"STATUTORY EMPLOYMENT AND LABOR LAW"

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STATUTORY EMPLOYMENT AND LABOR LAW

I.
INTRODUCTION

This paper is designed as a guide for county officials regarding statutory labor claims. The list of statutes is not exhaustive. It does not take the place of counsel from a licensed attorney in a particular case. Each case and factual scenario is different. This paper sets forth the provisions and requirements of some of the most commonly used labor and employment statutes. Prior to making any employment decisions, county officials should consult with an attorney that has a good knowledge of the statutes and their accompanying case law.

II.
ANTI-DISCRIMINATION STATUTES

A. Federal Anti-Discrimination Statutes

1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Section 2000, *et seq.*, bars discrimination on the base of race, color, national origin, religion, and sex. It applies to public employers with 15 or more employees, and It also applies to private employers, unions, employment agencies, and training programs.

Title VII prohibits discrimination in all aspects of employment, including but not limited to the application process, hire, pay, promotion, demotion, discipline, and discharge. It also protects against sexual harassment and discrimination on the basis of pregnancy.

Before a law suit is actually filed, the plaintiff must have filed a charge within 180 days (300 days depending on the presence of state coverage) with the Equal Employment Opportunity Commission (EEOC). After the EEOC issues a right to sue letter, the charging party has 90 days to file suit. Different and shorter limitations and procedures apply to federal employees.

A plaintiff can ask for injunctive relief, back-pay, reinstatement or front pay, attorney fees, and costs. Title VII also provides compensatory and/or punitive damages capped at $50,000 to $300,000 depending on the size of the employer.

a. National Origin Discrimination

Regardless of whether an employee or job applicant's ancestry is Mexican, American Indian, Ukrainian, Arab, or any nationality, he or she is entitled to the same employment opportunities as anyone else. The EEOC enforces the federal prohibition

against national origin discrimination In employment under Title VII of the Civil Rights Act of 1964, which covers employers with fifteen (15) or more employees.

National origin discrimination means treating someone less favorably because he or she comes from a particular place, because of his or her ethnicity or accent, or because it is believed that he or she has a particular ethnic background. National origin discrimination also means treating someone less favorably at work because of marriage or other association with someone of a particular nationality. Examples of violations covered under Title VII include:

This includes any employment: decision, Including recruitment, hiring, and firing or layoffs, based on national origin.

Harassment, including any offensive conduct such as ethnic slurs, that creates a hostile work environment based on national origin, is prohibited conduct. Employers are required to take appropriate steps to prevent and correct unlawful harassment. Likewise, employees are responsible for reporting harassment at an early stage to prevent Its escalation.

Language, or discrimination based on accent, cannot form the basis of an employment decision, unless the accent materially Interferes with job performance. A Sheriff cannot even require literacy unless the effective performance of the position requires literacy.

English-only rules may only be adopted only for nondiscriminatory reasons. An English-only rule may be adopted only if is needed to promote the safety or efficiency of the Sheriff's Office operation.

Foreign nationals are also covered by Title VII and the other anti-discrimination laws that prohibit discrimination against individuals, regardless of citizenship. However, relief may be limited If an individual does not have work authorization.

In Fiscal Year 2007, the EEOC received 9,396 charges of national origin discrimination. The EEOC resolved 7,773 of those charges. Monetary benefits for charging parties totaled $22.8 million (not including monetary benefits obtained through litigation).

b. Pregnancy Discrimination

Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII, including state and local governments. Title VII applies to women who are pregnant or affected by related conditions. Such employees must be treated in the same manner as other applicants or employees with similar abilities. Pregnancy discrimination includes applications and other hiring decisions. An employer cannot refuse to hire a pregnant woman because of her pregnancy, pregnancy-related condition or because of the prejudices of co-

workers, clients, or customers.

An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. However, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.

If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee. For example, if the employer allows temporarily disabled employees to modify tasks, perform alternative assignments or take disability leave or leave without pay, the employer also must allow an employee who is temporarily disabled due to pregnancy to do the same.

Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy related condition and recovers, her employer may not require her to remain on leave until the baby's birth. An employer also may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth. Employers must hold open a job for a pregnancy related absence the same length of time jobs are held open for employees who are sick or on disability leave.

Health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as for other health conditions. Insurance for expenses arising from abortion is not required, except where the life of the mother is endangered. Pregnancy-related expenses should be reimbursed exactly as those incurred for other medical conditions, whether payment is on a fixed basis or a percentage of reasonable-and-customary charge basis. The amounts payable by the insurance provider can be limited only to the same extent as amounts payable for other conditions. No additional, increased, or larger deductible can be imposed. Employers must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees.

Pregnancy-related benefits cannot be limited to married employees. In an all-female workforce or job classification, benefits most be provided for pregnancy-related conditions if benefits are provided for other medical conditions. If an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy-related conditions. Employees with pregnancy-related disabilities must be treated the same as temporarily disabled employees for accrual and crediting of seniority, vacation calculation, pay increases, and temporary disability benefits. It s also unlawful to retaliate against an individual for opposing employment practices that discriminate based on pregnancy or for a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

In Fiscal Year 2007, the EEOC received 5,587 charges of pregnancy-based discrimination. The EEOC resolved 4,979 pregnancy discrimination charges in 2007 and recovered $30.0 million In monetary benefits for charging parties (not including monetary benefits obtained through litigation).

c. Race/Color Discrimination

Title VII of the Civil Rights Act of 1964 protects individuals against employment discrimination on the bases of race and color. An individual cannot be denied an employment opportunity because of his/her racial group, perceived racial group, his/her race-linked characteristics (e.g., hair texture, color, facial features), or because of his/her marriage to or association with someone of a particular race or color. Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups. Title VII's prohibitions apply regardless of whether the discrimination is directed at Whites, Blacks, Latinos, Arabs, Native Americans or any other person of any other race, color, or ethnic background.

It is unlawful to discriminate against any individual in regard to recruiting, hiring, promoting, transferring, assigning work, performance measurements, the work environment, training, discipline, discharge, wages and benefits, or any other term, condition, or privilege of employment. Title VII prohibits not only .Intentional discrimination, but also neutral job policies that disproportionately affect persons of a certain race or color and that are not related to the job and the needs of the business. Employers should adopt "best practices" to reduce the likelihood of discrimination and to address Impediments to equal employment opportunity. Title VII's protections include recruiting, hiring, and advancement.

Job requirements must be uniformly and consistently applied to persons of all races and colors. If a job requirement is not important for job performance or business needs, the requirement may be found unlawful if it excludes persons of a certain racial group or color more significantly than others. Examples of potentially unlawful practices Include: (1) soliciting applications only from sources in which all or most potential workers are of the same race or color; (2) requiring applicants to have a certain educational background that is not Important for job performance or business needs; (3) testing applicants for knowledge, skills or abilities that are not important for job performance, or business needs.

