate to the individual presenting them. 8 C.F.R. § 274a(b)(1)(ii)(A). After reviewing those documents, the employer must sign the form and attest that it inspected the documents, the documents appeared to be genuine, and the documents verify the employee is entitled to work. 8 U.S.C. § 1324a(b)(1)(A).

Only certain documents can be used to verify an individual's identity and/or authorization to work. The employee must present the original document. 8 C.F.R. § 274a(b)(1)(v). No photocopies should be accepted by the employer.¹⁵ Note that the list of acceptable documents included in the instructions to the Form I-9 is no longer current. An employee can now only use one of five documents to verify both his identity and eligibility:

1. an unexpired U.S. passport;
2. an Alien Registration Receipt Card or Permanent Resident Card (also known as Form I-551 or green card);
3. an unexpired foreign passport containing a temporary I-551 stamp;

¹² A copy of the most recent version of the form and instructions issued by the USCIS is attached.

¹³ The translator/preparer providing assistance will be required to fill in a section of the form.

¹⁴ If the employer plans on hiring the employee for fewer than three business days, the employer will have to inspect the individual's documents and complete the employer section at the time of hire. 8 C.F.R. § 274a(b)(1)(iii).

¹⁵ An employee may submit a certified copy of a birth certificate for identification purposes. This is the lone exception.

4. an unexpired Employment Authorization Document (Form I-766, I-688, I-688A or I-688B) issued by the U.S. Citizenship and Immigration Services ("USCIS") and which contains a photograph, or
5. an unexpired foreign passport with a Form I-94 bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status.¹⁶

If the individual cannot produce one of the documents listed above, he must produce one document that verifies his identity and one separate document that verifies his eligibility for employment. 8 C.F.R. § 274a(b)(1)(v). For identity purposes, the individual may produce an original:

1. driver's license or identification card issued by a state;
2. school identification card with a photograph;
3. voter registration card;
4. U.S. military card or draft record;
5. identification card issued by federal, state, or local government agencies or entities;
6. military dependent's identification card;
7. Native American tribal document;
8. U.S. Coast Guard Merchant Mariner Card; or
9. driver's license issued by a Canadian government authority.

Individuals under the age of 18 who cannot produce one of these documents may use a school record, report card, clinic doctor or hospital record, or daycare or nursery school record to verify his/her identity.

To verify his eligibility to work, an employee must produce an original:

1. social security card, unless the card has "not valid for employment purposes" printed on its face;
2. Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350);

¹⁶ This document can be used only if the individual is an employment-authorized nonimmigrant alien, the period of endorsement has not expired, and the proposed employment is not in conflict with any restrictions identified on the Form I-94.

3. an original or certified copy of a birth certificate issued by a state, county, municipal authority, or outlying possession of the U.S. bearing an official seal;
4. Native American tribal document;
5. U.S. Citizen Identification Card;
6. identification card for use of resident citizen in the U.S.; or
7. unexpired employment authorization document issued by the USCIS.

An employer can neither limit what an employee may provide for verification or identification purposes beyond the limitations of this list nor specifically request that an employee provide certain documents that are listed for Form I-9 purposes. Doing so will open the employer to liability for engaging in an unfair immigration-related employment practice. 8 U.S.C. § 1324b(a)(6). An employer may copy documents that employees present solely for the purpose of complying with the verification requirements for the Form I-9. 8 C.F.R. § 274a.2(b)(3). If the employer chooses to copy the documents, it should implement a uniform policy that applies to all employees and their documents. The employer should not base its decision to copy an employee's documents solely on the employee's citizenship or immigration status or because the employee presents certain documents. If the employer chooses to copy the employee's verification documents, it must keep those copies with the Form I-9. 8 C.F.R. § 274a.2(b)(3). If the employer chooses to copy its employees' verification documents, then it must keep those copies with the Forms I-9. Id. The document copies, however, are not subject to the same retention regulations as the Forms. Id.

If an employer hires a former employee and the employer still retains a Form I-9 from that employee's previous employment with the employer, the employer may not have to complete a new form for that employee. The employer can inspect the employee's original Form I-9. 8 C.F.R. § 274a.2(c). If the employee is being hired within three years of his initial employment with the employer and the Form I-9 indicates he is still authorized to work, no new form will be needed. Id. The employer will only need to indicate on the Form I-9 the employee's new initial date of employment. 8 C.F.R. § 274a.2(c)(1)(i). If the form indicates that the employee is no longer eligible to work, the employer will be required to re-verify the employee's authorization to work. 8 C.F.R. § 274a.2(c)(1)(ii). Otherwise, the employee cannot be hired. Id.

2. Reverification

An employer will be required to reverify an employee's authorization to work under a number of different circumstances. First, an employer is required to re-verify an employee's employment authorization if a) the employee indicated in Section 1 of the Form I-9 that his work authorization will expire or b) a document submitted by the employee for verification indicates that the employee's work authorization will expire. 8 C.F.R. § 274a.2(b)(1)(vii). The employer must reverify on the Form I-9 that it has examined new documents provided by the employee, those documents appear to be genuine and relate to the employee, and those documents indicate that the employee is authorized to continue working. Id. The employer will note that it has done this by writing the presented document's identification number and expiration date on the Form

I-9. Id. The employer must engage in this re-verification process before the employee's initial work authorization listed on the Form I-9 expires. Id. If the form is not reverified, the employee can no longer be employed. Id.

An employer may request that an employee re-verify his authorization to work under two other circumstances. First, the employer may request re-verification if the employer becomes aware that an employee provided false documents during the initial verification. Employers may also request an employee re-verify his work authorization if the employer has reason to believe the employee is no longer authorized to work. The employer must have a genuine, good faith basis for its belief of the employee's status. If the employer requests that an employee presents documents for re-verification in bad faith, it may be held liable for discrimination.

3. Retention and Inspection of Forms I-9

Employers must retain Forms I-9 for at least three years. 8 C.F.R. § 274a.2(b)(2). If the employee works for the employer for more than two years, then the employer is required to retain the Form I-9 for one year after the employee's employment is terminated. 8 C.F.R. § 274a.2(b)(2)(i)(A). Forms must be retained in either their original form, on microform, on microfiche, or electronically. 8 C.F.R. § 274a.2(b)(2)(ii); 8 U.S.C. § 1324a(b)(3). The employer must be able to produce the Forms I-9 for inspection within three days of a request by the Department of Labor, the Department of Homeland Security or one of its agencies, or the Special Counsel for Immigration Related Unfair Employment Practices. 8 C.F.R. § 274a.2(b)(2)(ii). If the employer decides to retain the forms on microfilm or microfiche, they must be legible and readable when displayed on a viewer or reproduced on paper. 8 C.F.R. § 274a.2(b)(2)(iii). Further, the person producing the forms on microfilm or microfiche must provide the requesting authority with a reader-printer at the examination site. 8 C.F.R. § 274a.2(b)(2)(iii)(B). The reader-printers must have the capacity display and print a complete page of information. 8 C.F.R. § 274a.2(b)(2)(iii)(B).

4. Practical Advice

Employers should keep all Forms I-9 separate from employees' personnel files. The forms should be kept together in a separate file. This is suggested for two reasons. First, keeping the documents separate will allow the employer to quickly respond to a request of inspection. Leaving the forms in the personnel files would otherwise require the employer to have to retrieve each form from each individual's file. Second, keeping the files in a separate location will allow the employer to more easily monitor important dates that relate to the Forms I-9. For some employers, this will be especially important because the Form I-9 retention requirements may not coordinate with the employer's document retention policy.

Employers should consider developing a system to keep track of re-verification and retention dates. Monitoring re-verification dates is especially important. An employer could face prosecution for both failure to comply with the verification regulations and employing unauthorized workers if re-verification is not handled properly. The United States Citizenship and Immigration Services ("USCIS") advises employers to give employees at least 3-4 months notice of their work authorization expiration date. This will provide the employees adequate time to file for and receive new documents (and work authorization, if needed) for re-verification.

Employers should conduct internal audits to ensure that all Forms I-9 have been properly completed. This will allow the employer to correct any mistakes, complete incomplete forms, and make adjustments to procedures used in completing the forms. If an employer does find it has incomplete or incorrect Forms I-9, the employer may either a) correct the current form or b) complete a new form for that employee. In either case, the employer must be careful to use the date on which the form was actually completed. Employers that post-date forms to falsely show compliance with the timing requirements of the verification process may be subject to charges of document fraud under 8 U.S. C. § 1324c.

Employers should be aware that some documents presented by employees for employment authorization verification may appear to require reverification when they actually do not. The primary document culprit for this confusion is the Alien Registration Receipt Card (Form I-551). The green card, which will be presented only by permanent residents, bears an expiration date that is sometimes viewed by employers as the date the employee's work authorization ends. The expiration date on the card bears no relation to the individual's immigration status or work authorization. It is only the date on which the individual needs to acquire an updated card. An employer should never request an employee reverify his work authorization based on the green card expiration date.

