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THE IMPACT OF FEDERAL LEGISLATION ON THE EMPLOYER/EMPLOYEE RELATIONSHIP IN ILLINOIS

A Summary of Federal Regulation of Illinois Workplace Issues

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I. Introduction

The proliferation of federal regulations affecting the Illinois workplace has reached an all-time high. A recent study by *Newsweek* magazine revealed that the totality of federal regulations dealing with workplace issues now consists of 202 volumes numbering 131,803 pages. This is fourteen times greater than in 1950, and more than four times greater than in 1965. Economist Thomas Hopkins of the Rochester Institute of Technology estimates that the cost of regulations upon business nationwide exceeds $500 billion annually.

Under the broad auspices of the Commerce Clause of the United States Constitution, the federal government has imposed sweeping regulations on a wide spectrum of workplace issues ranging from hiring and firing, employee compensation, employee privacy and the accommodation of employees with disabilities or impairments. The purpose of this article is to undertake a brief survey of a number of these federal regulations, some old and some new, which most dramatically impact upon the employer-employee relationship in Illinois. This survey is by no means exhaustive, and purposefully omits certain aspects of the Illinois workplace where federal regulation is most prevalent, e.g. employee safety (OSHA, FELA, etc.), employee benefits (ERISA, COBRA, etc.) and the like.

Instead, this article concentrates on areas of increasing federal involvement while also discussing some of the less well-known items of legislation which create obligations on the part of the employer that are sometimes overlooked until compliance is demanded by means of a lawsuit or a complaint with an administrative agency. Hopefully this survey will provide some insight to Illinois employers, and the lawyers that counsel them, regarding the ever-increasing impact of federal regulations upon the Illinois workplace, and the obligations which such legislation creates.

II. Hiring and Firing

A. The Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq*., (hereinafter referred to as "ADEA") protects individuals from age 40 to 70. The purpose of the Act is to promote employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination employment, and to help employers and workers to find ways of meeting problems arising from the impact of age on employment. This prohibition against age discrimination is and will be a growing concern to employers as the maturation of the baby boomer population takes place.

The ADEA sets forth the definition of "employer" to whom the Act applies. Private businesses fall within the term "employer" if the business is engaged in an industry affecting commerce and has 20 or more employees for each working day during each of the 20 or more calendar weeks in the current or preceding calendar year. The Act applies to businesses of one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any other organized group of persons. The ADEA also applies to "employment agencies" who regularly undertake, with or without compensation, to procure employees for an employer. With respect to the 20 calendar work week description within the term "employer," it has been held that an employer must have had 20 or more employees on each day of the work week for that particular work week to count toward the 20-week period requirement in the ADEA.

The ADEA sets forth practices which are unlawful by employers. The unlawful practices are:

(1) 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;
(2) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) To reduce the wage rate of any employee, because of age.

Employment agencies may not fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

The ADEA sets forth lawful practices which serve as exceptions to the Act. These lawful practices are:

(1) Bona fide occupation qualification defense (BFOQ);
(2) Reasonable factors other than age (RFOA);
(3) Where compliance would violate the laws of a foreign country where the workplace is located;
(4) Discharge or discipline for good cause.

The above lawful practices under the ADEA are considered to be affirmative defenses and must be pled as such. The employer asserting the defense has the burden of proof in establishing the defense.

Any person falling within the statutory age category who is allegedly aggrieved, may bring a civil action in any court of competent jurisdiction. The right of such person to bring a private action, however, shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the rights of such person or employee pursuant to the ADEA. The EEOC is a party to only a small percentage of age discrimination cases that are filed, and the vast majority are brought by individuals with no participation by the EEOC. If an individual files a lawsuit pursuant to ADEA, the filing of the lawsuit by the EEOC does not result in a dismissal of the private person's ADEA lawsuit.

The ADEA requires an aggrieved individual to file with the EEOC a charge alleging unlawful discrimination no less than 60 days before the filing of a lawsuit. In general, the filing with the EEOC must be done (1) within 180 days after the alleged unlawful practice occurred, or (2) within 300 days of the alleged unlawful act if the state in which the act took place had laws empowering a state agency to either grant or seek relief. In Illinois, the 300 day period applies. When the EEOC receives a charge, it is to promptly notify all persons named in such charge as prospective defendants in the action, and to seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, on persuasion. The limitations period can be tolled for equitable reasons, such as failure by the employer to post at the workplace the notice required by the ADEA. *See Posey v. Skyline Corp.*, 702 F.2d 102 (7th Cir.) *cert. denied* 464 U.S. 960 (1983). Exactly when the period for filing a claim or notice begins to run has been a frequently litigated issue. It has been determined that the time for filing a charge starts when the aggrieved party is informed of the alleged employment action, such as termination. *See Mull v. ARCO Purethene Plastics, Inc.*, 784 F.2d 284 (7th Cir. 1986).

The ADEA specifically sets forth the damages and other relief which are available. In any action brought to enforce the ADEA, the court has jurisdiction to grant both legal and equitable relief. This relief can include judgments compelling employment, reinstatement, promotion, or enforcement of liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation. (*See* 29 U.S.C. §626).

Prospective relief or "front pay" has been determined to be awardable by many circuits, including the Seventh Circuit. *See Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 130-1331 (7th Cir. 1987) (Vacated and remanded on other grounds, 486 U.S. 1020, 100 L.Ed 2d 223 (1988).) Damages for pain and suffering are not recoverable under the ADEA, nor are punitive damages. *See Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684 (7th Cir.), *cert. denied* 459 U.S.1039 (1982). Liquidated damages are payable in cases of willful violations of the ADEA. These liquidated damages are statutory damages in an additional amount equal to the amount of back pay awarded. A violation of the ADEA is willful if the employer knew of the potential applicability of the ADEA, and if a jury finds that it is "deliberate and indeed bare-faced," then a reviewing court will affirm an award of liquidated damages. *See Smith v. Great American Restaurants, Inc.*, 969 F.2d 430, 434-35 (7th Cir. 1992).

If an employer violates the law inadvertently, then liquidated damages will not be warranted. *Heiar v. Crawford County*, 746 F.2d 1190, 1201 (7th Cir. 1984). Attorneys' fees and costs can be awarded in the successful prosecution of an ADEA claim. *See, e.g., EEOC v. G-K-G, Inc.*, 39 F.3d 740 (7th Cir. 1994).

Mitigation defenses are available to an ADEA defendant. Amounts actually earned by a claimant are to be deducted from any award for back pay. Although the circuits are split on whether unemployment compensation is to be deducted, the Seventh Circuit held that unemployment compensation is not to be deducted. *See Synvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (7th Cir. 1981). An employer defending an ADEA action can argue that a plaintiff does have an affirmative duty to mitigate his or her losses, such as looking for new employment.

The courts interpreting the ADEA have used the guidelines which have been adopted by the courts reviewing Title VII cases. Accordingly, a claimant alleging a violation pursuant to the ADEA may advance two general theories. A claimant may put forth evidence supporting a theory of disparate treatment, or he or she may attempt to prove the case by showing a disparate impact (generally through the use of statistics, it is argued that the employer's practices and policies have a disparate effect on persons falling within the protection of the ADEA.) In an ADEA claim, it is the claimant's ultimate burden to prove that his or her age was a determining factor in the termination decision -- the employee would not have been fired but for the employer's motive to discriminate on the basis of age. *See McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 371 (7th Cir. 1992).

For the plaintiff to prove age discrimination, this can be done by (1) direct or circumstantial evidence that age was a determining factor; or (2) the indirect, burden-shifting method of proof as originally used in cases filed pursuant to the Civil Rights Act of 1964. To prevail under the "direct method" of an ADEA claim, the plaintiff must present direct or circumstantial evidence that age was used as a determining factor in the decision by the employer to violate the ADEA with an unlawful practice. If, for example, a plaintiff is relying on comments made by supervisors or decision-makers with respect to there being "so many old people," the plaintiff must establish that the remarks upon which the plaintiff is relying were relating to the employment decision in question, as opposed to comments made relating to some other decision or circumstance. *See McCarthy v. Kemper Life Insurance Co.*, 924 F.2d 683, 686 (7th Cir. 1991) (Racial jokes made to plaintiff insufficient to support inference of racial discrimination because comments were made unrelated to the specific employment decision at issue which was termination.)