Employers may legitimately need information about their employees or applicants race for affirmative action purposes and/or to track applicant flow. One way to obtain racial Information and simultaneously guard against discriminatory selection is for employers to use separate forms or otherwise keep the Information about an applicant's race separate from the application. In that way, the employer can capture the information it needs but ensure that It is not used in the selection decision. Unless the information is for such a legitimate purpose, pre-employment questions about race can

suggest that race will be used as a basis for making selection decisions. If the information is used in the selection decision and members of particular racial groups are excluded from employment, the inquiries can constitute evidence of discrimination.

Title VII prohibits offensive conduct, such as racial or ethnic slurs, racial "jokes," derogatory comments, or other verbal or physical conduct based on an individual's race/color. The conduct has to be unwelcome and offensive, and has to be severe or pervasive. Employers are required to take appropriate steps to prevent and correct unlawful harassment. Likewise, employees are responsible for reporting harassment at an early stage to prevent Its escalation.

Title VII prohibits discrimination in compensation and other terms, conditions, and privileges of employment. Thus, race or color discrimination may not be the basis for differences in pay or benefits, work assignments, performance evaluations, training, discipline or discharge, or any other area of employment. Title VII Is violated where employees who belong to a protected group are segregated by physically isolating them from other employees or from customer contact. In addition, employers may not assign employees according to race or color. For example, Title VII prohibits assigning primarily African-Americans to predominantly African-American establishments or geographic areas. It is also illegal to exclude members of one group from particular positions or to group or categorize employees or jobs so that certain jobs are generally held by members of a certain protected group. Coding applications/resumes to designate an applicant's race, by either an employer or employment agency, constitutes evidence of discrimination where people of a certain race or color are excluded from employment or from certain positions.

Employees have a right to be free from retaliation, for their opposition to discrimination or their participation in an EEOC proceeding or other participation in an agency proceeding or a subsequent lawsuit.

In fiscal year 2007, the EEOC received 30,510 charges of race discrimination. The EEOC resolved 25,882 race charges in FY 2007, and recovered $67.7 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits through litigation).

d. Retaliation

An employer may not fire, demote, harass or otherwise "retaliate" against an individual for reporting discrimination or participating in a discrimination. proceeding or lawsuit arising from a claim of discrimination. The same laws that prohibit discrimination based on race, color, religion, national origin, age, and disability, as well as wage differences between men women performing substantially equal work, also prohibit retaliation against individuals.

The Americans with Disabilities Act (ADA) also protects individuals from

coercion, intimidation, threat, harassment, or interference in their exercise of their own rights or their encouragement of someone else's exercise of rights granted by the ADA. Three main terms are used to describe retaliation. An “Adverse Action” is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include employment actions such as termination, refusal to hire, and denial of promotion. Other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights. Adverse Actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history. Even if the prior protected activity alleged wrongdoing by a different employer, retaliatory adverse actions are unlawful. For example, it is unlawful for worker's current employer to retaliate against him for pursuing an EEO charge against a former employer. Of course, employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination.

“Covered Individuals” are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity are also covered individuals. For example, it is illegal to terminate an employee because his spouse participated In employment discrimination litigation. Individuals who have brought attention to violations of law other than employment discrimination are NOT covered individuals for purposes of anti-discrimination retaliation laws. For example, "whistleblowers" who raise ethical, financial, or other concerns unrelated to employment discrimination are not protected by the EEOC enforced laws.

In Fiscal Year 2007, the EEOC received 26,663 charges of retaliation discrimination based on all statutes enforced by the EEOC, and recovered more than $124 million in monetary benefits for charging parties and alleged aggrieved individuals (not including monetary benefits obtained through litigation).

e. Religious Discrimination

Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices, except to the extent a religious accommodation is warranted. For example, an employer may not refuse to hire individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices.

Employees cannot be forced to participate or not participate in a religious activity as a condition of employment.

Employers must reasonably accommodate an employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer. A reasonable religious accommodation is any adjustment to the work environment the will allow the employee to practice his or her religion. An employer might accommodate an employee's religious beliefs or practices by allowing flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers, modification of grooming requirements and other workplace practices, policies and/or procedures. An employer is not required to accommodate an employee's religious beliefs and practices if doing so would impose an undue hardship on the employers' legitimate business Interests. An employer can show undue hardship if accommodating an employee's religious practices requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' lob rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation.

Employers must permit employees to engage In religious expression, unless the religious expression would impose an undue hardship on the employer. Generally, a employer may not place more restrictions on religious expression than on other forms of expression that have a comparable effect on workplace efficiency
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Employers must take steps to prevent religious harassment of their employees. An employer can reduce the chance that employees will engage in unlawful religious harassment by implementing an anti-harassment policy and having an effective procedure for reporting. Investigating and correcting harassing conduct.

It is also unlawful to retaliate against an Individual for opposing employment practices that discriminate based on religion or for filing a discrimination charge, testifying, or participating in any way in an Investigation, proceeding, or litigation under Title VII.

A protected activity includes a practice believed to be unlawful discrimination. A employee is protected from retaliation as long as that person has a reasonable, good-faith belief that the complained of practice violates anti-discrimination law, and the manner of the opposition Is reasonable. Examples of protected opposition include Complaining to anyone about alleged discrimination against themselves or others, threatening to file a charge of discrimination, picketing in opposition to alleged discrimination, or refusing to obey an order reasonably believed to be-discriminatory. Examples of activities that are NOT protected opposition include actions that interfere with job performance so as to render the employee ineffective, or unlawful activities such as acts or threats of violence. Filing or participating in an alleged discrimination proceeding is protected even If the proceeding involved claims that ultimately were

found to be invalid. Examples of participation include filing a charge of employment discrimination, cooperating with an internal investigation of alleged discriminatory practices or serving' as a witness in an EEO investigation or litigation. A protected activity can also include requesting a reasonable accommodation based on religion or disability.

In Fiscal Year 2006, the EEOC received 2,541 charges of religious discrimination. The EEOC resolved 2,387 religious discrimination charges and recovered $5.7 million In monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation).

f. Sex-Based Discrimination

It is unlawful to discriminate against any employee or applicant for employment because of his/her sex In regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of| individuals on the basis of sex. Title VII prohibits both Intentional discrimination and neutral job policies that disproportionately exclude individuals on the basis of sex and that are not job related. Title VII's prohibitions against sex-based discrimination also cover, Sexual harassment, which includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment.

The Equal Pay Act of 1963 requires equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. Title VII also prohibits compensation discrimination on the basis of sex. Unlike the Equal Pay Act, however, Title VII does not require that the claimant's job be substantially equal to that of a higher paid person of the opposite sex or require the claimant to work in the same establishment. It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating In any way In an Investigation, proceeding, or litigation under Title VII.

Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical acts of a sexual nature. Such acts constitute sexual harassment when the conduct affects an individual's employment, unreasonably interferes with an individual's performance, or creates art intimidating, hostile, or offensive work environment. Sexual harassment can occur in a variety of circumstances. These acts of harassment can include situations where the victim as well as the harasser is a woman or a man. The victim does not have to be of the opposite sex. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another work area, a co-worker, or a non-employee. The victim does not have to be the person harassed but could be anyone affected by the offensive conduct. Unlawful sexual harassment may occur without economic injury to or

discharge of the victim. The harasser's conduct must be unwelcome. It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and to stop. The victim should use any employer complaint mechanism or grievance system table. In investigating allegations of sexual harassment, the trier of fact is supposed to look at the whole record, the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred.

Education is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. The best practice is to provide sexual harassment training to all employees and establish a proactive complaint or grievance process and taking immediate and appropriate action when an employee complains.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in anyway in an investigation, proceeding, or litigation under Title VII.

In Fiscal Year 2007, the EEOC received 24,826 charges of sex-based discrimination, excluding sexual harassment claims. The EEOC resolved 21,982 sex discrimination charges in FY 2007 and recovered $135.4 million In monetary benefits for charging parties and other aggrieved Individuals (not including monetary benefits obtained through litigation).

In Fiscal Year 2007, the EEOC received 12,510 charges of sexual harassment-16.0% of those charges were filed by males. The EEOC recovered $49.9 million in monetary benefits for charging parties and allegedly aggrieved Individuals (not including monetary benefits obtained through litigation).

2. Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 621, *et seq*., bars discrimination against persons 40 and older on the basis of their age. It applies against government employers as well as private employers with 20 or more employees, unions, and employment agencies.

Prospective plaintiffs must file a charge with the EEOC within 180 days (300 days if a state has a similar statute).

The ADEA includes particular requirements to employers in the case of reductions in force and waivers of a right to file suit under the ADEA.

Damages and relief available include back-pay, reinstatement or front pay, liquidated damages equal to actual damages for willful violations, and attorney fees.

The ADEA's Protections apply to both employees and job applicants. Under the ADEA,. it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

It is also unlawful to retaliate against an Individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

It Is generally unlawful for apprenticeship programs, including joint labor-management apprenticeship programs, to discriminate on the basis of an individual's age. Age limitations In apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA or if the EEOC grants a specific exemption.

The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. A job notice or advertisement may specify an age limit only in the rare circumstances where age is shown to be a "bona fide occupational qualification" (BFOQ) reasonably necessary to the normal operation of the business,

The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise Indicate possible intent to discriminate based on age, requests for age Information are closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA,

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those greater costs would create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

An employer may ask an employee to waive his/her rights or claims under the ADEA either in the settlement of an ADEA administrative proceeding or court claim or in connection with an exit incentive program or other employment termination program. However, the ADEA, as amended by OWBPA, sets out specific, minimum standards that must be met In order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must:

1. be in writing and be understandable;

2. specifically refer to ADEA rights or claims;

3. not waive rights or claims that may arise in the future;

4. be in exchange for valuable consideration;

5. advise the Individual in writing to consult an attorney before signing the waiver; and

6. provide the Individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing It.

If an employer requests an ADEA waiver in connection with an exit incentive program or other employment termination program, the minimum requirements for a waiver are more extensive.

In Fiscal year 2007, the EEOC received 19,103 charges of age discrimination. The EEOC resolved 16,134 age discrimination charges in 2007 and recovered $66.8 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation).

3. Americans with Disabilities Act

The Americans with Disabilities Act (ADA), 42 U.S.C. Section 12101 et seq., is a comprehensive disability discrimination statute. It prohibits an employer from discriminating against a person with a disability, who has a history of a disability, or who is considered disabled by the employer. A disability is defined as a physical or mental impairment that affects a major life activity. The employee or potential employee must be able to perform the essential functions of the job with or without reasonable accommodation by the employer.

The ADA applies to employers with 15 or more employees. To file a law suit, the potential plaintiff must have filed a charge within 180 days (300 days depending on the presence of state coverage) with the Equal Employment Opportunity Commission (EEOC). After the EEOC issues a right to sue letter, the charging party has 90 days to file suit

Title 1 of the Americans with Disabilities Act prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. The ADA'S nondiscrimination standards also apply to federal sector employees under section 501 of the Rehabilitation Act, as amended, and its

implementing rules. An individual with a disability is a person who:

1. Has a physical or mental impairment that substantially limits one or more major life activities;

2. Has a record of such an impairment; or

3. Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.

Reasonable accommodation may include, but Is not limited to, making existing facilities used by employees readily accessible to and usable by persons with disabilities, job restructuring, modifying work schedules, reassignment to a vacant position, acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials or policies, and providing qualified readers or interpreters.

An employer is required to make a reasonable accommodation, to the known disability of a qualified applicant or employee If it would not impose an "undue hardship" on the operation of the employer's business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size. financial resources, and the nature and structure of its operation. An employer is not required to lower quality or production standards to make an accommodation, nor is an employer obligated to provide personal use items such as glasses or hearing aids.

Title I of the ADA also covers medical examinations and inquiries. Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

Employees and applicants currently engaging in the Illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA'S restrictions on medical examinations. Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.

It Is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on disability or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under

the ADA.

In Fiscal Year 2007, the EEOC received 17,734 charges of disability discrimination. The EEOC resolved 15,708 disability-discrimination charges in 2007 and-recovered $54 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation).

Relief available includes injunction, back-pay, reinstatement or front pay, attorney fees, and costs. The ADA also provides for compensatory and/or punitive damages capped- at $50,000 to $300,000 depending on the size of the employer. Jury trial is generally available.

4. Americans with Disabilities Restoration Act

The Americans with Disabilities Restoration Act, PL 110-325, 2008 S 3406, 122 Stat. 3553, became effective January 1, 2009. Congress passed extensive legislation to reverse the narrow interpretations and applications of the ADA imposed by the courts. A copy of the ADA Restoration Act is attached.

Before the amendments employees suing under the ADA met various "Catch 22s" that barred coverage. Frequently, if their impairments were severe enough to be found disabling, they could not perform the essential functions of the job with or without accommodation. This meant no ADA coverage. Or the impairment had to be viewed in its mitigated state. For instance, while uncontrolled (or sometimes controlled) diabetes is life threatening, the person with diabetes could only be considered under the ADA if he took insulin. The use of insulin, however, might mean that the person with diabetes was not disabled and not covered by the Act, because with insulin his life activities were not affected.