5. Discrimination Prohibited

IRCA, which applies to all employers with more than three (3) employees, generally prohibits the discrimination against any individual on the basis of his national origin or citizenship status¹⁷ with respect to hiring, discharge, recruitment, or referral for a fee. 8 U.S.C. § 1324b(a). Employers also cannot intimidate, threaten, coerce, or retaliate against any person for the purpose of interfering with any right or privilege secured by IRCA. 8 U.S.C. § 1324b(a)(5). Individuals who file or intend to file a charge or complaint, or who have testified, assisted, or participated in any manner in an investigation, proceeding, or hearing regarding a possible unfair immigration related employment practice are also protected from negative employer action. Id. An employer who engages in this type of conduct will be considered to have engaged in an unlawful immigration-related employment practice. Document abuse, which occurs when an employer requests more or different documents than are required to complete the Form I-9 or refuses to accept documents provided by an individual that reasonably appear to be genuine, will also be treated as an unfair immigration-related employment practice if it is coupled with discriminatory intent.¹⁸

¹⁷ To qualify for citizenship status protection under IRCA, an individual must be either a U.S. citizen or national, a lawful permanent resident of the U.S., a lawfully admitted refugee, or a lawfully admitted asylee to the U.S. IRCA does not provide protection for lawful permanent residents who fail to apply for naturalization within six months of the date the alien becomes eligible to apply or lawful permanent residents who apply for naturalization in a timely fashion but who have not been naturalized within two years of the date of application, unless the alien can establish that he is actively pursuing naturalization. 8 U.S.C. § 1324b(a)(3).

¹⁸ Note that an employer can also be charged with document abuse if it requests applicants to present verification documents **before** they are actually hired.

It is not discrimination if an employer hires a U.S. citizen or national over an alien applicant if the two individuals are equally qualified for the job. Protection from unfair immigration-related employment practices also do not apply to employers with three or fewer employees, national origin discrimination that is covered by Title VII of the Civil Rights Act of 1964, or citizenship discrimination that is otherwise required in order to comply with federal laws, regulations, or executive orders, or that required by federal, state, or local government contracts, or which the Attorney General deems to be essential for an employer to do business with a federal, state, or local government agency or department.

I. OCCUPATIONAL SAFETY AND HEALTH ACT

1. Who is Covered

The Occupational Safety and Health Act covers all private employers and all their employees in all of the fifty states, with very limited exemptions. Coverage is provided by the Occupational Safety and Health Administration (OSHA) or an OSHA-approved state job safety and health plan.

2. Basic Provisions/Requirements

OSHA's Role: OSHA has two principal functions: setting standards and conducting workplace inspections to ensure that employers are complying with the standards.

Standards: OSHA standards require that employers adopt certain, practices means, methods, or processes reasonably necessary to protect workers on the job. It is the *responsibility* of the employer to become familiar with the standards and to comply with the standards. In operating their business, employers must comply with all regulations applicable to their own actions and conduct.

General Duty Clause: Even if OSHA has not promulgated a standard addressing a specific hazard, employers are responsible for complying with the Act's General Duty Clause, which states that an employer "shall furnish . . . a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

3. OSHA Standards

Standards fall into four major categories: general industry, construction, maritime, and agriculture. Some requirements are identical across industries while some vary.

The standards include, among other requirements:

Access to Medical and Exposure Records: This regulation provides a right of access to employees and OSHA to relevant medical records, including records related to that employee's exposure to toxic substances.

Personal Protective Equipment: This standard requires employers to provide employees with personal equipment designed to protect them against certain hazards and to ensure that

employees have been effectively trained on the use of the equipment. This equipment can range from protective helmets to prevent head injuries in construction and cargo handling work, to eye protection, hearing protection, hard-toed shoes, special goggles for welders, and gauntlets for iron workers.

Hazard Communication: This standard requires manufacturers and importers of hazardous materials to conduct hazard evaluations of the products they manufacture or import. If a product is found to be hazardous under the terms of the standard, the manufacturer or importer must so indicate on containers of the material, and the first shipment of the material to a new customer must include a material safety data sheet (MSDS). Employers must use these MSDSs to train their employees to recognize and avoid the hazards presented by the materials.

Recordkeeping: Every employer covered by OSHA must maintain three types of OSHA-specified records of job-related injuries and illnesses.

The OSHA Form 300 is an injury/illness log, with a separate line entry for each recordable injury or illness. Such events include work-related deaths, injuries, and illnesses other than minor injuries that require only first aid treatment and that do not involve medical treatment, loss of consciousness, restriction of work, or transfer to another job. Each year, the employer must conspicuously post in the workplace a Form 300A, which includes a summary of the previous year's work-related injuries and illnesses.

OSHA Form 301 is an individual incident report that provides added detail about each specific recordable injury or illness. An alternative form, such as an insurance or workers' compensation form that provides the same details may be substituted for OSHA Form 301.

Reporting: Employers must report to the nearest OSHA office within 8 hours of the accident that results in one or more fatalities or hospitalization of 3 or more employees.

4. Employee Rights

Employees have the right to complain to OSHA about safety and health conditions in the workplace (the name of the complaining employee is kept confidential from the employer) and to participate in OSHA workplace inspections.

Each employer covered by OSHA must post prominently the OSHA 3165 poster informing employees of their rights and responsibilities.

Non-Discrimination: Employees who exercise their rights under OSHA can be protected against employer reprisal for the exercise of such rights, under Section 11(c) of the OSH Act. If OSHA agrees that discrimination has occurred, the employer will be asked to restore lost benefits to the affected employee.

5. Voluntary Protection Programs

OSHA actively recruits new businesses to join one of its voluntary protection programs, such as strategic partnerships, which are a cooperative approach to regulation and enforcement that expands worker protection beyond the minimum required by OSHA standards. By engaging in these partnerships, an employer subjects itself to greater regulation and inspection potential than it would otherwise have.

6. Inspections and Citations

All employer sites are subject to workplace inspections by OSHA compliance safety and health officers. OSHA conducts two general types of inspections, programmed, and unprogrammed. Establishments with high injury rates receive programmed inspections, while unprogrammed inspections are used in response to fatalities, catastrophes, and complaints.

De Minimis Violations: Certain violations of OSHA standards or the General Duty clause, which have no direct or immediate relationship to safety and health, may be treated as *de minimis*, requiring no penalty or abatement. OSHA does not issue citations for *de minimis* violations.

Other Than Serious Violation: A violation that has a direct relationship to job safety and health, but probably would not cause death or serious physical harm. A proposed penalty of up to \$7,000 for each violation is discretionary.

Serious Violation: A violation where a substantial probability that death or serious physical harm could result and where the employer knew, or should have known, of the hazard. A penalty of up to \$7,000 for each violation must be proposed.

Willful Violation: A violation that the employer intentionally and knowingly commits. The employer either knows that what he or she is doing constitutes a violation, or is aware that a condition creates a hazard and has made no reasonable effort to eliminate it. The Act provides that an employer who willfully violates the Act may be assessed a civil penalty of not more than \$70,000 but not less than \$5,000 for each violation.

If an employer is convicted of a willful violation of a standard that has resulted in the death of an employee, the offense is punishable by a court imposed fine or by imprisonment for up to six months, or both. A fine of up to \$250,000 for an individual, or \$500,000 for an organization, may be imposed for a criminal conviction.

Repeated Violation: A violation of any standard, regulation, rule, or order where, upon reinspection, a substantially similar violation is found. Repeated violations can bring fines of up to \$70,000 for each such violation. To serve as the basis for a repeat citation, the original citation must be final; a citation under contest may not serve as the basis for a subsequent repeat citation.

7. Employer Preventive Measures

Employers should implement preventive measures to reduce the risk of accidents or injuries in the workplace or of citations resulting from OSHA inspections. Effective safety preventive measures include:

Making safety an important priority;
Ensuring compliance with regulations;
Implementing training program;
Conducting safety audits;
Correcting employee safety violations;
Developing a safety committee; and
Ensuring proper documentation;

Employers should also develop a safety plan of action for how to respond to an OSHA investigation, including developing a inspection procedure, designating an OSHA coordinator, locating experienced legal counsel, and understanding the rules, regulations, and procedures.

III. LABOR UNIONS AND APPLICABLE LAWS

A. UNION ORGANIZATION PROCESS

1. Rights and Unfair Labor Practices

Employee Rights:

Section 7 of The National Labor Relations Act provides as follows:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

Employer Free Speech Rights:

Section 8(c) of the National Labor Relations Act provides as follows:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Unfair Labor Practices by Employers:

Section 8(a) of The National Labor Relations Act provides, in pertinent part, as follows:

It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

2. The Representation Process

The process is initiated by a petition which may be filed either by an employee, a group of employees, an individual or a labor organization acting on their behalf, seeking to represent, for the purposes of collective bargaining, the employees "in a unit appropriate for such purposes."

The Union must prove a 30% showing of interest within 48 hours of filing the petition.

Immediate Post-Petition Procedures:

Regional Director of NLRB notifies Company of petition

NLRB requests list of employers names and job classifications

Purpose: verify adequacy of showing of interest

Receipt of "Notice to Employees" for posting (no obligation to post notice)

Receipt of Commerce Questionnaire

Consent Or Stipulated Election:

Prior to any hearing, the NLRB will seek to have the parties "stipulate" the election or agree to a "consent election." It may be to the advantage of the employer to stipulate the election in order to gain a propitious time for the election where there are not unit issues. "Consent" elections are not favored in that you waive your right to appeal to the NLRB from the decisions of the Regional Director.

The Hearing:

Short notice: Usually a week's notice absent extenuating circumstances.

Two primary purposes:

- (a) To determine the existence of "commerce" or "jurisdiction"
- (b) To determine the appropriate unit and the scope of that unit *i.e.*, the inclusion or exclusion of individual jobs or job classification.