The indirect method of establishing a *prima facie* case of age discrimination finds its origins in the standards as developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed 2d 668 (1973). To establish a *prima facie* case using this method, the plaintiff must prove:

(1) The plaintiff was within the protected age group (ages 40 to 70);
(2) The plaintiff was performing his or her job well enough to meet her employer's legitimate expectations;
(3) The plaintiff was discharged; and
(4) Others outside the protected class were treated more favorably. *See, e.g., Konowitz v. Schnadig Corp.*, 965 F.3d 230, 232 (7th Cir. 1992).

Once the *prima facie* case has been demonstrated by the plaintiff, the burden shifts to the employer to articulate some legitimate non-discriminatory reason for its action which "if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the discharge or action." *See McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 371 (7th Cir. 1992).

Oftentimes an employee making an ADEA claim is affected by what the employer has termed as a cost cutting reduction in force (known as "RIF"). When the burden shifts to the employer to articulate some legitimate non-discriminatory reason, it will refer to its cost-cutting program and typically will produce guidelines implementing the RIF. The production of these RIF guidelines, if appropriately done, can satisfy the employer's burden to establish some legitimate non-discriminatory reason for its action. In essence, the presumption of discrimination
dissolves and the burden shifts back to the plaintiff to prove that the employer's reasons are simply a pretext for discrimination. *See Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1122 (7th Cir. 1994). When the burden passes back to the employee to establish "pretext," the plaintiff must produce evidence that the employer was more likely motivated by discriminatory reasons or that the reasons offered by the employer are not worthy of any credence. *See Robinson v. PPG Industries, Inc.*, 23 F.3d 1159 (7th Cir. 1994).

In most instances, discrimination is rarely admitted or obvious, and therefore it is often difficult to prove. The indirect method of proof permits a plaintiff to prove his or her case by eliminating all lawful motivations, as opposed to proving an unlawful motivation. *See LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984). When the burden shifts to the employer to articulate some legitimate non-discriminatory reason, it has been held that if the employer's "offered reason is both honest and non-discriminatory, his or her business judgement, no matter how erroneous, will not be challenged." *See Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1322 (7th Cir. 1989). *See also Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987) ("A business decision need not be good or even wise. It simply has to be non-discriminatory.")

B. The Older Workers Benefit Protection Act (OWBPA)
29 U.S.C. §621, et seq.

The OWBPA amendments to the ADEA, effective
October 15, 1990, establish six basic requirements for a valid waiver of rights under the ADEA. These requirements are:

1. The waiver has to be part of a written agreement between the employee and the employer, and it has to be written in ordinary English;
2. The agreement must refer specifically to rights or claims arising under the ADEA;
3. The waiver cannot cover rights or claims that may arise after the date on which the waiver is executed;
4. The waiver has to be exchanged for valuable consideration in addition to what the individual would already be entitled to receive;
5. The employee must be advised in writing to consult with an attorney before signing the agreement;
6. The employee has to be given a reasonable time period in which to review the agreement and decide whether to sign the waiver.

With regard to the amount of time an employee must be given to decide whether to sign the waiver, the OWBPA states that an employee asked to waive his ADEA rights must be given at least 21 days to consider the agreement. If the waiver is sought in connection with an exit incentive or other employment termination program offered to a group or class of employees, the period of consideration is at least 45 days. In both situations, the employee is entitled to revoke the waiver within 7 days after executing it, and the waiver does not become effective or enforceable until the revocation period has expired.

The OWBPA also states that no waiver agreement may affect the EEOC's right to enforce the ADEA and that no waiver may be used to justify interfering with an employee's right to file a charge or to participate in an EEOC action or proceeding. This conforms with prior case law which holds that even though an employee signs a waiver or release of his or her ADEA claim, an employee still has a right to file an ADEA charge and the EEOC, not the employee, may still proceed against an employer based on the charge of the employee who has signed a waiver of all claims. *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.,* 821 F.2d 1005, 1089-1090 (5th Cir. 1987); *Calicotte v. Carlucci,* 698 F.Supp. 944, 945 (D.D.C. 1988); *Hoffman v. United Telex Communications, Inc.*, 687 F.Supp. 1512, 1514 (D.Kan. 1988).

C. The Immigration Reform and Control Act
8 U.S.C. §1324, et seq.

The Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful for any employer or other entity including an agricultural association or employer, or farm labor contractor covered by the

Migrant and Seasonal Agricultural Workers Protection Act (MSPA) to knowingly hire, recruit, or refer for employment for a fee, any unauthorized alien, or, for any such employer, entity, association, or contractor to hire an individual without complying with the employment verification system established by the statute. In addition, an employer that hires an alien in violation of these rules also violates the Act if it continues to employ him knowing that he is, or has become, an unauthorized alien.

An "unauthorized alien" is an alien who has not been lawfully admitted for permanent residence, or who has not been authorized to be employed by either the terms of the Act or the Attorney General.

Under the IRCA, an employer has an affirmative duty to ensure that its employees are authorized to work.

An employer or other entity covered by the IRCA that demonstrates good faith compliance with the employment verification system has an affirmative defense to any charges of hiring, recruiting, or referral violations.

The IRCA identifies documents which demonstrate employment authorization under the verification system. These documents include:

> . . . a social security account number card, unless the card specifies on its face that it does not authorize employment in the United States;
> . . . a birth certificate, or other certificate establishing U.S. nationality at birth if it complies with regulatory specifications established by the Attorney General;
> . . . any other documentation demonstrating authorization of employment in the United States that is acceptable under regulatory standards established by the Attorney General.

The IRCA's employment verification system requires every employer and other entity covered by the Act, but excluding entities that recruit or refer applicants for a fee, to verify on a form designated by the Attorney General, under penalty of perjury, that any person hired, recruited or referred for employment for a fee is not an unauthorized alien. The entity must also verify that it has established the person's status by examining either a document that establishes both employment authorization and identity, or by examining one document that establishes employment authorization, and one that establishes identity. The employment Eligibility Verification Form, also know as Form I-9, is the document designated by the Immigration and
Naturalization Service (INS) to be used for verification
purposes.

The IRCA identifies documents which establish both employment authorization and identity under the verification system to include: a United States passport; a certificate of United States citizenship; a certificate of naturalization; an unexpired foreign passport, if appropriately endorsed by the Attorney General as authorizing the individual's employment in the United States; a resident alien card, or other alien registration card if it contains a photograph of the individual, or other personal identifying information satisfying the regulatory standards specified by the Attorney General, and if the card is evidence of authorization of employment in the United States.

D. Title VII and the Civil Rights Act of 1991
(See also Part V - Sexual Harassment)

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq*., (hereinafter "Title VII") prohibits discrimination on the basis of race, color, religion, sex, and natural origin. Title VII authorizes and requires the aggrieved employee to seek mediation and conciliation through the Equal Employment Opportunity Commission ("EEOC"), the governmental agency which enforces Title VII and which was created by Title VII.

In 1991, the United States Congress passed the Civil Rights Act of 1991 (hereinafter "the 1991 Act"), which resulted in substantial changes to employment discrimination law. The 1991 Act was passed because Congress determined that additional remedies under federal law were needed to prevent unlawful harassment and intentional discrimination in the workplace, that legislation was necessary to provide additional protections against unlawful discrimination of employment, and that the Supreme Court decision in *Wards Packing Co. v. Atonio*, 490 U.S.642 (1989), had weakened the scope and effectiveness of civil rights protections.

Section 102 of the 1991 Act provides for a jury trial for situations involving intentional discrimination claims, and authorizes both compensatory and punitive damages. Cases charging "disparate impact," pursuant to the 1991 Act are to be bench trials.

The Civil Rights Act of 1991 made statutory changes with respect to damages. The 1991 Act authorizes compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. The 1991 Act also provides for punitive damages where the employer has engaged in discriminatory practice or discriminatory practices with malice or reckless indifference to the federally-protected rights of an aggrieved individual.

The total compensatory damages allowable under the Act, and the amount of punitive damages which can be awarded, are capped by §102(b)(3) of the 1991 Act. The caps range from $50,000 to $300,000, depending on the number of employees as follows:

Number of Employees	**Damage Cap**
15 - 100	$ 50,000
101 - 200	100,000
201 - 500	200,000
501 and above	300,000

With respect to damages, the Act does allow for uncapped compensatory and punitive damages for intentional racial discrimination claims, does *not* allow the above damages for ADEA claims or for any form of *unintentional discrimination*, and provides that the capped compensatory and punitive damages apply only for intentional discrimination claims based on sex, religion, or disability.