The Restoration Act declared that the determination of whether a person is disabled will be made without regard to mitigating measures, except eyeglasses and contact lenses. It also provided that the ADA will be given liberal constructions, not the "demanding standard for qualifying as disabled" applied by the Supreme Court in *Toyota Motor Mfg, Kentucky, Inc. Williams*, 534 U.S. 184, 122 S.Ct. 681, 15 L.Ed.2d 615 (2002).

5. Rehabilitation Act

The Rehabilitation Act of 1973, 29 U.S.C. Section 701 et seq., the precursor to the ADA, applies to disabled employees of employers who receive federal funding or are federal contractors.

6. Immediate post-Civil War Statutes

Several statutes passed directly after the Civil War barred discrimination. 42 U.S.C. Section 1981 prohibits discrimination on the basis of race in the making of contracts including employment contracts. 42 U.S.C. Section 1983 prohibits denial of constitutional rights to public employees. If an employee has contractual or statutory job security, the public employer must provide due process. 42 U.S.C. Sections 1985 and 1986 prohibit employment discrimination resulting from conspiracy to deny equal protection. These statutes also provide protection to witnesses who participate or testify in a civil rights case.

B. Texas Anti-Discrimination Statute

Chapter 21 of the Texas Labor Code bars discrimination on the basis of race, color, national origin, sex, religion, age, and disability. It generally parallels Title VII and the Americans with Disabilities Act with some exceptions. It has not been amended as recently occurred with the ADA.

It applies to public employers and private employers with 15 or more employees.

The potential plaintiff must file a charge within 180 days with the Texas Workforce Commission. The EEOC provides on its charge form that the charge can be dual filed with the state deferral agency, but make sure this occurs or dual file directly. After receipt of a dismissal notice, suit must be filed within 60 days. Suit must be filed no later than two years from the date the charge is filed.

Relief available includes injunction, back-pay, reinstatement or front pay, attorney fees, and costs. Limited compensatory and/or punitive damages are also available. Jury trial can be requested.

III.
PAY AND BENEFITS

A. Federal Statutes

1. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA), 29 U.S-C, Sec. 201 et seq., establishes the minimum wage (Sec. 206) and, for most jobs, requires overtime pay after 40 hours in each single workweek (Sec. 207). The earnings an employee receives in a workweek, divided by the hours of work each week, must generally equal the minimum wage.

For law enforcement officers, however, the FLSA generally requires overtime pay after 43 hours in a single workweek. Specifically, in agencies with 5 or more employees, the FLSA dictates the maximum number of hours a law enforcement employee must

work before the governmental entity is required to pay overtime compensation. Section 207(k) provides:

> No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if . . .
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours ... bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(k). Section 207(k). This provision is not a true exemption from the strictures of the FLSA. However, it "adjusts the permissible length of the workweek but does not completely remove specified employees from the FLSA's protection." *Brock v. City of Cincinnati,* 236 F.3d 793, 810 (6th Cir.2001). Essentially, the § 207(k) partial exemption requires law enforcement employees to work forty-three hours per week before overtime compensation is mandated. *See* 29 C.F.R. § 553.230 (2008). Thus, § 207(a) dictates the applicability of the FLSA, but § 207(k) "soften[s] the impact of the FLSA's overtime provisions on public employers" by "rais[ing] the average number of hours the employer can require law enforcement and fire protection personnel to work without triggering the overtime requirement, and it accommodates the inherently unpredictable nature of firefighting and police work by permitting public employers to adopt work periods longer than one week." *O'Brien v. Town of Agawam,* 350 F.3d 279, 290 (1st Cir.2003).

Section 213(a)(20) of Title 29 of the United States Code has a specific exemption for law enforcement agencies with less than 5 employees. Such public agencies are exempt from the FLSA.

The overtime rate is generally one and one half times the employee's regular rate and is determined separately for each workweek. The act does not, in and of itself, allow private employers to fulfill overtime pay obligations by granting "compensatory time-off." The act does allow public employers, such as a Sheriff's Office, to grant "compensatory time-off."

The Department of Labor administers the FLSA. The general statute of limitations is two years. Damages and relief available include back-pay, reinstatement or front pay, liquidated damages equal to actual damages for willful violations, and attorney fees.

Disputes often occur concerning employee wage claims. In Texas, such wage

claims may be filed with the Texas Workforce Commission or the U.S. Department of Labor. Wage claims filed with the TWC must be filed within 180 days of the date when the payment became due. TEX. LAB. CODE § 61.051(c). Claims filed with the Department of Labor will be subject to the FLSA statute of limitations, e.g., two years for non-willful violations and three years for willful violations. 29 U.S.C § 255(a). Under the state wage law, the employer may be subject to a civil penalty of up to $1,000, in addition to the unpaid wages. TEX. LAB. CODE § 61.053(c). An intentional violation may also be prosecuted as a third degree felony if the employer refuses to pay the wages on demand. TEX. LAB. CODE §61.019. Under the FLSA, a court may award liquidated damages effectively doubling the amount of unpaid compensation awarded in the case of willful violations. 29 U.S.C. §§216, 260.

a. Timing of Payments

An employer must pay nonexempt employees at least twice a month. TEX. LAB. CODE §61-001(b). Exempt employees must be paid at least once a month. *Id.* at § 61.001 (a). The employer must post a notice in a conspicuous place in the work place indicating the pay days. *Id.* at§ 61.012(c).

In the case of a termination without cause by the employer, the employer must pay the employee within six days of the date of the discharge. In all other situations, the employer must pay a terminating employee no later than the next regularly scheduled pay day. *Id.*_at § 61.014.

b. Bonuses/Commissions/Profit Sharing

Numerous disputes arise concerning the payment of bonuses, commissions, or profit sharing plan payments following termination. In *Miller v. Riata Cadillac Co.*, 517 S.W.2d 773 (Tex. 1974), the Texas Supreme Court held that an employee who was discharged without cause could obtain a pro rata share of bonus payments based on the portion of the year for which that employee had been employed. In *Handy Andy, Inc. v. Rodemacher*, 666 S.W.2d 300 (Tex. Civ. App.—San Antonio 1994, no writ), the Court extended Miller to hold that even an express provision in an employment agreement specifying that an employee must remain in the business' employ through a specified date in order to obtain a bonus did not justify the denial of a pro rata share of an annual bonus. See also, Enstar Corp. v. Bass, 737 S.W.2d 890 (Tex. Civ. App.-El Paso 1987, no writ). The Texas Labor Code, however, now expressly provides that commission and bonus payments are due solely in accordance with the terms of the employment agreement. TEX. LAB. CODE § 61.015. In Burkard v. ASCO Co., 779 S.W.2d 805 (Tex. 1989), the Texas Supreme Court specifically noted that an employment agreement did not provide for the forfeiture of bonuses upon termination when sustaining a jury verdict for a bonus brought by a terminated employee. Accordingly, the continued validity of Handy is questionable. Similarly, Texas courts have generally upheld provisions in commission plans that specify that commissions will not be paid following termination. See e.g.. 0'Grady v. Gerald Hines, Inc., 683 S.W.2d 763 (Tex. Civ. App. - Houston [14th