- (i) plant-wide or departmental unit
- (ii) supervisory status

The hearing is conducted by a representative of the NLRB, often a non-lawyer.

Primary objective of the employer: To obtain a unit in which the employer has the best chance of winning the election consistent with the NLRB standards of "community of interest." This requires the careful preparation of the employer's witness to testify concerning the interrelation between jobs and the common interests of the employees.

At the close of the hearing, the parties are entitled to file briefs with the NLRB's Regional Director. The filing period is very short, 7 days, unless an extension is granted.

Once the record is closed and briefs are filed, the Regional Director of the NLRB will then issue a Decision and Direction of Election ("DD&E") defining the appropriate unit, as well as resolving the inclusion or exclusion of contested jobs or job classifications. The date of the DD&E will determine who is eligible to vote. The eligibility will then be limited to those "bargaining unit" employees employed in the pay period ending immediately preceding the date of the DD&E. Eligibility under a stipulated election will be those bargain unit employees employed in the payroll period ending immediately preceding the date of the Stipulation.

Parties may appeal Regional Director's decision by filing a Request for Review within 14 days.

Pre-Election Requirements

Establish location of election

Location of balloting/election booth must be away from supervisory view, executive offices

Eligibility list of names and addresses of employees must be submitted to NLRB within 7 days of direction of election or approval of consent agreement (Excelsior list)

List includes those employees employed during the pay period immediately preceding the date of the consent election agreement or the date of the regional director's direction of election

Voting list is provided to NLRB and to the Union

Make sure that the *Excelsior* list is complete and accurate. Resolve with your labor attorney the eligibility of individual employees who are of questionable eligibility status, *i.e.*, laid off employees, etc. The *Excelsior* list must be accurate and provided on time or you risk having the election set aside should the company prevail.

Notice of Election posters will be sent by NLRB to parties 5-10 days prior to election

Posting of Notice of Election is required 72 hours prior to election

Poster contains:

sample ballot

statement of employee rights

summary of election rules and procedures

Notices must be posted where employees have the opportunity to read them (time clock, bulletin board)

Notices must not be defaced – Employer required to monitor posters

The Election:

The "42 day" rule: NLRB guidelines require that the election must be held within 42 days of the filing of the petition. This time period can only be extended because extraordinary circumstances.

The "24 hour" rule: No captive audience speeches in the last 24 hours before the election.

The date and time of the election: The election should be held on a pay day to insure a maximum turnout; at a time when most eligible employees will be available to vote; and that is the least disruptive of the company's operations, *i.e.* shift change, etc. The place of the election should be in a "neutral" area such as break rooms, lunch rooms, etc.

Selecting the "observer." Each party to the election is entitled to one and sometimes, two observers. They must be non-supervisory employees, preferably a well respected eligible voter who is willing to serve.

The Day Of The Election:

The pre-election conference: A conference will be held between the parties and the NLRB agent immediately before the polls open primarily to determine any changes in the eligibility list, particularly with respect to any terminations, resignations, and potential challenges, etc. The NLRB agent will try to have the parties resolve any disputes over the eligibility of an employee. The Board Agent will then instruct the observers but the employer should take this opportunity, immediately before the polls open, to also instruct its observers, particularly with respect to challenges that the employer may want to assert during the course of the election, and as to observations that the observer may make regarding possible misconduct during the polling period and around the polls.

Counting The Vote: Immediately after the polls are closed, the NLRB agent will count the votes, "Yes" votes being for the union and "No" votes being against the union and for the company. Each observer will be asked to tally the opposite votes, *i.e.*, the company observer will tally the "yes" votes and the union observer will tally the "no" votes.

Each observer will be asked to sign a certification as to the conduct of the election, meaning that the election process itself was conducted fairly. This certification does not waive any objections that either party may have as to pre-election conduct that might influence the outcome of the election.

All challenged ballots will be set aside until the vote count is completed. At that time the NLRB agent will determine whether the number of challenged ballots is sufficient to affect the outcome of the election. If the challenged ballots are determinative, the Board Agent will seek to try to resolve the challenges by agreement, failing which he will then seal them to be resolved at a later time. If the challenged ballots are not sufficient in number, such will be noted on the Election Tally Sheet which will be signed by both observers to verify the results of the election.

B. STEPS EMPLOYERS CAN TAKE

While the NLRA prohibits employers from engaging in some conduct during a union organizational campaign, employers have many effective tools at opposing union organization. Employers who are prepared for campaigns, have trained supervisors, and have action plans in place succeed most easily at defeating election campaigns. Election campaigns are time consuming and costly. An employer must continue operation while running an effective campaign. Educating employees that a union is not in their best interest before the union gains enough support to file an election petition is the most effective and least expensive and disruptive way of defeating a union organizing drive.

Supervisor Training: Supervisors should be educated and trained regarding their roles and responsibilities for recognizing, reporting, and avoiding the need for union organization. While supervisors are prohibited from engaging in the following conduct:

T - Threats - Management may not make threats to employees regarding loss of pay, benefits, jobs, or opportunities for engaging in union activity. Companies may not threaten to close the plant if employees vote for a union.

I - Interrogation - Management may not question employees as to how they or others feel about unions or about employees' union activities or preferences.

P - Promises - Management is prohibited from making promises to employees for opposing union organization.

S - Surveillance - Management may not surveil employees union activities.

Supervisors should be encouraged to speak with employees about the following:

F - Facts - The Company is permitted to provide employees facts about union representation. It is imperative for companies to educate their employees

regarding the facts about unions because unions are allowed to make false promises.

O - Opinions - Management may provide their opinions to employees regarding unionization. Expressing opinions, as long as the opinions contain no threats of reprisal or promises of benefits, is protected free speech.

E - Examples - The Company can and should give examples to employees of what has happened to employees at other plants who were represented by unions. Union-represented companies in various industries have experienced economic hardship and received bad press recently.

Plan of Action: Employers should develop a plan of action regarding what to do when management learns that union activity is occurring among the employees. Any effective action plan should involve a quick educational response to the union activity, because the most effective, cheapest, and least disruptive method of opposing a union organizing drive is to defeat it in its early stages. The drive might well be much farther along that management realizes. Examples of responses that may be involved in a plan of action include:

Small Group Employee Education Meetings;

Distribution of Literature about Unions or Correspondence from Management;

Use of a Labor Relations Consultant to Speak to Employees Directly on the Floor;

Further Supervisor Training and Assessment of Vulnerable Areas;

Company-wide meetings;

Home mailings.

IV. GEORGIA STATE EMPLOYMENT LAWS

A. AGE DISCRIMINATION

O.C.G.A. § 34-1-2 prohibits Georgia employers from refusing to hire, employ or license, or from terminating any individual between the ages of forty (40) and seventy (70) solely on the basis of age, when the reasonable demands of the job in question do not require consideration of age and the individual is qualified physically, mentally and by training and experience to meet the job requirements. *See* O.C.G.A. § 34-1-2(a) (2002).

The statute does not allow for a private right of action for violating its provisions. However, any employer violating the statute will be guilty of a misdemeanor and must pay a fine.

B. ANTI-PICKETING

Georgia law makes it unlawful for anyone to prevent, or attempt to prevent, any individual from leaving or continuing in the employment of, or from accepting or refusing employment by any employer or from entering or leaving any place of employment of such employer. O.C.G.A. § 34-6-2 (2002).

Under Georgia law, it is also illegal for any person to engage in mass picketing at or near any place where a labor dispute exists in any manner that obstructs or interferes with ingress or egress. O.C.G.A § 34-6-5 (2002).

C. ARBITRATION

Many states, including Georgia, have enacted statutes allowing arbitration of employment-related disputes. In contrast to the skeletal outline of arbitration procedures delineated in the Federal Arbitration Act, the Georgia Arbitration Code (GAC) provides comprehensive procedures.

Employers should keep in mind that employment contracts fall outside the GAC's coverage unless the written arbitration clause is initialed by all signatories to the agreement at the time the parties execute the agreement. O.C.G.A. § 9-9-2 (c)(9) (2002).

D. AT-WILL EMPLOYMENT

The at-will employment doctrine, which states that employment for an indefinite term may be terminated at any time and without cause (i.e., for any reason or no reason at all), is an important concept in Georgia employment law. O.C.G.A. § 34-7-1. Accordingly, a strong presumption in favor of at-will employment arises when the term of employment is for an indefinite period of time. While many states are at-will employment states, some states recognize exceptions to the doctrine that Georgia law does not. As such, an employee making a claim for wrongful discharge has a substantially more difficult task in this state than in many others.

Exceptions commonly recognized by other states that have been rejected by Georgia courts are: (1) the public policy exception; (2) the promissory estoppel exception; and (3) the implied contracts in personnel policies, manuals & handbooks exception.