As noted specifically in the 1991 Act, Congress chose to address the evidentiary burdens applicable to discrimination claims which were brought under the disparate impact theory as set forth in *Wards Packing Co. v. Atonio*, 490 U.S. 642 (1989). In *Wards*, the plaintiffs alleged that they were placed in unskilled jobs by the employer and white employees had exclusively the skilled jobs. The *Wards* plaintiffs could show a numerical imbalance between their representation in the skilled jobs versus the unskilled jobs, but they were unable to prove or identify a specific employment policy or practice on the part of the employer which resulted in the disparate treatment. The Supreme Court in *Wards* found that the plaintiffs could not merely rely on this type of statistical showing, but must show that it was the employer's selection or criteria which caused the disparate treatment. The burden of persuasion was to remain on the plaintiffs, and only if the plaintiffs did establish this burden, then the defendant/employer was required to show that the challenged criteria was justified by business necessity.

As a result of the 1991 changes, an unlawful employment practice based on disparate impact is established only if (1) a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the employer fails to demonstrate that the challenge or practice is job related for the position in question and consistent with business necessity, or (2) the complaining employee demonstrates that there is an "alternative employment practice," and the employer refuses to adopt the alternative employment practice.

In conclusion, the Civil Rights Act of 1991 permits victims of unlawful intentional discrimination to collect compensatory and punitive damages, unless they can otherwise recover under §1981 of the Civil Rights Act of 1964. The 1991 Civil Rights Act applies to those "employers," as defined in Title VII, which is "a person engaged in an industry affecting commerce who has 15 or more employees ... and any agent of such a person." The 1991 Act provides that it is to become "effective upon enactment," but its provisions do not apply retroactively to conduct that pre-dates its enactment. *See Landgraf v. USI Film Products*, 128 L.Ed 2d 229, 114 S.Ct. 1483 (1994). *See also Dombeck v. Milwaukee Valve Co.*, 40 F.3d 230 (7th Cir. 1994).

E. The Pregnancy Discrimination Act of 1978

Title VII of the Civil Rights Act of 1964 provides that it is an unlawful employment practice for any employer to discriminate against any individual because of, among other reasons, an individual's sex. Notwithstanding this prohibition against discrimination on the basis of gender, the United States Supreme Court, in *Gilbert v. General Electric*, 429 U.S. 125 (1976), held that this statute did not bar employment discrimination on the basis of pregnancy. The Court reasoned that because not all women became pregnant, discrimination against pregnant employees does not necessarily amount to discrimination against female employees. This decision was severely criticized and resulted in the Pregnancy Discrimination Act of 1978 (hereinafter "PDA").

The PDA added language to the definition section of Title VII providing that:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical condition ..." 42 U.S.C. §2000e(k).

Arguably, it is difficult for a pregnant woman to establish that her employer intentionally discriminated against her on the basis of her pregnancy. As in other Title VII situations, if a plaintiff can prove that she lost her job or certain benefits of employment because of her employer's views toward her pregnancy, or because her employer enacted a policy that explicitly treated pregnancy different from other disabling conditions, she has made out a disparate treatment claim under Title VII. *See Maganvco v. Leyden Community High School Dist.*, 212, 939 F.2d 440, 445 (7th Cir. 1991). PDA claims therefore adopt the burden-shifting method of proving disparate treatment under Title VII as set forth in *MacDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973).

III. Employee Compensation and Related Issues

A. The Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq*., which was originally enacted in 1938, governs minimum wage, overtime pay, equal pay for men and women in the same jobs, child labor, and pay-related recordkeeping. The FLSA has been amended several times since its original enactment, to adapt to a myriad of changes constantly occurring in the workplace.

1. Coverage of the Act

Generally speaking, the provisions of the FLSA apply to almost all types of employees. Specifically, the FLSA applies to all "employees" engaged in transporting or producing goods that travel across state lines (including interstate commerce). These employees include those who: work in communications or transportation; regularly use the mail, telephones, or telegraph for interstate communication, or keep records of interstate transactions; handle, ship, or receive goods moving in

interstate commerce; regularly cross state lines in the course of their employment; work for independent employers who contract to do clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce; work for companies that have annual gross sales or business of $500,000 or more; work for hospitals, or residential facilities that care for the physically or mentally ill, disabled, or aged, or work for public agencies.

Under the FLSA, an "employee" subject to the Act is anyone who is "suffered or permitted to work" by an employer, *Rutherford Food Corp. v. McCombs*, 331 U.S. 722 (1947), unless the employee falls under one of the categories specifically excluded from the FLSA. The following types of persons may not be considered an "employee" for purposes of the FLSA:

• ***Independent contractors, §213***

A person who "works" at employer's place of business but is independent from the business may be considered an independent contractor and, therefore, may be excluded from the FLSA. These workers may include "contingent" workers who fill temporary labor needs. The analysis of whether a worker can be considered an independent contractor begins with the basic question of "how much control does the company assume over the way the work is done?" See *Knight v. United Farm Bureau Mutual Insurance Co.*, 950 F.2d 377 (7th Cir. 1991); *Freemon v. Foley,* 911 F.Supp. 326 (N.D.Ill. 1995). The ultimate determination is, of course, case specific and the existence of the following may result in a finding that the worker may be properly considered an independent contractor: (1) existence of a limited contract; (2) lack of exclusive of the relationship; (3) lack of integration of services; (4) lack of control over work hours; (5) work performed away from employer's premises; (6) lack of hourly or weekly salary; (7) worker's exclusive authority to employ and supervise others; (8) worker's right to terminate employment;
(9) payment of travel and other expenses; (10) worker's substantial investment in the project. If an employer treats a worker as an employee on federal or state wage reports or returns, *i.e.*, issuing a W-2 rather than a Form 1099, the IRS treats this as an admission that the worker is an employee and not an independent contractor.

In some cases, courts use an economic reality test to decide whether a person is an independent contractor or an employee. See *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567 (10th Cir. 1994).

• ***Trainees, §214***

Some workers which may be considered "trainees" are not employees under the FLSA because there is no promise of employment at the end of the training period. The Wage and Hour Division has devised a test which is used to determine whether a trainee may be properly considered an employee and, therefore covered under the FLSA. The Wage and Hour Division test requires that a trainee who meets six of the following criteria is not an employee under the FLSA: (1) the training is similar to that which would be given in a vocational school; (2) the training is intended to benefit the trainee; (3) the trainee is not a replacement employee, but are closely watched as the perform the work; (4) the trainee is not entitled to a job at the conclusion of the training period; (5) the employer gains not immediate benefit from the work performed by the trainee; and (6) the employer and trainee both understand that the trainee is not entitled to wages or compensation for time spent training.

One should note that in *Reich v. Parker Fire Protection District*, 992 F.2d 1023 (10th Cir. 1993), the Court of Appeals ruled that the test is a "totality of the circumstances" test, meaning that not all six point must be met in order for one to be properly considered a trainee and, therefore, exempt from the FLSA.

• ***Prisoners*, see *Vanskiki v. Peters, 974 F.2d 806 (7th***

Cir. 1992).

- ***Elected officials, their personal staff, political appointees, and legal advisors.***

Any elected official and only those people who "work directly for" or are "directly connected" to the elected official is not covered under the FLSA.

- ***Volunteers.***

It must be clear that the volunteer worker is not economically dependent upon the "employer." An employer who gives a volunteer worker either (a) room and board, benefits, or is somehow held responsible for their "job performance" or results of their volunteer efforts may be found to have changed the volunteer into an employee under the FLSA. On the other hand, public employers are allowed to compensate some volunteers for their reasonable expenses.

2. Minimum Wage

The FLSA requires that all covered workers be paid a universal minimum wages. Currently, the minimum wage is $4.25 per hour. There are several types of employees who are covered by the FLSA which may be paid less than the minimum wage under specific circumstances. Concerning this special category of employees, as listed below, the employer must observe specific recordkeeping requirements so that the employer can prove it is actually qualified to pay the employee less than the universal minimum wage.

- ***Students, §214***

Full-time students who word in retail, service, and agricultural occupations and at institutions of higher learning can be paid at a WP not less than 85 percent of the minimum wage, with special certification from the Wage an Hour Division of the Department of Labor.

- ***Apprentices and Learners, §214***

Anyone who is either a student learner or general learner, and who is learning a trade by working in that trade falls in this category. Certification by the Wage and Hour Division is required for this exemption to apply.