Dist] 1984, no writ); Mitsubishi Aircraft Int'l, Inc. v. Maurer, 675 S.W.2d 286 (Tex. Civ. App.- Dallas 1984, no writ); Reyna v. Gonzalez, 670 S.W.2d 439 (Tex. Civ. App.-Corpus Christi 1982, no writ.) Finally, Texas courts have recognized that an express provision in a profit sharing plan denying participating for terminated employees is enforceable. Lang v. MBank Dallas, 756 S.W.2d 811 (Tex. Civ. App.-Dallas 1988).

c. Deductions from Wages

The Texas Wage Law specifically states that an employer may not deduct any amount from an employee's wages unless authorized to do so by a state or federal law, court order, or a written authorization from the employee. TEX LAB. CODE §61.018. Thus, employers must avoid the temptation of recouping losses they believe are attributable to an employee by payroll deductions. If an employer advances salary to an employee, the employer should obtain written authorization for a deduction from wages, including an acceleration clause in the event of termination. Finally, an employer must provide employees with a written earnings statement that sets forth the nature and amount of any deductions, as well as the employee's name, rate of pay, total pay earned, and total hours worked or pieces produced, in the case of nonexempt employees. TEX LAB. CODE § 61.003.

d. Compensatory Time Off

Many employers and employees prefer compensatory time off to overtime payment. Under a compensatory time off plan, an employee would be entitled to take off time from work in exchange for working overtime. In the public sector, compensatory time off is allowed. In the private sector, there is no authority for compensatory time off. Instead, under the FLSA, an employer must pay overtime for all hours worked in excess of 40 hours in a week.

An informal compensatory time off procedure, however, is possible under the FLSA. Under such a procedure, however, the employee would have to take the compensatory time off within the same payroll period in which the overtime is worked. In addition, compensatory time off must be taken in accordance with the applicable time and one-half overtime rate. That is, an employee must take off one and one-half hours for each hour of overtime worked.

e. Time Records

Employers covered by the FLSA must keep records showing the following:

1. Employee's fall name, number or identifying symbol.

2. Home address.

3. Date of birth if employee is under 19.

4. Sex and occupation.

5. Time and day upon which workweek start.

6. Regular hourly rate of pay (for nonexempt employees).

7. Total daily and weekly hours worked (for all nonexempt employees).

8. Total daily or weekly regular earnings.

9. Total overtime weekly earnings.

10. Total additions or deduction affecting payments.

11. Total wages paid each pay period.

12. Date of pay and pay period covered.

13. Retroactive wage payment under government supervision.

14. Factors other than sex that may justify wage differential to employees of different sex.

15. Records should also be kept regarding the activities of exempt employees that justify the exemption.

There is no specific form of timekeeping required under the FLSA. The employer, however, has the burden of establishing that they are accurate records. An employer may "round" up to 15 minute increments, provided that on average, the upward and downward adjustments are equivalent over time.

f. Minimum Wage

The current federal minimum wage rate is $5.15 per hour. Although Texas technically has its own minimum wage rate of $3.35, that rate would only be relevant to the relatively few employers who fall outside of the FLSA's jurisdiction.

g. Opportunity Wage

One exception to the minimum wage is an "opportunity" wage for employees under 20 years of age during the first 90 consecutive calendar days of employment. 29 U.S.C. § 206(g)(l), (4). The opportunity wage must be at least $4.25 per hour. In addition, an employer may not terminate or reduce the hours of an older employee in order to make room for the sub-minimum wage employee.

h. Tipped Employees

Employees who receive at least $30.00 per month in tips may be paid a basic hourly rate of no less than $2.13, with the tips credited towards the other portion of the $5.15 minimum wage. If the employee's tips do not equal or exceed $3.12 per hour, the employer would have to make up the difference. The employer must communicate this fact to the employee before work commences. 29 U.S.C. § 203(m), (t).

i. Overtime

The FLSA requires the payment of overtime at the rate of rime and one-half for all hours worked in excess of 40 hours per "workweek." An employer may select the time period to be used as a standard workweek, e.g. 12:01 a-m. Sunday through 12:00 midnight on Saturday or 8:00 a.m. Monday through 7:59 a.m. the following Monday. The employer, however, is required to specify in writing, e.g. in an employee handbook, the workweek used for overtime purposes and may not change the workweek merely to avoid overtime in a particular pay period.

j. Overtime Exemptions

Certain employees are exempt from the overtime requirements. One of the most frequent mistakes employers make is the mis-classification of employees as exempt. These mis-classifications sometimes result from an employer's failure to understand and comply with the Department of Labor's "salary basis" test. Other times they result from the fact that an employee's duties simply do not fall within the scope of an exemption. This section will discuss both the salary basis test and the major overtime exemptions, i.e. the administrative, executive, professional, outside sales, and computer professional exemptions.

2. The Salary Basis Test

Employers claiming an administrative, executive, or professional exemption to overtime rules must satisfy the salary basis test. The salary basis test requires that employees regularly receive an amount of pay on a weekly or less frequent basis that is not subject to reductions due to the quality or quantity of work, the number of days or hours worked, the unavailability of work, or absences for jury duty, witness attendance, or temporary military duty. 29 C.F.R. §602(A). Employers may make payroll deductions for: (1) employee-initiated absences lasting for one or more days, *id.* at § 541.602(b)(l); or (2) absences due to sickness or disability, provided that the deduction is made in accordance with a bona fide sick pay or disability pay plan, id. at § 541.602(b)(2). Employers may also dock a salaried employee's pay when the employee is suspended for violation of a safety rule of major significance or if the employer, in good faith, suspends the employee for violations of other disciplinary rules, e.g. sexual harassment. *Id.* at § 541.602(b)(3) and (4). Moreover, even an infrequent or exceptional docking practice may jeopardize the exemption for all employees in the subject class, regardless

"of whether such employee" has actually been docked or docked during the weeks for which overtime was worked. See Abshire v. County of Kern, 903 F.2d 483 (9"'Cir. 1990).