First, a number of courts in other states have taken the position that, in certain instances, public policy considerations warrant an exception to the at-will rule. Georgia courts have rejected this position, noting that, "[although there can be public policy exceptions to the [at-will] doctrine, judicially created exceptions are not favored and Georgia courts thus defer to the legislature to create them." *Reilly v. Alcan Aluminum Corp.*, 528 S.E.2d 238, 239-240 (Ga. 2000). The courts have gone so far as to apply this principle when the claimants allege that termination of their employment is in retaliation for legitimate employee conduct. *Robins Federal Credit Union v. Brand*, 507 S.E.2d 185 (Ga. App. 1998). *See also Evans v. Bibb Co.*, 342 S.E.2d 484 (Ga. App. 1986) (refusing to adopt public policy exception where employer terminated employee for filing workers' compensation claim). *See also Reilly*, 528 S.E.2d 238 (declining to recognize a public policy exception where claimant allegedly terminated in violation of Georgia's age discrimination statute). Accordingly, unless the employer discharges

the employee in violation of a statute that specifically prohibits discharge (retaliation), Georgia courts will not recognize the claim.¹⁹

Second, employees raising promissory estoppel claims generally allege that the employer promised employment to them and, in reliance on that promise, the employee changed his or her position to his or her detriment. *See Filcek v. Norris-Schmid, Inc.*, 401 N.W.2d 318 (Mich. Ct. App. 1986)(holding promissory estoppel exception to at-will doctrine applied where the claimant quit his job in reliance on a job by defendant only to be told later that the offered position was no longer available). While other jurisdictions recognize these types of claims, Georgia courts have rejected promissory estoppel claims as a way to circumvent the at-will rule. *See Simpson Consulting v. Barclays Bank PLC*, 490 S.E.2d 184 (Ga. App. 1997); *Johnson v. Metropolitan Atlanta Rapid Transit Auth.*, 429 S.E.2d 285, 287 (Ga. App. 1993).

Third, while some courts recognize an exception to at-will employment based on language included in personnel policies, Georgia courts have consistently refused to recognize an exception to the at-will doctrine based on language in handbook and personnel policies. Georgia courts view recognition of an implied contract based on manuals or handbooks with no definite term as inconsistent with the employment at-will doctrine and will not extend employment contract rights based on employment manuals in the absence of clear contractual language granting such rights. Therefore, under Georgia law, employee handbooks containing disclaimers, absent other evidence of a contract, do not constitute written employment agreements sufficient to alter the at-will employment relationship.

E. CHILD LABOR

The Georgia child labor laws are very much like the provisions of the Fair Labor Standards Act governing child labor. O.C.G.A. § 39-2-1 et seq. The restrictions on employing minors are categorized by age and type of work, with minors under sixteen not being permitted to work: (1) in any occupation that is dangerous to the health and "morals of the minor"; (2) between the hours of 9:00 p.m. and 6:00 a.m.; (3) during the hours when school is in session (4) more than four hours on any day when school that the minor attends is in session, or more than 8 hours on any non-school day, or more than 40 hours in any one week. *Id.* Minors under the age of twelve are not allowed to work at any time, unless their work is in agriculture, a private home, or employment by a parent or guardian. O.C.G.A. § 39-2-9 (2002).

F. CHILD SUPPORT

Employers are prohibited from discharging or otherwise discriminating in employment against an employee solely because of the "execution of a wage assignment to pay for child support." O.C.G.A. § 19-11-20 (b) (2002). The employer may collect, however, as administrative costs, up to twenty-five dollars for the first income deduction and up to three dollars for each subsequent deduction. O.C.G.A. § 19-11-20 (d) (2002).

G. COVENANTS NOT TO COMPETE

¹⁹ Keep in mind, however, that these circumstances could expose an employer to liability under federal statutes.

Like most states, Georgia has its own laws governing covenants not to compete. As a general matter, such covenants are looked upon in this state with disfavor. *See* O.C.G.A. § 13-8-2. However, Georgia courts recognize that employers have a legitimate interest in protecting the goodwill, specialized training and confidential information entrusted and invested in an employee and will therefore, enforce "reasonable" covenants not to compete under appropriate circumstances.

To enforce a covenant not to compete in Georgia, the employer must show that the covenant is reasonable as to (1) geographic area, (2) time, and (3) scope of activity. The covenant must satisfy reasonableness as to all three criteria because Georgia courts, unlike the courts in other states, will not "blue pencil" or modify an invalid covenant as to make it enforceable. Georgia courts will declare an entire non-compete covenant unenforceable if the court finds it to be invalid in any respect. *See Watson v. Waffle House, Inc.*, 253 Ga. 671 (Ga. 1985).

First, as a general rule, a reasonable geographic restriction is one that encompasses only the territory in which the employee performed services for the employer. *See generally Pierce v. Industrial Boiler Co., Inc.*, 315 S.E.2d 423 (Ga. 1984)(holding geographic area restriction in covenant reasonable because the "120 mile radius" of the employee's former place of employment pertained to the territory where the former employee performed work and served to protect the employer's investment of time and money in developing the employee's skills).

Second, the determination of reasonableness with respect to time limitations depends on the factual circumstances of each case. Georgia courts have upheld restrictions ranging from one to two years. *See Chaichimansour v. Pets Are People Too, No. 2, Inc.*, 485 S.E.2d 248 (Ga. App. 1997)(two-year restriction); *Puritan/Churchill Chem. Co. v. McDaniel*, 286 S.E.2d 297 (Ga. 1982); *See also Smith v. HBT, Inc.*, 445 S.E.2d 315, 318 (Ga. App. 1994) (upholding five-year restriction based on specialized nature of the employer's business).

Third, the scope-of-activity restrictions must be reasonable. Reasonable scope-of-activity restrictions are those restrictions that limit an employee's ability to work for a competitor in the same or similar capacity as the former employee performed while working with the employer. *Harville v. Gunter*, 495 S.E.2d 862 (Ga. App. 1998) (finding that an employee who worked as a speech pathologist could not be prevented from acting as an officer, director, or shareholder with other corporations practicing speech pathology). Accordingly, Georgia courts will invalidate "any capacity" restrictions which prevent employees from accepting any jobs with competitors. *See generally Allied Informatics v. Yeruva*, 554 S.E.2d 550 (Ga. App. 2001).

H. CRIMINAL RECORDS

Under O.C.G.A. § 35-3-34, an employer can obtain a copy of an individual's criminal history from the Georgia Crime Information Center if the employer submits the individual's finger print or a signed consent form provided by the Center. An employer obtaining an individual's criminal report, that later decides not to hire the individual or makes an adverse employment decision regarding an employee based on that report, must disclose to the individual that a report was obtained from the Center. The employer must also disclose the specific

contents of the record and a statement concerning how the information in the report affected the employment decision. O.C.G.A. § 35-3-34(b) (2002).²⁰

Georgia employers must also keep in mind that under the Georgia First Offender Statute, courts are authorized to place a criminal defendant who pleads guilty on probation, "without entering a judgment of guilt." O.C.G.A. § 42-8-60 (2002). While Georgia law allows an employer to deny employment based on criminal *convictions*²¹ where there is a legitimate business purpose for doing so, an applicant who fulfills the terms of his probation under the First Offender Statute is "discharged" and cannot be "considered to have a criminal conviction." O.C.G.A. § 42-8-62(a) (2002). Accordingly, since a discharge is not a criminal conviction, it "may not be used to disqualify a person in any application for employment...." O.C.G.A. § 42-8-63 (2002).

I. DISABILITY ACT

The Georgia Equal Employment for Persons with Disabilities Code is Georgia's version of the Americans with Disabilities Act ("ADA"), and prohibits employers from discriminating against any individual with a disability with respect to wages, rates of pay, hours, or other terms or conditions of employment because of the individual's disability, unless the disability restricts the individual's ability to adequately perform his or her job. O.C.G.A. § 34-6A-4 (a) (2002). While the ADA and its companion Georgia statute have many similarities, a few key distinctions exist.

First, the ADA applies to employers having fifteen or more employees *for each working day*, whereas Georgia's disability statute applies to employers with fifteen or more employees *in its employ*. Thus, the Georgia statute applies to more smaller businesses that employ at least 15 employees, but rarely have fifteen employees working on the same day. Second, the ADA protects against some physical and mental disorders or conditions that the Georgia statute excludes from coverage.²² Third, and probably most significant, while the ADA allows

²⁰ The Fair Credit Reporting Act may also require an employer to make certain disclosures and acquire consent from applicants to obtain the applicant's criminal record as part of an employment-related background check.

²¹ The distinction between convictions and arrests is important because the EEOC has concluded that employment decisions based on arrests, and not convictions, have a disparate impact on minorities and therefore violate Title VII.

²² For example, the ADA defines physical or mental impairment to include cosmetic disfigurement, which Georgia law has omitted from its coverage definition. Claustrophobia and depression likewise do not constitute a handicap within the meaning of the Georgia Equal Employment for Persons with Disabilities Code. However, those conditions are likely covered under the ADA. *See Bowers v. Estep*, 420 S.E.2d 336, 340 (Ga. App. 1992). Additionally, persons *addicted* to drugs or alcohol are exempt from protection under the Georgia statute while the ADA only excludes individuals "currently engaged in the use of illegal drugs." O.C.G.A. § 34-6A-2(1); 42 U.S.C.A. § 12114.

employers to make inquiries regarding an *employee's* ability to perform his job; the ADA does not allow an employer to make pre-employment inquiries concerning existing disabilities of an *applicant*. Under Georgia law, however, pre-employment inquiries of an applicant regarding existing disabilities are not prohibited. *See* O.C.G.A. § 34-6A-3(a) (2002).²³

Under the Georgia statute, an aggrieved employee may file suit and recover, among other things, reinstatement, back pay, reasonable attorney's fees, and other equitable relief that the court deems appropriate. O.C.G.A. § 34-6A-6.