- ***Workers with Disabilities, §214***

When employing workers with disabilities, an employer can obtain special certification from the Wage and Hour Division which will allow the employer to pay the worker less than the universal minimum wage. Even after certification, the employer must pay the worker with a disability wages which are "commensurate" with the wages of other employees by comparing the productivity of the two.

- ***Tipped Employees***

Under the 1989 amendments to the FLSA, an employer does not have to pay the universal minimum wage to employees who usually receive more than $30 a month in tips. As of April 1991, an employer may count part of the tips (50 percent) toward their minimum wage. Consequently, an employer need only pay tipped employees $2.13 per hour as long as the employees are allowed to keep all their tips. The FLSA requires that in order to take a tip credit, the employer must inform employee ahead of time
regarding its intention to take the tip credit. Under no circumstances may the employee's wages fall below the universal minimum wage when wages and tips are combined.

3. Maximum Hours

Except its provisions regarding child labor, the FLSA does not limit the number of hours an employee can be required to work as long the employee is properly paid pursuant to FLSA provisions regarding overtime pay.

4. Overtime Pay

The FLSA requires employers to pay overtime to covered employees who work more than 40 hours in one workweek. Specifically, an employer must pay overtime (one and one-half times the employee's regular rate) to any
employee who works more than 40 hours within one workweek (seven consecutive days). See *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1993) An employee's regular rate is the hourly rate figured on a weekly basis. The FLSA's overtime requirement of time and one-half after 40 hours is based on the workweek and not the calendar week. Under the FLSA, however, hospitals may compute overtime on a 14-consecutive-day basis, as long as employees are paid one and one-half times their regular rate for all hours worked in excess of eight in one day period and in excess of 80 in a 14-day period. See *Klien v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993). See also *Alexander v. City of Chicago*, 994 F.2d 333 (7th Cir. 199) (regarding overtime pay for public law enforcement officers). The FLSA does not require employers to pay overtime for hours worked in excess of eight hours per day, or for work performed on holidays, Saturdays, or
Sundays.

5. Child Labor Laws

The FLSA contains rules pertaining to the employment of young people between 14 and 16 years of age. The FLSA states that persons within this age group can work no more than three hours a day and no more than 18 hours a week during the school year. Also during the school year, they can only work between the hours of 7 a.m. and 7 p.m. When school is not in session, however, persons in that age group can work a maximum of eight hours per day and 40 hours per week, between 7 a.m. and 9 p.m.

Under no circumstances may persons between the ages of 14 and 16 years old perform jobs involving hazardous work, including jobs that involve cooking or baking. Workers under 18 years of age are prohibited from working in a variety of hazardous jobs, including most manufacturing, construction, mining, and driving jobs, as well as those jobs which require the operation of certain machinery.

6. Recordkeeping

The FLSA requires every employer to which the Act applies to maintain records pertaining to wages, hours, occupations, and other terms of employment for all covered employees regardless of whether the employee(s) is (are) exempt from the FLSA's minimum wage and overtime provisions. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Covered employers are required to observe special recordkeeping rules for certain types of employees, *i.e.*, students, commissioned employees, and "tipped" employees, *etc.* Covered employers must also observe special record keeping requirements for employees engaged in certain jobs, including those under special
certificates, *i.e.*, workers with disabilities hired under special certificates for pay commensurate with their abilities, etc. Employers should preserve the records for at least
(3) years.

7. Exemptions

- ***White Collar Exemptions***

The following is a list of exceptions for under which certain employees are considered exempt from the FLSA's overtime provisions. See generally, *Klien v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993); *Mueller, et. al. v. Reich*, 54 F.3d 438 (7th Cir. 1995). These exemptions are to be narrowly construed against the employer, *Bankston v. State of Illinois, et. al.*, 60 F.3d 1241 (7th Cir. 1995), and the employer bears the burden of proving the exemption. *Alex, et. al. v. City of Chicago*, 29 F.3d 1235 (7th Cir. 1994).

(1) Executive exemptions, See, *Sturm v. TOC Retail, Inc.* 864 F. Supp. 1346 (M.D.Ga. 1994).
(2) Administrative exemptions, See *Cowan v. Tricolor, Inc.*, 1994 WL 688258 (D.Del.).
(3) Professional exemptions, See, *Dallheim v. KDFW-TV*, 172 F.Supp. 533, N.D.Tex).
(4) Outside salesperson exemption. The test here is whether the employee is engaged in work that id directed toward securing his or her own sales. If so, the employee is considered exempt for the FLSA's minimum wage requirement.
(5) Highly paid computer professionals. Computer systems analysts, computer programmers, software engineers, and other similarly skilled employees who are paid a regular rate of more than 6 1/2 times the minimum wage are exempt from the FLSA's minimum wage and overtime provisions.

8. Enforcement

The FLSA creates a Wage and Hour Division in the Department of Labor to oversee the Act and enforce its provisions. Inspectors from the Wage and Hour Division may inspect an employer's records, question employees and investigate possible violations of the FLSA

B. The Equal Pay Act

The Equal Pay Act ("EPA") of 1963, 29 U.S.C. §206, was enacted as an amendment to the Fair Labor Standards Act ("FLSA"). It prohibits differences in pay between men and women for the performance of "substantially equal jobs." In its simplest terms, the EPA requires employers to pay men and women equal pay for equal work. Specifically, the Act provides that:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. §206(d)(1).

Under the EPA, an employer may not pay lower wages to employees of one sex than are paid to employees of the opposite sex employed in the same establishment performing equal work in jobs that require equal skill, effort and responsibility and that are performed under similar working conditions. *Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543 (7th Cir 1991);

In assessing whether two jobs require equal skill, effort, and responsibility for EPA purposes, courts will look to duties actually performed by each employee and his or her job description. *Dey v. Colt Construction & Development*, 28 F.3d 1446 (7th Cir. 1994).

The EPA's requirement of "equal wages" applies to all forms of compensation such as incentive and piece rates, overtime, vacation and holiday pay, and employer contributions to fringe benefit plans. Different wage payment for men and women performing equal work are not unlawful when based on several noted exceptions, as listed below.

The difference between the EPA and the sex discrimination provisions of Title VII is that Title VII applies to all conditions of employment, whereas the EPA prohibits sex discrimination only in the area of compensation. In both Title VII and the EPA, however, Congress has manifested a sensitivity to sex-based classifications. Although Title VII is much broader than the EPA, its provisions regarding discrimination based on sex are *in pari materia* with the EPA.

The provisions of EPA designate several exceptions to the equal pay standard. See *Loyd v. Phillips Brothers, Inc.*, 25 F.3d 518 (7th Cir. 1994). Basically, different rates of pay are permissible if they are based on at least one of the following statutory exceptions: (a) a bona fide merit system; (b) a seniority system; (c) a bona fide training program; (d) a system which measures earnings by quantity or quality of production; (e) shift differential and red circle rates for temporary assignments based on legitimate business reasons; or (f) any other factor other than sex.

All employers subject to the Fair Labor Standards Act ("FLSA") are likewise subject to the provisions of the EPA. However, the EPA's application is broader than the FLSA. The EPA applies to some types of employees which are not covered by the FLSA *i.e.*, executive, administrative, and professional employees and outside salespersons. *Bence v. Detroit Heath Corp.* (6th Cir. 1983). In essence, the EPA applies to employers with two or more employees engaged in interstate commerce, engaged in production of goods for commerce, or employed in an enterprise engaged in commerce or the production of goods for commerce. Unless specifically excluded under the FLSA, all federal, state and local government workers are protected by the EPA. The EPA also applies to labor unions which cause or attempt to cause an employer to violate the Act.

The EPA was originally administered and enforced by the United States Department of Labor in accordance with the procedures established by the FLSA. In 1979, however, the Equal Employment Opportunity Commission ("EEOC"), also received authority to administer and enforce the EPA. Under its authority given by the FLSA, the EEOC may enter an employer's premises and inspect the employer's records regarding wages, hours, and related payroll records which the FLSA requires employers to maintain. Suit may be filed by either the EEOC or an individual complainant.

C. Family and Medical Leave Act

On February 5, 1993, President Clinton signed the Family and Medical Leave Act of 1993, 29 USC §2601, *et seq*., and on January 6, 1995, the Department of Labor issued its final rules implementing the Act, effective February 6, 1995. (29 CFR Part 825, *et seq*.).

The Act requires many employers to provide up to a total of twelve work weeks of unpaid leave during any twelve month period for employees (1) at the time of the birth or adoption of a child, or (2) at the time of a serious health condition affecting the employee or a family member.