3. Administrative Exemption

An employee qualifies under the administrative exemption if he or she receives a weekly salary of not less than $455 and if his or her primary duty is office or non-manual work directly related to the management, policies or general business operations of the employer or employer's customer, and includes work requiring the exercise of discretion and independent judgment. Indicia of administrative status include the authority to regularly and directly assist the proprietor of an employer who is employed as an executive or administrator, performance only under general supervision or working along specialized or technical lines requiring special training experience or knowledge. "Primary duty" typically means at least 50% of an administrative employee's time. The requirement that the administrative work be directly related to the management policies or general business operations of the employer or its customers means that the work generally must relate to administrative operations, as distinguished from production or sales work. The requirement of discretion and independent judgment means that the employee must have the authority to make independent choices, free from immediate direction or supervision regarding matters of significance. These decisions need not be final, but may be in the form of recommendations. The requirement that discretion and independent judgment be exercised should not be confused with the exercise of skill. If decisions are made on the basis of skill or experience only, the employee is not considered to be exercising discretion. Administrative trainees who are not actually performing the duties of an administrative employee are not exempt 29 C.F.R. § 541,200-204.

4. Executive Exemption

An employee is exempt as an executive if he or she receives a weekly salary of not less than $455, and (1) his or her primary duty is the management of the enterprise or of its customarily recognized departments or subdivisions, (2) he or she customarily and regularly directs the work of two or more of the company's other employees, and (3) he or she has the authority to hire or fire other employees or provides recommendations that are given particular weight as to the hiring, firing, or other substantial change in employee status. Indicia of executive status include the authority to hire, fire, advance, promote, or otherwise effect a change in employee status, or the making of recommendations that are given particular weight regarding such changes. An executive must also customarily and regularly exercise discretionary power. As a rule of thumb, an employee must spend at least 50% of his or her time in management to be considered exempt. The following duties are considered to be managerial: interviewing, selecting, and training employees; setting and adjusting employees' rates of pay and work hours; directing employees' work; maintaining employees' production or sales records for use in supervision or control; appraising employees' performance; handling

employee complaints and grievances; disciplining employees; planning work; determining the techniques to be used; determining the type of materials, supplies, machinery, or tools to be used; and controlling the flow and distribution of materials or merchandise and supplies. The term "customarily and regularly" means a frequency that is greater than occasional, but not necessarily constant. The term "discretionary power" means more than the routine discretion exercised by any employee or concerning the mechanics of performance. Instead, the discretion must relate to policy. 29 C.F.R. § 541.100-106. In addition, an owner of at least 20% of the equity in a business is exempt provided the owner is actively engaged in management of the business. 29 C.F.R. § 541.101.

5. Professional Exemption

An employee may qualify as a professional if he or she earns at least $455 per week and either: (1) performs work that requires advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and the consistent exercise of discretion and judgment; (2) performs work that is original or creative in a recognized field of artistic endeavor; or (3) is employed in an educational institution in a teaching capacity. 29 C.F.R. § 541.300-304.

6. Outside Salesperson Exemption

An employee is exempt as an outside salesperson if he or she is employed for the purpose of making sales and is customarily and regularly away from the employer's place of business for such purposes. 29 C.F.R. §541.500-504.

7. Computer Professionals Exemption

An employee is exempt as a computer professional if the employee is paid on either a salary basis of $455 per week or more or an hourly rate of $27.63 per hour. The employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker. In addition, the employee's primary duties must consist of:

(a) The application of systems analysis techniques and procedures;

(b) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs;

(c) The design, documentation, creation, testing, or modification of computer programs relating to machine operating systems; or

(d) A combination of the foregoing. 29 C.F.R.S 400-402.

8. Highly Compensated Individual

The regulations exempt "highly-compensated" individuals who are paid an annual payment of at least $100,000.00. To be exempt, such employee's primary duties must be office or non-manual work and must include the customary and regular performance of at least one of the duties for exempt executive, administrative, or professional employees. 29 C.F.R. § 541.601.

a. Bonuses and Profit Sharing

Many employers fail to recognize the consequence of bonus or profit sharing payments upon overtime compensation. If an employer makes such a payment, it must be credited towards the regular rate of pay used to calculate overtime pay during the bonus or profit sharing period, unless the payment falls into a statutory exception. With respect to bonuses, both the fact and the amount or manner of calculating the amount of the bonus must remain entirely discretionary with the employer. The employer can only determine and grant the discretionary bonus towards the end of the bonus period. Otherwise, the bonus will increase the liability for all overtime worked during the bonus period. In contrast, to be excluded from the overtime calculation, profit sharing must be made pursuant to a specific written plan setting a formula for the distribution of sums solely from the profits of the company to all hourly employees who meet certain requirement. The plan cannot disqualify eligible employees who remained on the payroll through the end of the period used to calculate profit and may not be based on factors such as attendance, quality or quantity of production, rate of production or efficiency. The plan also cannot promise a minimum lump sum payment or predetermined fixed amount and the employer's contribution cannot be based on factors other than profit, such as hours of work, production, efficiency, sales, or cost savings.

b. Alternative Workweek

For employees who work irregular hours, the employer can elect alternative workweek schedules/compensation arrangements. These alternative arrangements are considered to be exceptions to the general overtime rules and, therefore, are construed narrowly by the courts. An employee electing one of these alternatives needs to ensure that it is properly established and implemented.

The FLSA permits employers to offer guaranteed weekly compensation to employees who necessarily work irregular hours. Typically, these contracts are called "Belo" contracts after the U.S. Supreme Court decision that first discussed them in detail. *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942). To be valid, a Belo contract should be in writing and meet the following test: (a) the contract must specify a regular rate of pay not less than the minimum wage; (b) the contract must specify overtime compensation at a rate not less than one and one half times the straight-time rate; (c) the contract must provide a weekly guarantee of pay; (d) The guarantee can only cover up to 60 hours of work per week 29 U.S.C.§ 207(f).

An employer may agree to pay an employee a fixed salary that will cover the employee's straight-time rate for all hours worked. Thereafter, the employer will only have to pay overtime for hours worked in excess of 40 at the rate of one-half the employee's straight-time rate for each particular workweek. Under this arrangement, the employer must recalculate the employee's straight-time rate for overtime purposes for each week in which an employee works in excess of 40 hours, i.e. by dividing the fixed salary by the number of hours worked each week.

c. Proper Recording by Employer

As a general rule, an employer must record and compensate an employee for all hours that an employee is works. It is not adequate to just instruct an employee not to work overtime. If an employer is or should be aware that the employee is working additional hours, the employer is obligated to "properly record" and compensate such hours. Off-the-clock work claims are particularly difficult since the employer has no record of such work and the employee's own version of the facts is likely to receive substantial weight if the court concludes off-the-clock work occurred.

d. On-Call Time

In determining whether on-call is compensable is the degree to which the employee is free to pursue normal personal activities during the on-call period. The greater the restrictions the employer places, the greater the likelihood that the time will be deemed compensable. Courts examine all relevant factors, including for example whether the employee has to carry a pager, whether the employee has to remain on-site or within a specified area, whether the employee has the option to decline the call and let someone else handle the matter, how often an employee is summoned to work during the on-call period.