J. DRUG-FREE WORKPLACE PROGRAM

Georgia employers who implement a Drug-Free Workplace Program are entitled to premium discounts under the employer's workers' compensation policy. To qualify for the discount under the statute, the Drug-Free Workplace Program must consist of the following: (1) a written policy statement including, among other things, notice that drug testing can occur prior to the employee's first test; (2) substance abuse testing; (3) available resources of employee assistance programs; (4) educational programs discussing substance abuse at least twice a year in the first year of certification (once per year in all subsequent years); (5) supervisor training on substance abuse and (6) confidentiality policies in compliance with the standards established in the statute. O.C.G.A. § 34-9-413 (a).

K. EMPLOYMENT RECORDS

With respect to employment records, Georgia law imposes different, lesser requirements than are imposed under the Fair Labor Standards Act. In Georgia, employers are required to keep a true and accurate record of the name, address, and occupation of each person employed by him, and of the daily and weekly hours worked by each person and of the wages paid during each pay period to each person. These records must be kept on file for at least one year after the date of the record. O.C.G.A. § 34-2-11 (2002).

L. EQUAL PAY ACT AND THE RIGHT TO ARBITRATE

The Sex Discrimination in Employment Act (SDEA) makes it unlawful for an employer to make decisions regarding an employee's pay on the basis of sex. Expressly, the SDEA prohibits employers from paying wages to employees of one sex at a rate less than that paid to employees of the opposite sex for "equal work in jobs which require equal skill, effort, and responsibility and which are performed under similar working conditions," except where payment is based on: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex. O.C.G.A. § 34-5-3(a). The statute forbids an employer to lower the wage rate of any employee to comply with the law after having paid an unlawful wage differential. *Id.*

²³ There are a number of other differences between the ADA and the Georgia Equal Employment for Persons with Disabilities Code. These are just a few examples of the more substantive distinctions. As with many of the issues referenced in this Memorandum, a more comprehensive analysis should be undertaken before making critical employment decisions.

The SDEA provides for a private right of action whereby any employee may file suit to collect his or her unpaid wages. O.C.G.A. § 34-5-5 (a) (2002). In addition to the unpaid wages, a prevailing employee can recover attorney's fees up to 25 percent of the employee's award. *Id.*

Additionally, the SDEA, with the concurrent jurisdiction of the Federal Arbitration Act, contains its own arbitration provision which gives either party the right to request arbitration of disputes arising under the SDEA. O.C.G.A. § 34-5-6 (2002).

M. FELLOW-SERVANT RULE

Under the doctrine of respondeat superior, an employer is liable for injuries to a third party resulting from the acts of an employee committed within the scope of his or her employment. O.C.G.A. § 51-2-2 (2002). One exception to this rule is the "fellow servant rule." The fellow servant rule states that an employer is not vicariously liable to one employee for injuries arising from the negligence or misconduct of other employees "about the same business." O.C.G.A. § 34-7-21 (2002). It is important to keep in mind, however, that although the employer might not be vicariously liable for the other employee's negligence or misconduct, the employer could be directly liable to the injured employee for the employer's negligence in hiring or retaining an employee with knowledge that the employee is potentially a danger to coworkers. *Lindsey v. Winn Dixie Stores, Inc.*, 368 S.E.2d 813, 815 (Ga. App. 1988).

N. FIXED-PERIOD EMPLOYMENT

If a contract of employment provides that wages are payable at a specific period, the courts in Georgia will presume that the employment relationship extends for that period of time. If anything else in the contract indicates that the employment was to last a longer term, "the mere reservation of wages for a lesser time will not control." On the other hand, an indefinite hiring may be terminated at will by either party. O.C.G.A. § 34-7-1.

O. GARNISHMENT

Georgia employers are prohibited from discharging employees solely because their earnings have been garnished for *one* indebtedness. O.C.G.A. § 18-4-7.

P. HAZARDOUS CHEMICALS CONSENT

Georgia law requires that labor pools and work site employers provide specified forms to inform workers that a work assignment on which they might be placed involves the exposure to hazardous chemicals and to obtain such person's consent to that exposure. O.C.G.A. § 34-10-3.

Q. INTERFERENCE WITH EMPLOYMENT RIGHTS

O.C.G.A. § 34-6-4 (2002) forbids any person to prevent or attempt to prevent anyone from engaging in, remaining in, or performing the business, labor, or duties of any lawful employment or occupation.

R. JURY DUTY AND SUMMONS

Georgia law makes it unlawful for an employer to discharge, discipline, penalize, or threaten to penalize an employee because the employee is absent from work to attend a judicial proceeding in response to a subpoena, jury summons, or other court order. O.C.G.A. § 34-1-3 (2002). These protections are not afforded to employees missing work to attend a judicial proceeding to answer a criminal charge. O.C.G.A. § 34-1-3(c). Nor does the statute prevent the employer from requiring that the employee give reasonable notification of any expected absences. *Id.*

S. LETTERS OF REFERENCE

Georgia employers should be very cautious when providing letters of reference or recommendation on behalf of former employees to prospective employers. Though the issue has yet to be addressed in Georgia courts, a number of courts across the country have found employers liable for negligent reference or recommendation. *See generally Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997) (finding school district providing letter of recommendation liable for negligent reference where former employer failed to disclose employee's sexual misconduct in letter and subsequently hired teacher molested thirteen-year old student); *see also Doe v. Methacton Sch. Dist.*, 880 F. Supp. 380 (E.D. Pa. 1995). In short, where a letter of recommendation or reference is provided, if the employee has any dangerous propensity that could cause injury to others, the employer should disclose this information to the prospective employer.

Generally, the disclosure of certain information could subject an employer to defamation claims; however, as noted above, failure to disclose the information could subject the employer to claims for negligent reference or recommendations. In an attempt to balance these two competing concerns, Georgia has enacted a shield law (see "Shield Law" topic below) which gives the employer writing the letter of reference some protection for disclosing information which might otherwise subject the employer to defamation claims. Accordingly, any Georgia employer submitting a letter of reference on behalf of an employee, which includes anything other than merely objective information such as title and dates of employment, should err on the side of full disclosure.

T. MILITARY LEAVE

Georgia employers may not discharge or refuse to restore employment to employees in permanent positions who are members of the military, including the Georgia National Guard, because of the employee's membership in the military or because of any absence from work to perform military service. O.C.G.A. § 38-2-280 (2002). For these protections to apply, however, the individual must: (1) be leaving a permanent position; (2) apply for reemployment within ninety (90) days after s/he is relieved of service, (3) still be qualified to fulfill the duties of his or her job; and (4) provide a certificate of completion of military service, signed by an officer of the relevant military branch. O.C.G.A. § 38-2-280 (a). Despite these statutory protections, the employer may discharge or refuse to restore employment to an employee if the employer can demonstrate that the employer's circumstance have changed in such a way as to make it impossible or unreasonable to rehire or reinstate the individual's employment. O.C.G.A. § 38-2-280.

These statutory protections also extend to employees who temporarily leave their jobs to attend annual training, attend military service schools, or participate in military assemblies, provided that the leave does not exceed six months in a four-year period. O.C.G.A. § 38-2-280(b). To have employment restored, the employee must request restoration within ten (10) days of completing the temporary service. *Id.*

Where an employee's position has been restored pursuant to this statute, no loss of seniority may occur and the employee must be eligible to participate in insurance and any other benefits offered by the employer to employees who have taken other company-approved leaves of absence. Moreover, any employee whose position is restored according to this statute may not be discharged from the position within one year of the restoration, unless the employee is discharged for cause. O.C.G.A. § 38-2-280(e).

U. MINIMUM WAGE

Currently, the minimum hourly wage rate in Georgia is \$5.15, mirroring the minimum hourly wage required previously under federal law. O.C.G.A. § 34-4-3 (2002); 29 U.S.C. § 206(a)(1) (2004). This fact is particularly significant because, among many other exemptions,²⁴ the Georgia minimum wage laws do not apply to employers who are subject to federal minimum wage laws, as long as the applicable federal minimum wage rate is "greater" than the Georgia minimum wage rate.

Because the Georgia statute exempts so many businesses from its coverage, it seems logical to presume that the Georgia legislature intended only a few companies be bound by the Georgia law in this area. However, because the minimum wage rate in Georgia is the *same* as the minimum wage rate under federal law, and because the Georgia statute states that employers are only exempt from the Georgia rate if the federal minimum wage rate is "*greater*", many Georgia businesses may have to comply with Georgia's rate, as opposed to the federal rate. This is problematic because under federal law, the statute of limitations for suits seeking back wages is normally two years, and is three years for "willful" violations. Under Georgia law, the statute of limitations for failure to pay minimum wage is automatically three years.

In addition to the expanded statute of limitations, Georgia law also requires employers who are subject to the state's minimum wage laws to maintain records of the employee hours worked and the wages paid, and copies of any regulations or orders issued relating to the law

²⁴ The Georgia minimum wage provisions do not apply if: (1) the employer has sales of forty thousand dollars per year or less; (2) the employer has fewer than five employees; (3) the employer employs domestic employees; (4) the employer is a farm owner, sharecropper, or land renter; (5) the employee's compensation consists wholly or partially of gratuities; (6) the employee is a high school or college student; (7) the employee is employed as a newspaper carrier; or (8) the employee is employed by a nonprofit child-caring institution or long term care facility serving children or mentally disabled adults who are enrolled and reside in residential facilities of the institution, provided that the employee also resides in such facilities, receives board and lodging from the facility without cost, and receives annual compensation of at least \$10,000.00.

must be posted in a manner such that the information is easily and often seen by the employees. O.C.G.A. § 34-4-5.