An employer subject to the act is any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year.

An employee eligible for leave is one who has been employed (a) for at least 12 (need not be consecutive) months by the employer, and (b) for at least 1,250 hours of service with that employer during the previous twelve months. (Section 101(2)(A)(i), (ii)). Employees who work for an employer who has fewer than 50 employees, if the total number of employees employed by that employer within 75 miles of that worksite is less than 50, are not entitled to leave under the Act. (Section 101(2)(B).

Family Leave

An eligible employee may take up to 12 work weeks of unpaid leave during any 12 month period because of the birth of the employee's son or daughter, and to care for that son or daughter, or because of the placement of a son or daughter with the employee for adoption or foster care. (Section 102(a)(1)(A),(B)).

The final regulations provide an age limit for who is an adopted son or daughter and state that a son or daughter means a biological, adopted or foster child, a step child, a legal ward, or a child of a person standing in local parentis, who is either under age 18, or age 18 or older and "incapable of self care because of a mental or physical disability." 29 CFR §825.113(c).

Entitlement to leave for a birth or placement of a son or daughter expires at the end of a 12 month period beginning on the date of the birth or placement. (Section 102(a)(2)). For the birth or placement of a child, an
employee cannot take intermittent leave or leave on a reduced schedule unless the employer and employee agree otherwise. (Section 102(b)(1)). The right to leave applies equally to both male and female employees. In Illinois, the regulations of the Illinois Human Rights Commission provide that child care leave after the birth of a child or adoption of a child must be made available to both parents.

More than one parent may take leave at the same time. However, if a husband and wife are employed by the same employer, the total number of work weeks of leave to which both are entitled may be limited by the employer to a combined total of 12 during any 12-month period. (Section 102(f)).

When the need for leave is foreseeable for a birth or placement of child, an employee must give at least 30 days notice, unless circumstances require the leave to begin in less than 30 days (Section 102(e)(1)).

An employee may choose to substitute any of the employee's accrued paid vacation leave, personal leave or family leave for any part of the 12 week period allowed
for the birth or placement of a child. Furthermore, an
employer may require an employee to do so. (Section 102(d)(2)(A)).

Medical Leave

An eligible employee may take up to 12 weeks of unpaid leave during any 12 month period to care for the employee's spouse, son, daughter, or parent, if that family member has a serious health condition or because the employee has a serious health condition that makes him or her "unable to perform the functions" of the employee's position. (Section 102(a)(1)(c)(d)). Each of 2 married employees are entitled to 12 weeks leave unless they are taking time off to care for a sick parent. In that case, an employer may limit their leave to a combined total of 12 weeks (Section 102(f)).

The final regulations define when an employee is "unable to perform the functions of the position." The final regulations state that this is a situation where the healthcare provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans With Disabilities Act (ADA), 42 USC §12101 et seq., and the regulations at 29 CFR §1630.2(n) implementing the ADA. (29 CFR §825.115).

Notice Required for Medical Leave

The final regulations provide that in all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employees. 29 CFR §825.208. Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where the employees are employed, whether or not it has any "eligible" employees, a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints of violations of the FMLA with the Wage & Hour Division of the Department of Labor. 29 CFR §825.300.

An employer must amend all employee handbooks and any other existing written benefit and leave policies to explain FMLA entitlements and employee obligations. 29 CFR §825.301(a)(1).

Even if an employer does not normally maintain written policies or manuals, it must prepare and provide a written explanation to any employee seeking qualified leave. 29 CFR §825.301(a)(2). An employer must provide a written notice to each employee requesting leave, within a reasonable time of the request, containing at a minimum, the following information: (1) that the leave will be counted against the employee's annual FMLA leave entitlement; (2) any requirements for the employee to furnish medical certification of a serious health condition, and the consequence of failing to do so; (3) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution; (4) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments and the possible consequences of failure to make such payments on a timely basis; (5) any requirement for the employee to present a "fitness-for-duty" certificate to be restored to employment; (6) a statement regarding whether the employee is a key employee; and (7) the employee's right to restoration to the same or equivalent job upon return from leave. 29 CFR §825.301(b)(1).

Normally, an employee must give 30 days notice for leave based on the serious health condition of a spouse, child, or parent, or of the employee, where the need for leave is foreseeable. If the date of treatment requires leave to begin in less than 30 days, the employee must provide notice as practicable (Section 102(e)(2)(B)).

The employee's notice need not expressly assert rights under the FMLA or even mention the FMLA, but may only state for example that leave is needed for an expected birth or adoption. 29 CFR §825.302(c); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995).

The final regulations clarify what is a "serious health condition" which entitles an employee to FMLA leave. The final regulations state that a "serious health condition" means an illness, injury, impairment or physical or mental condition that involves in-patient care or continuing treatment by a healthcare provider. 29 CFR §825.114(a)(1)(2).

In cases where an employee requests leave due to the employee's serious health condition or to care for his or her seriously ill family member, the employer may require that a leave request be supported by a medical certification. 29 CFR §825.305(a). This certification must be issued by the healthcare provider of the employee or the employee's ill family member.

An employee may choose to substitute any of the employee's accrued paid vacation leave, personal leave or medical or sick leave of the employee for any part of the 12 week period allowed for medical leave. Furthermore, an employer may require an employee to do so. (Section 102(d)(2)(B)).

Employees cannot take intermittent leave or leave on a reduced schedule for the birth or placement of a child, unless the employer and employee agree otherwise. (Section 102(b)(1)). An employee may obtain intermittent leave or leave on a reduced schedule for the care of a spouse, son, daughter or parent with a serious health condition, or for the employee's own serious health condition subject to the requirements for notice and certification by a doctor. (Section 102(b)(1)).

The FMLA does not protect employees from legitimate disciplinary action for absences unrelated to their taking FMLA leave. *See McCown v. UOP,* 1995 WL 519818 (N.D.Ill. 1995).

Restoring Employee to Prior Position

The Act requires that after a leave, an employee must be restored to the position he or she held when the leave began, or to an equivalent position, with equivalent employment benefits, pay, and other terms and conditions of employment. (Section 104(a)(1)). An employer may require an employee on leave to report periodically at reasonable intervals on the employee's status and intention to return to work. (Section 104(a)(5)). Restored employees are not entitled to accrue any seniority or employment benefits during the leave period, or any right, benefit, or position other than those to

which the employee would have been entitled if he or she had not taken the leave. (Section 104(a)(3)). (29 CFR §825.215(d)(2)).

As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition to the employee's position, an employer may require a fitness-for-duty certification, provided that the requirement is part of the employer's uniformly applied policy or practice which requires all similarly situated employees (that is, the same occupation and the same serious health condition) who take leave for such conditions to obtain and present certification that the employee is able to resume work. 29 CFR §825.310(a).

The final regulations also provide that when properly requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide the medical certification that the employee is able to return to work at the end of the FMLA leave. If the employee does not, the employer may delay restoration until the certification is provided. 29 CFR §825.310(c). In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. 29 CFR §825.311(c).

Prohibited Actions and Enforcement

It is unlawful for an employer to interfere with, restrain or deny the exercise of rights under the Act or to discharge or discriminate in any other manner against an individual for opposing any practice made unlawful by the general leave requirements of the Act. (Section 105(a). It is also unlawful to discharge or discriminate against an individual for filing a charge, giving information in connection with any inquiry or proceeding related to a right protected by the general leave requirements of the Act, or testifying in any inquiry or proceeding related to any right provided by the general leave requirements of the Act. (Section 105(b)).

An employee can sue an employer that violates the general leave requirements of the Act or interferes with an employee's exercise of rights under the Act. (Section 105). The employee may seek as damages wages and benefits lost because of a violation, any actual monetary losses sustained as a direct result of the violation, such as the cost of providing child care up to a sum equal to 12 weeks, interest, liquidated damages, and attorneys fees.

IV. Employee Privacy Issues

A. The Drug-Free Workplace Act of 1988

Under the Drug-Free Workplace Act of 1988, 41 USC §701, *et seq.*, federal government contractors and employers that receive federal grants are required to maintain a drug-free workplace. The statue covers all organizations receiving contract awards of $25,000 or more, all contracts awarded to individuals, and all recipients of federal grants regardless of grant size. The Act applies to contracts and grants awarded on or after March 18, 1989.