e. Meal Periods

Employers are not required to count "bona fide meal periods" during which an employee is relieved of all duties. Generally, the meal period must last at least 30 minutes. The employee, however, does not have to be free to leave the premises.

f. Travel Time

Commuting to and from work is generally non-compensable. This is true even if the employee is commuting in the employer's own vehicle, provided that the employee's use of the vehicle is by mutual agreement and within normal commuting distances. Travel to or from a work site at the beginning or end of the day is also not compensable, provided the employee is not required to perform any work, e.g. load a truck, in connection with such travel. Travel during the course of a normal workday is compensable. There are some exceptions to the foregoing rules. If there is an agreement or established practice of paying for such travel, then the time counts

towards hours worked. Second, if the employee is called to work outside of normal work hours, the travel time is compensable. Travel to a distant city during a single workday is compensable. For overnight stays, the travel is compensable if it occurs during the employee's normal work hours or, if on a regularly scheduled weekend or other day off, during the same hours of the day. If the employee is to operate a vehicle or perform outside of normal work hours the time is compensable, unless the employee is operating the vehicle for the employee's own convenience.

g. Training Time

Training time is generally compensable. To be excluded from hours worked, the training time must: (a) occur outside of work hours; (b) be voluntary; (c) be unrelated to the employee's current job responsibilities; and (d) not permit the performance of any work of value to the employer during the training period.

h. Vacation, Sick Leave, and Severance Pay

One common question employers ask is whether an employer has to provide vacation, sick leave, or severance pay upon termination. Courts have also held that ordinary vacation and severance plans, which are paid out of general funds and not separately funded and administered, are not covered by ERISA. *Massachusetts v. Morash*, 109 S. Ct. 1668 (1989) (vacation plan); *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct 2211 (1987) (severance pay). The Texas Payday Law, however, defines "Wages" as including pay provided under any written vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay policy. TEX. LAB. CODE § 61.001(7). Thus, except for parental leave rights under the FMLA, which are beyond the scope of this presentation, there is no obligation to provide such pay in the absence of a written policy. If a written plan does exist, employers should ensure that the policy specifically address the effect of termination.

9. Equal Pay Act

The Equal Pay Act, 29 U.S.C, Sec. 206(d), part of the FLSA, prohibits discrimination in pay on the basis of sex. It provides that an employer must pay men and women equally for work on jobs that require equal skill, effort, responsibility, and that are performed under similar working conditions. Exceptions include pay pursuant to a seniority system, merit system, or where earnings are determined by the quantity or quality of production. The employer cannot comply with the act by lowering the pay of the higher paid employee. The Equal Pay Act requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determine whether jobs are substantially equal. Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment.

Skill is measured by factors such as the experience, ability, education, and training required to perform the job. The key issue is what skills are required for the job, not what skills the Individual employees may have. For example, two bookkeeping jobs could be considered equal under the EPA even if one of the job holders has a master's degree in physics, since that degree would not be required for the job.

Effort is the amount of physical or mental exertion needed to perform the job. For example, suppose that men and women work side by side on a line assembling machine parts. The person at the end of the line must also lift the assembled product as he or she completes the work and place It on a board. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.

Responsibility is the degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept a customer's personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility such as turning out the lights at the end of the day, would not justify a pay differential.

Working conditions encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.

The prohibition against compensation discrimination under the EPA applies only to jobs within an establishment. An establishment is a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. However, in some circumstances, physically separate places of business should be treated as one establishment. For example, if a central administrative unit hires employees, sets their compensation, and assigns them to work locations, the separate work sites can be considered part of one establishment.

Pay differentials are permitted when they are based on seniority, merit, quantity or quality of production, or a factor other than sex. These are .known as "affirmative defenses" and it is the employer's burden to prove that they apply. In correcting a pay differential, no employee's pay may be reduced, Instead, the pay of the lower paid employee must be increased.

Title VII, the ADEA, and the ADA also prohibit compensation discrimination on the basis of race, color or disability.

10. Employee Retirement Income and Security Act

The Employee Retirement Income and Security Act (ERISA), 29 U.S.C., Sec. 1001 et seq., pertains to pension and health and welfare plans voluntarily provided by

employers. It imposes requirements of disclosure, fiduciary duty, and prohibits termination to avoid vesting or payment of benefits. It also provides for claims for unpaid benefits. ERISA covered plans must be in writing and available. They usually have a required and lengthy claim and claim appeal procedure before the claims can be pursued in court.

11. COBRA (Consolidated Omnibus Budget Reconciliation Act)

COBRA (Consolidated Omnibus Budget Reconciliation Act), 29 U.S.C. Section 1161 et seq., provides for continuation of health care benefits when coverage under an employer provided plan ends, usually due to termination of employment. The employee or former employee must be sent notice of termination of benefits and be allowed to continue coverage for up to a set time period at his expense.

12. Health Insurance Portability and Accountability Act ODPPA)

The Health Insurance Portability and Accountability Act (HIPPA), 42 U.S.C. Section 1320d et seq., also provides some privacy protection to employees with regard to their medical conditions and provides some protection against lapse of coverage when an employee moves between employers.

B. Texas Statute - Texas Pay Day Act

The Texas Pay Day Act, Texas Labor Code, Section 61, regulates time and method of payment for wages or salary. It also establishes an administrative enforcement scheme for collection of overdue wages. It does not replace a common law contract cause of action for unpaid wages, but a there is, as a matter of law, no common law contract cause of action that can be brought against a Sheriff.

IV.
PERSONAL AND FAMILY LEAVE

A. Federal Statutes

1. Family Medical Leave Act

The Family Medical Leave Act (FMLA), 29 U.S.C; Section 2601 *et seq*., requires twelve weeks of unpaid leave for certain employees. At the conclusion of the leave, the employer must restore the employee to his employment. The FMLA requires leave for an employee's "serious health condition" that makes him unable to perform the functions of his position. Serious health conditions do not include minor illnesses. To be covered, the condition must require hospitalization, ongoing treatment, or result in incapacity for more than three days and involve treatment by a health care provider. The FMLA also requires leave when the employee is needed to care for children, parents, and spouses with regard to their serious health conditions.

Leave must be requested except in the case of an emergency where it should be requested as soon as possible. The leave may be intermittent, such as for recurring treatments or because of recurring debilitation caused by the serious health condition. An employer cannot interfere with an employee's right to leave and must restore the employee to his pre-leave position or an equivalent position. An employer may not retaliate against an employee who opposes an unlawful practice under the FMLA. 29 U.S.C. Section 2615.

2. Uniformed Services Employment and Re-employment Rights Act

The Uniformed Services Employment and Re-employment Rights Act (USERRA), 38 U.S.C. Section 4301-4333, requires leave and job restoration for employees on reserve duty or active duty in the armed forces. USERRA generally prohibits discrimination against employees on qualified leave, requires accumulation of seniority during leave, and requires return to the position that the employee would have held if he had not been on leave.