V. MULTIRACIAL CLASSIFICATIONS

Under Georgia law, any written form used by any entity conducting business in Georgia requiring the employment of labor which requests information on the racial or ethnic identification of an employee *and* which contains a list of racial and ethnic classifications from which such employee must select one may not use the term "other" to identify multiracial individuals; rather, the statute requires that the document include "multiracial" among the employees' choices the classifications. O.C.G.A. § 34-1-5 (2002).

W. PUBLIC EMPLOYEE STRIKES

O.C.G.A. § 45-19-1 et seq. prohibits state employees or officials from promoting, encouraging, or participating in a strike.

X. RIGHT TO WORK

A Right to Work law secures the right of employees to decide for themselves whether or not to join or financially support a union. Under Georgia's right-to-work law, employers are prohibited from requiring, as a condition of employment or continuance of employment, that employees become or remain members of a labor organization. O.C.G.A. § 34-6-21. Under the Georgia right-to-work laws, employees also have the right to refrain from joining a labor union after the individual is employed. *Id.* Additionally, employers may not deduct wages without the consent of its employees for union dues and fees and may not condition employment on payments to a union. O.C.G.A. §§ 34-6-22, 24, 25, 26.

All contracts requiring union membership or payments as a condition of employment are void and illegal. *Id.* This differs significantly from other states which permit employers to require union membership as a condition of employment.

Y. SAFETY & HEALTH LAWS

While Georgia has no comprehensive safety and health regulations for the workplace, the statutes and case law impose a general duty on employers to provide a safe workplace for their employees. Under Georgia law, employers are obligated to furnish and use safety devices and safeguards in addition to adopting and using safety methods and procedures which would be "reasonably adequate" to render the workplace safe. O.C.G.A. § 34-2-10.

Z. SHIELD LAW FOR EMPLOYERS PROVIDING REFERENCES

Georgia law provides a qualified immunity for employers, or their representatives, who disclose factual information concerning an employee's or former employee's job performance to a prospective employer of the employee or former employee upon request of the prospective employer or the person seeking employment. O.C.G.A. § 34-1-4 (2002). The disclosure may contain information regarding any acts of the former employee which would constitute a violation of state laws, if the acts occurred in this state, and information regarding the employee's

ability or lack of ability to carry out the duties of his or her job. The employer may be liable for the disclosure, however, if the disclosure is made in violation of a nondisclosure agreement or the information disclosed was otherwise considered confidential according to applicable federal, state, or local statutes or regulations. *Id.*

AA. STRIKES

Georgia law requires that any labor union or local give 30 days' written notice to the employer before any strike, slowdown, or stoppage of work in the state. O.C.G.A. § 34-6-1. The notice must state the intent to call a strike, slowdown or stoppage of work and the reasons for the proposed action. These notice requirements do not apply, however, to any labor organization of railroad employees operating under the Railway Labor Act or in a seasonal industry, e.g., ladies' garment, hat and millinery, and men's clothing. *Id.* Please note, however, that this statute is without practical effect since it is preempted by federal law.

Although no Georgia court has addressed the 30-day strike notification requirements, the Eleventh Circuit has held that a similar Florida regulation requiring a 15-day pre-strike notice is preempted by the National Labor Relations Act ("NLRA"). *See National Labor Relations Board v. State of Florida, Department of Business Regulation, Division of Pari Mutuel Wagering*, 868 F.2d 391 (11th Cir. 1989). The Supreme Court has held that the NLRA preempts state laws which conflict with employee conduct that is protected under § 7 of the NLRA. Based on those principles, the Eleventh Circuit held that because the effectiveness of a strike primarily depends on its economic impact; fifteen days' notice effectively nullified the players' protected rights because notice allowed the owners to lessen the economic impact of the strike by acquiring replacement players before the strike commenced. Applying these same principles to the much longer 30-day pre-strike notification statute in Georgia, it is likely that a court would conclude that the Georgia notice requirement is likewise preempted by the NLRA.

BB. TRADE SECRETS ACT

The Georgia Trade Secrets Act of 1990 was enacted to assist Georgia businesses in protecting the companies' trade secrets. Under the Act, a trade secret is any valuable information, regardless of form, that is not generally known to competitors. In order for the information to be protected as a trade secret under the Act, an employer must show that the information is valuable because it is not known to competitors and the information is the subject of reasonable efforts to keep it confidential. O.C.G.A. § 10-1-761.

Employers should keep in mind that simply having employees sign confidentiality agreements is probably not sufficient to establish that the employer engaged in reasonable efforts to keep the information confidential. *Equifax Sys., Inc. v. Examination Mgt. Sys., Inc.*, 453 S.E.2d 488 (Ga. App. 1994). Employers are instead encouraged to take the following additional steps to ensure that they have satisfied the statutory requirement: (1) employers are encouraged to mark appropriate documents "confidential;" (2) employers should keep sensitive information in a secured location; and (3) employers should limit access to sensitive information (both tangible and intangible alike) to those with a "need to know."

Once an employer establishes the presence of a trade secret, the Georgia Trade Secrets Act permits the employer to enjoin any misappropriation of the trade secret. O.C.G.A. § 10-1-762.²⁵ In fact, under Georgia law, an employer can legally enjoin an employee who takes or has possession of a trade secret, but has yet to use it. *Id.* See also *Essex Group, Inc. v. Southwire Co.*, 501 S.E.2d 501 (Ga. 1998). The Georgia Trade Secrets Act also allows for the employer to recover the actual loss caused by the misappropriation, in addition to any unjust enrichment resulting from the misappropriation. O.C.G.A. § 10-1-763 (a).

CC. UNEMPLOYMENT BENEFITS²⁶

The purpose of unemployment insurance is to supply income assistance to individuals who are without employment for reasons beyond their control. Georgia's unemployment tax law coupled with the Federal Unemployment Tax Act, ensures that sufficient funds are available for unemployed Georgia workers to purchase life's necessities, as well as to allow these workers to seek work that is consistent with their skills and earning potential.

Employers must make contributions without deducting from the wages of their employees. The Georgia taxable wage base is the first eight thousand five hundred dollars paid to an employee during the calendar year. O.C.G.A. § 34-8-49(b)(1)(D) (2002). Each new or newly covered employer must pay at a rate of 2.62 percent of wages paid by the employer during each calendar year until the employer is eligible for a rate of calculation based on experience. O.C.G.A. § 34-8-151(c) (2002).

Under the experience rating system, an employer's taxes are determined by analyzing the actual cost of providing employment benefits to its employees. Employers whose experience indicates that their unemployment costs are less have lower rates; the converse is true for employers with higher unemployment costs.

In addition to contribution requirements, the unemployment laws impose notice, posting, and record-keeping requirements on Georgia employers. Employers must provide a Separation Notice to all employees on their last day of work, regardless of the reason for separation. Georgia employers are also required to give Special Notice to the Georgia Department of Labor when a mass separation due to lack of work or strike occurs. Employers are required to conspicuously post any printed statements released and required by the Commissioner of Labor

²⁵ Georgia has also enacted two other statutes addressing misappropriation of trade secrets: the general trade secret theft statute and the Georgia Computer Systems Protection Act ("GCSPA"). Violations of the general trade secret theft statute are punishable by up to five years (not less than one year) in prison and a fifty thousand dollar fine. See O.C.G.A. § 16-8-13(b). The GCSPA permits both civil and criminal actions. O.C.G.A. § 16-9-90 et seq. Any person violating this statute is subject to a prison sentence of up to fifteen years and a fine of fifty thousand dollars.

²⁶ As this is only a general overview and the unemployment laws are governed by very detailed and fairly complex statutory provisions, employers are encouraged to consult legal counsel to ensure compliance with these laws.

or the Georgia Department of Labor in an area frequented by the employees. Additionally, record-keeping requirements, similar to those required under the FLSA, are imposed on employers for purposes of unemployment compensation.

DD. UNLAWFUL ASSEMBLY

It is unlawful, under Georgia law, for any two or more individuals to assemble near or at any place where a labor dispute exists and prevent or attempt to prevent any person from engaging in any lawful work. O.C.G.A. § 16-11-30 et seq. (2002).

EE. UNLAWFUL ENTICEMENT OF EMPLOYEES

Georgia law prohibits employers from enticing or attempting to entice employees who are under *contract* to another employer away from such employment during the term of service. The privilege of fair competition protects a competitor who solicits another employer's *at-will* employee; however, inducing an employee to breach his *contract* with his employer is an actionable tort. *See generally Carroll Anesthesia Assoc., P.C. v. Anesthicare, Inc. et al.*, 507 S.E.2d 829, 832 (Ga. App. 1998).

FF. VOTING LEAVE

When an employee provides reasonable notice requesting time off to vote in any municipal, county, state or federal primary or election, for which the employee is registered and qualified to vote, Georgia law requires that an employer give an employee the necessary time off from work to vote. O.C.G.A. § 21-2-404. The time off is not to exceed two (2) hours and the statute does not apply if the employees' work hours begin at least two hours later than, or end at least two hours earlier than the poll closes. *Id.*

GG. WAGE PAYMENT

An employee may be paid in three ways under Georgia law: (1) lawful money of the United States; (2) check; (3) by direct deposit to an authorized bank, trust company, or other financial institution, with the consent of the employee. O.C.G.A. § 34-7-2 (2002).