To be eligible for contract awards or grants, contractors and grantees must: (1) agree to publish a policy prohibiting the unlawful manufacture, distribution, possession or use of controlled substances in the workplace; (2) establish a drug-free awareness program; (3) inform employees that they are required to abide by the employer's policy and to report any criminal convictions for drug-related activity in the workplace; (4) notify the federal contracting or granting agency of any criminal convictions of employees for illegal drug activity in the workplace; (5) take appropriate and required personnel action, which can range from discharge to participation in a drug-abuse assistance or rehabilitation program, against any employee convicted of a criminal drug offense; and (6) make a good faith effort to maintain a drug-free workplace by complying with the law's requirements.

The Act does not mandate or even mention testing employees for illegal drug use. Employers that fail to meet the Act's requirements risk the suspension or termination of their federal contract or grant payments if they: (1) falsely certify that they will provide a drug-free workplace; (2) violate a certification by failing to comply with the law; or (3) report such a large number of employees who have been convicted of illegal drug activity that it appears that the firm has not made a good faith effort to maintain a drug-free workplace. Failure to comply with the Act's requirements can also lead to debarment from participation in future contract or grant activity. Detailed information on how federal contractors and grantees must comply with the provisions of the Drug-free Workplace Act is contained in the implementing rules issued on January 31, 1989. The implementing rules are contained at 54 Federal
Register 4946.

Effective January 1, 1992, the Illinois Drug-Free Workp l a c e Act, 127 §132.311, et seq., like the federal Drug-F r e e Workplace Act, requires every firm that has a state grant or contract of $5000 or more from the State of Illinois and at least 25 employees to certify that it will provide a drug-free workplace to include establishing a drug-free awareness program. The amendment also provides that a State of Illinois contracting or granting agency may refuse to consider any employer that does not make the required drug-free workplace certification and may subject any contractor or grantee to suspension or debarment for failing to abide by such a certification. In addition, the state agency may suspend, terminate, or debar a contractor or grantee where the number of criminal drug statute violations for activity in the workplace indicates the lack of a good faith effort to provide a drug-free workplace.

The amendment also provides that the state contracting or granting agency may waive sanctions and that any action taken by a contractor in compliance with the Act cannot be considered a violation of the Illinois Human Rights Act.

B. The Employee Polygraph Protection Act of 1988

The Employee Polygraph Protection Act of 1988, 29 USC §2001, became effective on December 27, 1988. The basic purpose of the Act is to eliminate, as much as possible, polygraph examinations in the employment setting. Therefore, the Act's prohibitions are extensive. Exceptions are narrow and onerous to fulfill.

In essence, the Act forbids most private employers from using polygraph and other types of lie detector tests as a pre-employment screening device and strictly regulates the use of polygraph tests on current employees.

Specifically, Section 3 of the Act prohibits most private employers: (1) from directly or indirectly, requiring or causing any employee or applicant to take a lie detector test; (2) from using the results of any such tests; and (3) from discharging or discriminating against an employee or prospective employee who refuses to take a lie detector test, who has field a complaint or instituted any proceeding under the Act or who has exercised any right afforded by the Act.

Section 4 provides that the Secretary of Labor shall print and distribute a notice setting forth summaries of the provisions of the Act and that each employer shall post and maintain such notice in conspicuous places on its premises.

Section 7(e) and (f) provide exceptions for private security firms and private drug manufacturers and distributors.

Section 7(d) provides that covered employers may request employees to submit to a polygraph test if the test is administered in connection with an "ongoing investigation" involving economic loss or injury to the employer's business, but only if the employee had access to the property that is the subject of the investigation and the employer had a reasonable suspicion that the employee was involved in the incident or activity under investigation. In addition, the employer must execute a

statement, provided to the employee before the test, that sets forth with particularity the specific incident or activity being investigated and the basis for testing the particular employee(s). The statement must be signed by a person authorized to legally bind the employer and must contain, as a minimum, an identification of the specific economic loss or injury to the employer, a statement indicating that the employee had access to the property that is the subject of the investigation, and a description of the basis for the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

Section 8 of the Act provides the guidelines for conducting a polygraph examination allowed under the Section 7(d) limited exemption for ongoing investigations. These guidelines provide that the employee can terminate the test at any time, that prior to testing the employer must give to the employee reasonable written notice of the date and location of the test, that prior to the test the employee must be provided an opportunity to review all questions to be asked during the test and that during the test the employee may not be asked any questions in a manner designed to degrade the employee or any questions concerning the employee's religious beliefs or affiliations, beliefs or opinions regarding racial matters, political beliefs or affiliations, any matter relating to sexual behavior, or beliefs, affiliations, opinions or lawful activities regarding unions or labor organizations.

Section 9 of the Act provides that a private employer may disclose information obtained from a test only to the examinee or any person designated in writing by the examinee or a government agency, but only insofar as the disclosed information is an admission of criminal conduct.

Section 6 of the Act provides that an employer who violates any provision of the Act may be assessed a civil penalty of not more that $10,000. In addition, the Act provides a private right of action to employees or prospective employees affected by the violation and allows such employees or prospective employees to obtain in a private civil action damages to include employment, reinstatement, promotion and the payment of lost wages and benefits.

The Act changed Illinois law on the question of whether an employer could terminate an employee for refusing to submit to a polygraph examination. In the case of *Cipov v. International Harvester Co.,* 134 Ill.App.3d 522, 481 N.E.2d 22 (1st Dist. 1985), the Illinois Appellate Court held that terminating an employee for refusing to take a polygraph examination did not state a cause of action for the tort of retaliatory discharge. The basis for the court's decision was that there is no Illinois statute prohibiting an employer from making polygraph examinations a condition of employment or continued employment. The new f e d e r a l Act changed that law. Under the Act, employers can no longer terminate employees for refusing to submit to a polygraph examination.

C. Omnibus Crime Control and Safe Street Act of 1968
18 U.S.C. Sec. 2510-2521

Electronic Communications Privacy Act of 1986
18 U.S.C. Sec. 2510-2121

Privacy for Consumers and Workers Act
S.984, HR.1900; 103d Congress, 1st Session

These three Acts are surveyed in consort since all deal with essentially the same topic: the protection against the unauthorized interception of wire, oral and electronic communications.

T h e F o u r t h Amendment to the U.S. Constitution protects against unreasonable searches and seizures. The Supreme Court has held that the Constitutional prohibition against unwarranted intrusions extends to federal, state and local government employees in cases of searches made by their employers. However, private sector employees do not benefit from this Fourth Amendment protection where a search is conducted by their employer.

Protection against privacy intrusions for employees in the private sector, and corresponding restrictions on their employers, can be found in the Omnibus Crime Control and Safe Street Act of 1986 (Title III) and Electronic Communications Privacy Act of 1986 (ECPA). These laws are commonly referred to as the "Wiretap Statutes." They offer a limited degree of privacy protection for the telephone communications of private-company employees. It is not as clear whether the protection extends to E-mail and voice mail communications in the workplace.

Title III of the Omnibus Crime Control and Safe Street Act of 1968 was intended to comprehensively regulate the use of wiretaps and hidden microphones on all communications transmitted via common carrier. The law prohibits the actual or attempted interception of any wire or oral communication; the actual or attempted use of electronic, mechanical or other device to intercept any oral communication; and the actual or attempted disclosure or use of the contents of any wire or oral communication. A private right of action for violation of the law was established in Section 2511 of the Act.

Title III reflected the prevalent technologies of the era, but it failed to account for future technological advancement. Title III expressly protected against only the unauthorized aural interception of a communication. Thus, there was no protection against the interception of text, digital or machine communication. These sources of communication do not involve audible sounds and therefore were not covered.

With the rapid progression of both communications technology and the means of electronic surveillance, substantial changes in the law were required. The result was the Electronic Communications Privacy Act of 1986, which amended the Omnibus Crime Control and Safe Street Act of 1968. ECPA updated and clarified federal privacy protections in light of dramatic changes in computer and telecommunications technology. The most significant change involved the addition and definition of "electronic communication" to coverage under the law. It was added wherever Title III had previously referenced only wire and oral communications. The phrase encompasses any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electric or photo-optical system. There was also an expanded concept of the term "intercept" to include both aural and other means of acquiring wire, oral or electronic communications. Intercepting devices include those capable of intercepting electronic communications.

The ECPA also contains provisions protecting "stored communications." Anyone who intentionally accesses without authorization a facility through which an electronic communication is provided or intentionally exceeds an authorization to access that facility while it is in electronic storage may be subject to both fines and imprisonment.