3. Jury Service

The Judiciary and Judicial Procedure Act, 28 U.S.C. Sec. 1875, prohibits termination based on jury service.

B. Texas Statutes

1. Military Service

Texas Government Code, Sections 431.005 -431.006, prohibits discharge for military service.

2. Juror Re-employment Act

The Juror Re-employment Act, Tex.Civ.Prac. & Rem-Code, Section 122.001(a), protects against employment termination due to jury service.

3. Voting

The Texas Election Code provides criminal liability against an employer who denies work time off to attend a precinct convention at which the employee is a delegate (Section 161.007) or who threatens or subjects an employee to loss or reduction of wages or worse for voting (Section 276.004).

4. Public Evacuation

The Texas Labor Code, Section 22.002, prohibits discharge or discrimination

against an employee who leaves the employee's place of employment to participate in a general public evacuation ordered under an emergency evacuation order.

5. Subpoenas

The Texas Labor Code, Section 52.041, prevents an employer from discharging, disciplining, or penalizing an employee because he complies with a valid subpoena to appear in a civil, criminal, legislative, or administrative proceeding.

V.
WORKPLACE SAFETY-OSHA

The Occupation Safety and Health Act (OSHA), 29 U.S.C. Section 651 et seq., is the primary statute addressing safety in the workplace. Other more specialized federal laws apply to mining, maritime, and other industries. These laws are preventative; they do not compensate injured employees. But they can result in fines and enforcement proceedings before an accident.

Employees may request OSHA inspections. If OSHA does not comply or does not comply quickly enough, the employee may take further action. OSHA also protects refusal of an employee or employees to perform work exposing him (them) to a danger of death or serious injury. Where possible, certain pre-refusal steps are required.

VI.
WORK PLACE INJURY

Worker Compensation statutes provide limited compensation for work-related injuries without regard to fault. Texas is unique among all fifty states in that it allows employers to opt out of the workers' compensation system. If the employer does so, it is liable to injured employees if its negligence causes the injury. Some defenses, however, are abrogated even for such opt out employers. The Texas Legislature has prohibited pre-injury and post-injury waivers if the employer opts out of worker's compensation.

VII.
TEXAS UNEMPLOYMENT COMPENSATION ACT

The Texas Unemployment Compensation Act is found at Texas Labor Code, Section 408.000, *et seq*. Injury, illness, or resulting disabilities that arise out of or occur in the course of employment, are covered. Coverage may be available even if the injury did not occur on the employer's property, during an actual work activity, or during working hours. Employee negligence is not a defense. Extreme forms of employee misbehavior may preclude an award. Special procedures including early reporting of injury are required. Section 451 of the Texas Labor Code prohibits discrimination because an employee filed a worker's compensation claim, hired a lawyer to represent him in a claim, instituted or caused to be instituted a proceeding under the Worker's

Compensation Act, or testified or is about to testify in a worker's compensation proceeding.

VIII.
REDUCTION IN FORCE, LAY-OFF, AND TERMINATION

A. Federal Statutes

1. Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. Section 2101 et seq., requires that employers who plan to close a plant or facility or plan a mass termination or lay-off that affects varying numbers of employees depending on circumstances provide 60 days advance notice to the employees or their unions if one exists, the community, and the state. Exemptions apply to temporary jobs, completion of projects, temporary facilities, and other particular instances. Employers who fail to provide the 60 day notice are liable for pay and benefits to each affected employee for each day of the violation.

2. Age Discrimination in Employment Act

The Age Discrimination in Employment Act, includes particular reporting and information requirements be made to covered employees in the case of certain reductions in force, lay-off, and mass termination.

B. Texas Statute - Unemployment Compensation

The Texas Unemployment Compensation Act, Texas Labor Code, Section 207.000 *et seq*., provides unemployment compensation for employees who were not fired for misconduct. From the employee's perspective, lack of misconduct is different and less stringent than fired for cause. For instance, an employee who was unqualified or simply unable to do the job, might receive benefits. Resignation will usually bar unemployment compensation, unless the resignation was for good cause.

IX.
WHISTLEBLOWERS

A. Sarbanes-Oxlev Act

The Sarbanes-Oxley Act of 2002, 18 U.S.C. Section 1514A, provides protection to whistleblowers who provide information or assist in an investigation of the Act, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders. Complaints to the Department of Labor are required within 90 days. The Act was passed in reaction to the Enron scandal and collapse.

B. Texas Whistleblower Act

The Texas Whistleblower Act, Texas Government Code Sections 554.001-010, protects only state and local government employees.

X.
UNAUTHORIZED IMMIGRANT WORKERS

Employer liability for violation of all the anti-discrimination statutes. National Labor Relations Act, and pay statutes generally apply in favor of undocumented workers. Injunctive relief attaches. And an employer cannot retaliate on the basis of immigrant/citizenship status. Immigration Reform and Control Act (IRCA), 8 U.S.C. Section 1324b. Undocumented workers are entitled to damages including back pay under the Fair Labor Standards Act, because they have actually worked such time. The U.S. Supreme Court held in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 S.Ct, 1275, 152 L.Ed.2d 271 (2002), that undocumented workers may not be entitled to back pay (for time not actually worked) and/or reinstatement that substitutes for or continues employment that is illegal. Whether Hoffman applies to back pay or reinstatement under anti-discrimination statutes is being determined variously depending on the court.

XI.
PRIVACY

A. Medical Examinations

The Americans with Disabilities Act (ADA), 42 U.S.C. Section 12112(d)(2) bars pre-employment physicals of all applicants. The employer, however, may make a job offer conditional on a medical examination if the employer does not discriminate in requiring or administering such examination and does not use the medical information gained to engage in disability discrimination. 42 U.S.C. Section 12112(d)(3).

B. Intrusive Questions

Some intrusive questions to prospective employees or active employees are barred by the anti-discrimination statutes. These include questions about specific physical or mental health issues, pregnancy, race, national origin, etc.

XII.
SURVEILLANCE

The Electronic Communications Privacy Act (EPCA), 18 U.S.C. Section 2510 et seq., applies to employer eavesdropping and reading of employee communications in some instances.

XIII.
POLYGRAPH OR LIE DETECTOR TESTS

The Employee Polygraph Protection Act of 1987 (EPPA), 29 U.S.C. Sections 2001-2009, bars private employers from using polygraph and lie detector tests on job applicants. It does permit such examinations to investigate current employees suspected of specific wrongdoing, subject to important restrictions. The EPPA does not apply to public employees. But the Fourth and Fourteenth Amendments to the United States Constitution limit lie detector tests of public employees.

XIV.
FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act (FRCA), 15 U.S.C. Section 1681, regulates employer use of third party investigations and reports about job applicants and employees.