The statute does not require the employer to pay its employees on any specific date or day of the week. The statute does require, however, that the pay period be divided into at least two equal periods within the month. *Id.*

HH. WITNESS DUTY

As mentioned above in the discussion of jury duty, Georgia law forbids employers for terminating employees who are absent from work to attend a judicial proceeding in response to a subpoena or other court order. O.C.G.A. § 34-1-3.

II. WORKERS' COMPENSATION

Workers' compensation laws are designed to do two things: (1) protect employees by ensuring that benefits are available to them for all workplace injuries, regardless of fault; and (2)

protect employers by ensuring that workers' compensation payments are the sole remedy to injured employees. Georgia law provides medical and rehabilitative expenses and lost wages to injured workers and requires that employers keep a record of all injuries received by employees in the course of their employment and report to the Workers' Compensation Board any injuries requiring medical treatment or absence from work of more than seven days. O.C.G.A. § 34-9-12 (2002)

To be compensable under Georgia's Workers' Compensation Act, employees' injuries (1) must arise out of the employment and (2) the injury must have occurred while the employee was acting in the course of the employment. O.C.G.A. § 34-9-1(4) (2002). Georgia also recognizes aggravation of a preexisting condition as a compensable injury as long as the aggravation arises out of and occurs in the course of the employment. The burden is on the employee to demonstrate the percentage of the disability that is attributable to the aggravation. *Metro Interiors, Inc. et al. v. Cox* 461 S.E.2d 570 (Ga. App. 1995). Further, psychological injuries are compensable, but only if accompanied by a compensable physical injury. *Betts v. Medcross Imaging Center, Inc. et al.*, 246 Ga. App. 873 (Ga. App. 2000).

Generally, only employees of a company are covered under the workers' compensation laws; independent contractors are not. However, in some instances, Georgia employers may be liable for injuries sustained by employees of independent contractors. See O.C.G.A. § 34-9-8 (2002).²⁷ For an employer to be liable for injuries to an independent contractor's employees, the employer must have first established a contractual relationship with a third party and then sublet a part of the work to the independent contractor. See *Yoho v. Ringier of America, Inc.*, 263 Ga. 338 (Ga. 1993) quoting *Evans v. Hawkins*, 150 S.E.2d 324 (Ga. App. 1966). Under those circumstances, the employer becomes secondarily liable for the injured employee's workers' compensation benefits. *Id.*

Because the workers' compensation laws are designed primarily to protect employees, very few defenses are available to employers with respect to workers' compensation claims. However, an employer will not be liable for compensation to an injured employee if: (1) the injury is the result of intentional behavior on the part of the employee or the injury is self-inflicted; or (2) if the injury is the result of the employee's willful failure to use available safety equipment or to perform a duty imposed by law; or (3) if the injury was the result of the employee being intoxicated or under the influence of a controlled substance. O.C.G.A. § 34-9-17 (a-b) (2002).

To receive workers' compensation benefits for an on-the-job injury, an employee must give notice to an employer within 30 days of an accident. In most cases, if notice is not given during that time, compensation will not be paid. O.C.G.A. § 34-9-80 (2002). The employee generally has one year from injury to file a claim. If the employer provided remedial benefits, the employee must file the claim one year from treatment; however, if the employee received

²⁷ O.C.G.A. § 34-9-8 (a) reads: "A principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as the immediate employer."

weekly benefits, the claim must be filed within two years from the last payment. O.C.G.A. § 34-9-82 (2002).

After the employee files the claim for compensation, an Administrative Law Judge (ALJ) will conduct a hearing. O.C.G.A. § 34-9-102 (c) (2002). The ALJ functions much like and has similar powers as traditional judges presiding in civil cases. Though the hearing is conducted informally, the same rules of evidence used in all civil nonjury cases in Georgia must be followed. Within thirty days after the close of evidence, the ALJ files his decision.

If a party is dissatisfied with the ALJ's decision, the party may appeal to the appellate division of the Workers' Compensation Board. O.C.G.A § 34-9-103(a) (2002). The Board will not address a case pending before the ALJ unless the ALJ states that immediate review by the Board should be had. After a final judgment by the Board has been issued, only then can the issue be raised in a civil court proceeding.

V. EMPLOYMENT GUIDELINES FOR COMMENCING OPERATION IN GEORGIA

A. PREPARATION OF EMPLOYEE HANDBOOK

An employee handbook can be a very useful means by which an employer can make sure that its employees are informed about important company policies and benefits. An employee handbook also can be the source of constant headaches and lawsuits. The suggestions set forth below are designed to help Georgia employers create handbooks that are helpful rather than hurtful.

As you go through the task of assembling an employee handbook, keep in mind seven potential problem areas -- the employee's at-will status and related policy flexibility issues, substance abuse issues, equal opportunity and the sex harassment issue, the potential for Wage/Hour problems, the hypertechnical issues of solicitation and military leave, Americans With Disabilities Act ("ADA") questions, and the impact of the Family and Medical Leave Act of 1993 ("FMLA"). As these areas pose high exposure absent advance planning, corners should not be cut in addressing these matters.

Maintaining the employee's at-will status and the employer's right to change policies and guidelines require disclaimers in the front of the handbook, in the discussion regarding discipline and discharge, and in the sections discussing benefit plans. The handbook should contain a prominently-placed disclaimer that makes clear that the handbook contains statements of policy or guidelines (as distinguished from the terms of a contract or offer), that denies that the handbook is a contract or offer to contract, that affirmatively characterizes the employment-at-will relationship, including the employee's benefits as well as the employer's rights, that enables the employer to change policies or guidelines at any time without having a renegade or careless supervisor's oral statements make unwanted modifications, and that provides for the employee's acknowledgement of all of the foregoing.

The discipline and discharge policy should be characterized as a "Guideline" and stated so as to maintain the employer's discretion to determine guilt or innocence, offer a nonexclusive list of examples of terminable offenses, spell out the terminated employee's benefit rights (e.g.,

vacation, sick leave, severance), and provide for progressive discipline but allowing the employer to skip disciplinary steps when necessary. Company introductory remarks should avoid job security or longevity assurances, and "probationary" periods should be redesignated as "orientation" or "training" periods in order to avoid conferring "tenure" on the employee after the period expires.

The handbook in this day and age cannot avoid dealing with the problem of substance abuse in the workplace. ADA, FMLA, the Georgia Workers' Compensation Law of 1992, and other federal and state legislation provide employers certain rights and responsibilities in this regard. Other federal and state provisions regulate the employer's investigation of such conduct, and still other provisions impose consequences on the employer who remains ignorant of workplace substance abuse. Substance abuse problems require not only a necessarily detailed policy governing illegal drugs and alcohol (treated differently by federal and state laws concerning testing and disability discrimination), but also impact the wording of disciplinary and discharge policies or guidelines, and the availability of certain employee benefits.

Testing serves an essential role in protecting the employer who takes action based on the violation of a substance abuse policy, but testing requires: a preexisting policy, the careful designation of the grounds on which to test (taking account of whether the individual is an applicant, an offeree, or an employee; whether the substance is an illegal drug or something else; and, whether the test is random or for some defined cause), the procedure for evaluating test results, the characterization of the results ("intoxicated" or "under the influence" only works for alcohol), the level of disciplinary action, and the availability of an employee assistance program for those who come forward on their own.

The handbook should contain an equal employment opportunity policy that acknowledges, but does not expand, the employer's nondiscrimination (and, if applicable, affirmative action) obligations, and that provides a means for dealing effectively with--and thereby distancing the employer from--all forms of protected status harassment (including race, religion, national origin, and disability as well as sex). Dealing effectively with the emotionally charged issue of sex harassment requires a clear definition of what is prohibited, an effective means for raising concerns, a confidential and thorough investigation procedure, a meaningful mechanism for determining guilt, and an assurance of punishment for the guilty. A mechanism that nails down the most details at the earliest stage will be the most likely to minimize liability.

Wage and Hour problems may arise in the determination of who is exempt and who is not, the discussion of bonuses and workweek for nonexempt employees, and the disciplinary suspension for exempt employees. The workweek issue is less likely to cause an employer a problem if employees are either clearly exempt or clearly nonexempt, and if there are no other job classifications that are ambiguous as to exempt status. The bonus issue will not be a problem if the Christmas bonus is the only bonus given, and if the handbook's discussion makes clear its totally discretionary character.

Solicitation regulation, which should be included in order to help Georgia employers prepare themselves in the event of future unionization campaigns, should be drafted so that it covers relevant points. Solicitation policy concerns include solicitation by employees, solicitation by nonemployees, and handbilling. The handbook's policy may not be consulted

often, but it must be drafted correctly. The principal solicitation problem for most Georgia employers is likely to be the issue of discriminatory enforcement. The more an employer allows solicitation for charities, flower funds, and employee used car sales, the less likely the employer will be able to enforce its rule against a future union organizing campaign. Likewise, military leave, which has hypertechnical rules for policies respecting enlistees, draftees, and reservists, should be carefully addressed in the handbook in order to prevent future liability if it is ever applied.

ADA concerns affect discussion of employee selection, transfer, substance abuse, medical fitness inquiry, and discriminatory benefit plan terms. ADA obligations prohibit disability discrimination, require reasonable accommodation, and restrict medical inquiries and tests. The handbook itself should be available in a form that is useable to the sight-impaired or learning disabled, as should all selection devices discussed in the handbook. The handbook should make clear the employer's willingness to offer reasonable accommodation in the performance of its jobs, in the selection process, in connection with terms and conditions (e.g., access of the sight-impaired to the breakroom with security buttons on the door), and in transfer and reassignment opportunities. The benefit plans described should not contain condition-specific exclusions or benefit caps that are not justifiable by actuarial considerations under EEOC regulations.