There are exceptions to the general prohibition against intercepting private communications. If a business has a
private communications system then an employee can intercept other employees' messages so long as doing so is within the normal course of the employee's employment and the interception occurs either as a result of a necessary activity or as a result of protecting the provider's rights or property.

Telephone monitoring by an employer may not result in liability under Title III if a legitimate business purpose justified the employer monitoring. For example, if calls are monitored with a goal of helping employees provide better service to the public or to check the quality or proper functioning of the business, then a legitimate business purpose may be advanced. It helps, however, for the employer to notify employees in advance of the monitoring, that the monitoring equipment not be installed secretively and that there be a recognized company policy regarding the use of company phones for personal calls.

Another exception deals with the nature or subject of the telephone calls. Calls which relate to the business of the employer may be intercepted, since it is within the ordinary course of business. On the

other hand, personal calls cannot be intercepted, except to the extent necessary to determine whether or not the call is personal. If an employer monitors all calls, regardless of their nature with no attempt to limit the monitoring to business calls only, then the employer may not be protected by the statutory business purpose exception.

There are relatively few cases interpreting Title III and the ECPA with regard to employer monitoring of employee communication. None were found in the 7th Circuit Court of Appeals. But as a general premise, a court would likely allow any business-related communication to be monitored because it implicates the legal and legitimate business interests of the employer. By the same token, personal communications are protected and can only be monitored to the extent necessary to determine that they are personal.

Employee protections against monitoring wire communications may not necessarily apply as extensively to electronic communications. When the ECPA was enacted, it retained Title III language in Section 2511(2)(a)(i) expressly prohibiting the provider of wire communication services to the public from routine observation or random monitor-
ing of communications except for mechanical or service
quality control checks. The same limitations do not exist for electronic communications systems. Congress did not include the same language for electronic communications, which leaves E-mail messages in the workplace more susceptible to random interception than voice or voice mail messages.

One would expect that the courts would apply the same analysis to E-mail as it has to telephone monitoring.
However, current research has not produced any appellate court decisions dealing with the issue of privacy with regard
to E-mail. The statutory construction and Congressional
hearing reports would seem to indicate that at least limited monitoring of employee E-mail by employers is permissible. The ECPA has broad prohibitions against accessing and disclosing electronically stored communications, which includes both temporary storage during transmission and permanent storage by the system provider. The system provider, however, is exempt from these prohibitions, giving rise to a conclusion that an employer-owned E-mail system provides the employer with the right to read employee E-mail regardless of the content. However, given Congress' obvious concern for individual privacy in enacting the ECPA, employers should be cautious in their electronic communication monitoring activities.

In an attempt to further define rights of personal privacy, Congress introduced the Privacy for Consumers and Workers Act in the first session of the 1993 Congress. The Act would not have explicitly prohibited employers from accessing employee E-mail and voice mail accounts, but it would have required employers to provide written notice to employees who were subjected to electronic monitoring. However, neither the Senate nor House bills were forwarded out of committee.

D. Fair Credit Reporting Act of 1970

The purpose of the Fair Credit Reporting Act of 1970, 15 U.S.C. §1681 *et seq*., is to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner which is fair and equitable to the consumer. It is intended to protect consumers from having inaccurate information circulated in order to protect the reputation of the consumer. A consumer is defined as any individual.

This includes consumer reports made by consumer reporting agencies specifically for employment related purposes, in which case "consumers" would most often be employees, prospective employees or former employees.

A "consumer report" is defined in the statute as 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 credit or insurance or for employment purposes. An "investigative consumer report" is one which contains information obtained through personal interviews with friends, neighbors, associates or anyone else who may have information about the consumer. "Employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

Consumer reporting agencies may furnish consumer reports pursuant to court order and pursuant to authorization by the consumer to whom it relates. In addition, a consumer report can be furnished to a person who intends to use the information for employment purposes without either court order or the subject consumer's authorization. Obtaining a consumer report under false pretenses, that is, for purposes other than those allowed by the statute at Section 1681b, could subject a person to civil liability for damages, including punitive damages.

An employer who procures an investigative consumer report must disclose to the consumer that such a report has been requested. The notice must be made in writing and delivered no later than three days after the report is requested. Such notice is not required if the consumer report is being used for employment for which the consumer has not specifically applied.

After being notified that an investigative consumer report has been requested, a consumer can make written request for disclosure of the nature and scope of the investigation. The employer must disclose that information no later than five days after such a request is made by the consumer.

Any time employment is denied on the basis of information contained in a consumer report provided by a consumer reporting agency, the user of that information must so notify the consumer against whom such adverse action was taken. The name and address of the consumer reporting agency making the report must be supplied to the consumer.

Violation of the provisions of this Act by consumer reporting agencies or the user of consumer report information can result in civil liability for which damages, including punitive damages, can be assessed.

V. Sexual Harassment Claims
Title VII of the Civil Rights Act of 1964

One of the fastest growing areas in employment discrimination law relates to claims of sexual harassment in the workplace. Title VII of the Civil Rights Act of 1964 prohibits an employer from discrimination against any individual on the basis of sex, and although the statute does not specifically refer to sexual harassment, both the Equal Employment Opportunity Commission and federal case law have determined that Title VII's prohibition against sex discrimination includes a prohibition against sexual harassment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986). *See also* 29 CFR §1604.11.

There are two categories of sexual harassment claims under Title VII. The first category, *quid pro quo*, occurs when an employer demands sexual consideration in exchange for tangible job benefits. This typically involves a supervisor or someone who has influence over the hiring or promotion considerations of the employee. To establish a claim of *quid pro quo* harassment, a plaintiff must prove the following elements:

(1) The employee belongs to a protected group;
(2) The employee was subject to unwelcome sexual harassment;

(3) The harassment complained of was based upon sex;
(4) The employee's reaction to the harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment.

Pursuant to federal law, employers are held vicariously liable f o r *quid pro quo* harassment by a supervisor. Employers should be aware that they will be held liable for these types of acts of their supervisors or managers even if they have no specific knowledge of the conduct.

The second type of sexual harassment is called "hostile or offensive working environment" harassment. This was first recognized by the United States Supreme Court in the landmark decision of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The establishment of a *prima facie* case of hostile environment sexual harassment entails proof of the following elements:

(1) The employee belongs to a protected group;
(2) The employee was subject to unwelcome sexual harassment;
(3) The harassment complained of was based on sex;
(4) The harassment complained of affected a term, condition, or privilege of employment.

An employer will be vicariously liable for hostile environment sexual harassment if it knew or should have known of the harassment and failed to take timely and appropriate action. Accordingly, an employer is liable if it has actual knowledge of the harassment and fails to take appropriate action, or if the employer has constructive knowledge of the harassment and fails to take timely action. If the employer becomes aware of the situation and takes prompt, remedial action, the principal/employer is not liable for such acts of harassment. *See Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989).

Exactly what is a "hostile working environment" is a an emerging area of law, and its contours are evolving. The media focus on sexual harassment has never been greater, considering the publicity given in the Anita Hill-Justice Clarence Thomas hearings before the Senate Judiciary Committee, and the publicity given to the Tailhook scandal. Most recently, the Supreme Court considered the definition of an "abusive work environment" or a "hostile work environment" in *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993).

I n *Harris*, the Supreme Court granted certiorari to resolve a conflict among the circuits as to whether con-
duct, to be actionable as "abusive work environment"
harassment, must "seriously affect an employee's psychological well-being" or lead the plaintiff to "suffer injury." Justice O'Connor, in writing for the majority, found that there was no need for the conduct to result in the plaintiff suffering injury or affecting her psychological well-being. Justice O'Connor stated:

> "Conduct that is not severe or persuasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Id*. at 370.

As to what this means, the Court did offer some factors to be looked at to determine whether or not the environment was "hostile" or "abusive": (1) The frequency of discriminatory conduct; (2) Its severity; (3) Whether it is physically threatening or humiliating, or a mere offensive utterance; (4) Whether it

unreasonably interferes with the employee's work performance. The Court emphasized that while psychological harm may be taken into account, no single factor is required.