FMLA obligations for those "eligible" employees will impact the same areas as ADA, plus the nature of sick leave, maternity/disability leave, personal leave, reinstatement following leave, benefit continuation during and following leave, and transfer rights. FMLA regulations require the inclusion in the employee handbook of certain information regarding leave rights and responsibilities under the FMLA statute and the employer's policies. Statutory and regulatory responsibilities, however, may affect discussion of personal leave, parental leave, sick leave, maternity leave, disability leave, vacation, salary and benefit continuation, and, in the case of reduced schedule or intermittent leave, transfer and reassignment.

We recommend adding to the beginning of your handbook a page designed to be torn out and retained in the employee's personnel file when the employee receives a copy of his or her handbook. A carbon of this page should remain in the handbook. Essentially, the employee, by his or her signature on this page, acknowledges (1) that he or she remains an employee-at-will, free to resign with or without notice, but free to be terminated with or without notice or cause, (2) that the terms of the handbook are not intended to be a contract or offer of a contract of employment but are intended as guidelines, (3) that the Company reserves the right to modify the terms of the handbook, (4) the employee cannot rely on oral representations of supervisors in derogation of the handbook's terms, and (5) that the employee has had an opportunity to review the handbook.

B. HIRING PROCESS

1. The Application

Contents:

- Require only the information on the form. Employees who have other motives for seeking employment will frequently add additional information.
- The application should require all fields to be completed.
- The application should contain a provision asking applicant to verify that accurate information has been provided and stating that providing false information will result in rejection of the application or employment termination.
- The applicant should indicate which shifts he/she is available to work.
- The application should provide a date upon which it will expire. The date should be six months from initial submission *at the most* because of the need for applicants need to update any new information.
- The application may ask if an applicant is capable of performing the requirements of the job, including the hours and duties of work.
- If OFCCP requirements apply, they must be satisfied.

Dos and Don'ts:

- Don't ask for age, national origin, family plans or marital/child status, union membership, medical or health inquiries, don't ask for arrests - consider only asking for felony convictions
- Do ask if applicant is authorized to work, over 18, prior employment - employers, duration and reason for leaving, references and authorization to contact.

At Will Employment:

The application should contain a clear statement that the application is for position of at-will employment. The managers who interview or offer the job to the applicant should be trained not to make written or oral promises outside of application regarding duration or term of employment.

2. Job Descriptions

- (a) Benefits of maintaining job descriptions for positions:
- (b) assists in determining applicant capacity and qualification for position;
- (c) clarifies duties and expectations of employees;
- (d) aids in evaluating employee performance; and
- (e) helps determine essential functions of job for ADA purposes.

3. Points to consider if you intend to use pre-employment testing.

- (a) Do not substitute tests for inadequate recruiting or selection;
- (b) Identify key attributes important to job and method for testing attributes;
- (c) Does the test result in a disparate impact on a protected group of individuals? Has the test been validated to be a good predictor of job performance?
- (d) ADA - Is the test job-related and necessary for the business?
- (e) Accommodations - when do you need to provide to employees for testing?
- (f) Keep the results of the testing confidential.

4. Drug Testing

You may require applicants to agree to screen for illegal drugs. This pre-employment drug testing may be in addition to any random or for-cause testing you have for current employees.

5. Immigration Requirements

- (a) Employers must verify the identity and eligibility to work of all employees hired - review employee's required documents under List A or List B and C.
- (b) Employees and employers must complete I-9 form for each employee.
- (c) Cannot discriminate based on national origin or citizenship

6. Background Checks

- (a) Reference and background checks are important to prevent application dishonesty and to screen out problem employees and avoid liability for negligent hiring.
- (b) Fair Credit Reporting Act - Checks into credit, criminal background, or other checks from a third party require a disclosure and authorization separate from application.
- (c) Pre-adverse action notice - before taking adverse action against an applicant based on a covered consumer background check, the employer must provide employee rights under the FCRA, a copy of the report, and a pre-action letter.

- (d) Post-adverse action notice - must provide notice to employee of the adverse action and the basis for the action.
- (e) Investigative consumer reports - (more specific than credit or criminal background checks) - heightened requirements for these types of reports.
- (f) See the Fair Credit Reporting Act section above in Section II.G. and the Criminal Background check section below in "C."

C. CRIMINAL BACKGROUND CHECKS

Employers must comply with the provisions of the Fair Credit Reporting Act when performing criminal background checks. However, it is important for employers to perform thorough background checks. While employers must take steps to comply with the law when performing background checks, the failure to perform such checks could potentially result in civil liability if the employee engages in conduct while working for the employer that could have been foreseen if a background check had been performed. For example, if an employee had a previous conviction for rape, that could have been discovered by a criminal background check, and the employee commits a sexual assault while working for the employer. The employer may be liable to the assault victim for negligent hiring.

Some courts have applied disparate impact discrimination analysis on employer's decisions to reject employees who have arrests, convictions, or convictions for felonies. It is certainly appropriate to reject applicants who have felony convictions, but this screening tool should be utilized late in the application process. A time limit (such as ten years) should be placed on convictions barring employment. If possible, screen out only convictions (misdemeanor or felony) that correlate to effective performance of the job at the facility.

D. MEDICAL EXAMS AND INQUIRIES

Performing medical exams on prospective employees is an effective means to ensure that new employees are able to perform the essential functions of their position. However, medical exams or inquiries must be performed in accordance with the provisions of the American Disabilities Act ("ADA") and HIPPA. The medical inquiries and tests that may be performed depend on the stage of the hiring process.

1. Application Stage - Pre-offer

Employers may not perform medical exams on applicants, other than tests for illegal drugs, or require applicants to answer medical inquiries prior to an applicant receiving an offer. Prohibited medical inquiries include questions regarding previous disability, workers' compensation and sick leave usage. Employers may inquire whether applicants are able to perform the duties of the job sought, if the question is asked to all applicants for the particular position.

2. Postoffer Stage

Once an offer of employment has been issued to an applicant, an employer may perform medical exams and make medical inquiries as long as the exams or inquiries are made of all offerees for the particular position and the results are used in a manner that is job-related and consistent with business necessity.

3. Employment Stage

Once employment has been accepted, employers may only perform tests or inquiries that are job-related and consistent with business necessity.

Require Truthful Responses: Employers in Georgia should provide notice to offerees on any medical questionnaire that the failure to answer truthfully or provide truthful information may result in forfeiture of workers' compensation benefits. Georgia workers' compensation law allows an employer to use an untruthful response to foreclose workers' compensation benefits if the individual was warned by the employer at the time of the response.

HIPPA Requirements: HIPPA regulations will preclude the release of medical information to the employer unless the offeree/employee has signed a valid HIPPA authorization authorizing the health care provider to release the information to the employer.

E. SALTING

1. What Is Salting?

Salting is placing, or attempting to place, union organizers (paid or unpaid) into a non-union shop. The purpose of salting is to organize a non-union company or to disrupt the company's operations through unfair labor expenses, and their associated expenses, or both. Salting often results in unfair labor practice charge

Salting occurs in Georgia, as unions train their organizers or members how to effectively "salt" an employer.

2. Salting Is Legal

Section 7 of the National Labor Relations Act ("NLRA") guarantees to employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8(a)(1) forbids employers to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. Section 8(a)(3) prohibits employer discrimination on the basis of union activity.

Even though "salts" work for the union, may be paid by the union, and may quit if the union tells them to, they are protected by the labor laws. They do not have to tell the employer that they are "salts."

To prove that an employer violated the NLRA by failing to hire a "salt," the General Counsel for the NLRB must show that (1) the employer was hiring or had plans to hire; (2) the applicant (salt) had experience or training relevant to the announced or generally known requirements of the position, or that the employer did not follow the criteria or that the criteria were used as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicant.

On September 29, 2007, the NLRB issued its decision in *Toering Electric Co.*, 351 NLRB No. 18 (Sept. 29, 2007), which imposed on the General Counsel the additional burden in an § 8(a)(3) salting case of demonstrating that the applicant was "someone genuinely interested in seeking to establish an employment relationship with the employer." Applicants who submit applications for the sole purpose of generating unfair labor practice charges do not have a claim for refusal to hire or to be considered for hire under the NLRA.

3. Employer Steps to Counteract Salting

Control Application Process: Employers should avoid advertising for hourly positions and control when and where applications are accepted. Applications should only be accepted for current openings and the period for which an application will be held should be minimized. Employers may enact rules to prevent leaving parts of the application blank or from defacing the application by including unrequested information. Employees who accept applications should be trained as to how to spot a potential "salt."

Review Applications Carefully: Salts often have higher pay at their previous job than other employees seeking a position, so a compensation cutoff might be consider. Salts are often relocating from another town. Salts will often have worked for numerous unionized employers.

Train and Act Consistently: Employers should train the employees performing interviews or evaluating applications on the dos and don'ts of hiring. All applicants should be treated consistently. Policies should be publicized and enforced consistently.

VI. CONCLUSION

We hope the foregoing information is helpful to you. Please do not hesitate to contact us if you have any questions or concerns or would like additional information.