By the Court's own admission in its decision in *Harris*, the majority took a middle path between making actionable any conduct that is merely offensive and requiring the conduct to produce a tangible psychological injury. What one may view as outrageous conduct, another may not view as conduct which would create a hostile work environment. For example, in *Baskerville v. Culligan Int'l Co.*, 50 F.3d 426 (7th Cir. 1995), the Seventh Circuit in reversing a plaintiff's jury verdict, did not think the following acts by plaintiff's supervisor could reasonably be thought to add up to sexual harassment: (1) calling plaintiff a "pretty girl;" (2) making grunting sounds when she wore a leather skirt; (3) responding to her comment that his office was hot by saying "not until you stepped in here;" (4) telling her, following a certain public address announcement, that the announcement meant that "[a]ll pretty girls run around naked;" (5) telling her that his wife told him he should clean up his act and think of plaintiff as Ms. Anita Hill; and (6) responding to plaintiff's inquiry as to whether he got his wife a Valentine's Day card by explaining that he should have because it was lonely in his hotel room and by making a gesture with his hand that was intended to suggest masturbation. The court characterized these acts as merely vulgar and mildly offensive and distinguished them from the kind of male attention that can make the workplace hellish for women. The court further noted that a handful of comments spread over several months is unlikely to have the same emotional impact as a concentrated or incessant barrage. Lastly, the court was persuaded by the absence of any evidence that any of the comments were made when plaintiff and her supervisor were alone outside the workplace or any suggestion of any other contextual feature of their conversations that might make the supervisor a harasser. Sexual harassment claims pursuant t o T i t l e VII will continue to define what conduct is so severe to create a hostile or abusive work environment.

VI. Employee Disability and Impairment Issues

A. Americans With Disabilities Act (ADA)

Purpose of the ADA

The purpose of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq*., is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. §2(b) 1-3

Effective Dates:

On July 26, 1992, Title I, the section covering employment, became applicable to state and local governmental units and private employers with 25 or more employees.

On July 26, 1994, Title I became applicable to state and local governmental units and private employers of 15 or more employees.

Title I does not apply to private employers of less than 15 employees.

Definition of Disability

The term "disability" means, with respect to an individual; (1) A *physical or mental impairment* that substantially
limits one or more of the *major life activities* of such individual; (2) A record of such an impairment; or (3) Being regarded as having such impairment. §3(2) (A-C)

An impairment is a physiological disorder affecting one or more of a number of body systems or a mental or psychological disorder. §3(2)(A-C).

A physical or mental impairment limits a major life activity if it limits a function such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working

and reading. It also involves basic activities the average person in the general population can perform with little or no difficulty, such as sitting, standing, lifting and reaching. (29 C.F.R. §1630.2(i) and 29 C.F.R. Part 1630 Appendix, Section 1630.2(i)).

Examples of Disabilities

A physical or mental impairment includes such conditions, diseases and infections as: orthopedic, visual, speech and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; HIV infection; cancer; heart disease; diabetes; mental retardation; emotional illness; specific learning disabilities; drug addiction; and alcoholism. (29 CFR §1630.2(h) and 29 CFR Part 1630 Appendix, §1630.2(h).

Illegal Use of Drugs

Section 510 of the Act provides that the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when action is taken on that basis.

Court Interpretations Of What Is A Disability

Temporary Disability

In *McDonald v. Commonwealth of Pennsylvania Department of Public Welfare*, 4 AD Cases 1185 (3rd Cir. 1995), an employee requested unpaid sick leave for approximately two months to recover from abdominal surgery. Her request was denied. Since she was unable to attend to her duties, she was discharged.

The employee filed a lawsuit under the ADA. The court rejected her claim on the basis that her disability was not covered by the ADA. In the EEOC's Interpretive Guidance of the ADA it states that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are not disabilities. Such limitations may include....broken limbs, ...appendicitis and influenza."

The court found that although the employee was incapacitated for several weeks, her inability to work was not permanent, but of limited duration and therefore not a disability covered by the ADA.

Injured Knee

One court ruled that a former employee's knee was not a "disability" within the meaning of the ADA. The court ruled that while the injury was debilitating it was of relatively short duration and the employee's post-injury physical condition was nearly as good as it was prior to the injury. The court further ruled that the employee's inability to run briskly and climb stairs easily were not sufficient residual effects to constitute a "disability." See *Blanton v. Winston Printing Co.* (M.D.N.C.) 1994 WL 652506.

Anemia

Another court ruled that an employee who suffered from anemia was not handicapped within the meaning of the Rehabilitation Act because the only evidence was that the employee's condition may have caused her to become drowsy and may have caused her to fall asleep during only one meeting and was not sufficient to show a substantial limitation of one of her major life activities. See *Castle v. Bentsen* (D.D.C.) 1994 WL 637803.

Drug Abuser

In yet another ADA decision, a court found that an employee who was discharged after his employer found out about his abuse of drugs might be protected as a "qualified individual with a disability" under the ADA despite the ADA's statutory exclusion of persons currently engaged in the

illegal use of drugs. The court relied on another provision making it unlawful to discharge an employee who is undergoing substance-abuse treatment or has already done so. In making its decision, the court found inapplicable a provision of the EEOC's Technical Assistance Manual stating that a drug abuser cannot avoid termination by entering a rehabilitation program or by claiming that he is now in rehabilitation and is no longer using drugs illegally. See *McDaniel v. Mississippi Baptist Medical Center*, 3 AD Cases 1528 (D.Miss. 1994).

HIV-Positive Employees

In *Doe v. Kohn Nast & Graf P.C.*, 3 AD Cases 879 (DC Pa. 1994), the court held that an HIV-positive employee has a disability protected by the ADA. In *Doe*, the defendant law firm that discharged an HIV-positive attorney tried to defend its action by arguing that the attorney's condition was not disabling. However, the court in *Doe* accepted the Department of Labor regulations under which one can have a protected disability without being "disabled."

Prohibition of Discrimination

Section 102(a) of the ADA provides that no covered employer shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.

If Employer Unaware of Employee's Disability

In *Hedberg v. Indiana Bell Telephone Co.*, 4 AD Cases 65 (7th Cir. 1995), the telephone company decided to reduce the number of employees in its work force. In so doing it evaluated the records of employees in order to keep the best ones. Hedberg was terminated due to his tardiness and poor work ethic or laziness. He filed suit claiming that he was suffering from primary amyloidosis and that he had been terminated in violation of the ADA.

The company claimed and the evidence was undisputed that it was unaware of his disability at the time it terminated him and that it therefore could not have fired him because of his disability. The employee argued that actual knowledge of the disability is irrelevant and that firing him because of the symptoms of his disability is the same as firing him because of the disability itself.

The court rejected this argument. It stated that "[a]llowing liability when an employer indisputably had no knowledge of the disability, but knew of the disability's effects far removed from the disability itself and with no obvious link to the disability, would create an enormous sphere of potential liability."

The court acknowledged that in some cases, such as an employee having seizures, the symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability.

Definitions Applicable to Employment

"Employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, *and any agent of such person*. (§101(5))

A "qualified individual with a disability" is an individual with a disability who, *with or without reasonable accommodation*, can perform the *essential functions* of the employment position that such

individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description *before* advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. (§101(8))

The term "reasonable accommodation" may include: (a) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (b) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. (§101(9) (A) and (B))

An employer discriminates against a qualified individual with a disability by not making reasonable accommodations *unless* the employer can demonstrate that the accommodation would impose an "undue hardship" on the operation of the employer. (§102(b) (5) (A)) The term "undue hardship" means an action requiring significant difficulty *or* expense, when considered in light of the following factors:

(a) The nature and cost of the accommodation needed under this Act;
(b) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation under the operation of the
facility;
(c) The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(d) The type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative, or
fiscal relationship of the facility or facilities in question to the covered entity. (§101(10))

Court Interpretations Of A Qualified Individual With A Disability

HIV-Positive Surgeon

I n *Scoles v. Mercy Health Corporation*, 3 AD Cases 1665 (E.D.Pa. 1994), the court held that a hospital was warranted in disclosing to a surgeon's former patients that the surgeon had been diagnosed as being infected with the HIV virus and in forbidding the doctor to practice invasive procedures without documentation that the patient had consented to the procedure despite the doctor's HIV status. The court ruled that the surgeon was not otherwise qualified to perform orthopedic surgery within the meaning of the Americans With Disabilities Act and that he posed a "direct" threat to patients.

Back Injury Case

The EEOC has filed a suit alleging that a company violated the ADA when it refused to reinstate an employee following back surgery and then fired him. The employer's position was that the employee was not reinstated because he could not perform the essential functions of his job. This case of *EEOC v. H. Hirschfield Sons Co.*, filed September 3, 1993 (E.D.Mich.), is important since a significant number of the charges filed with the EEOC alleging ADA violations involve employees with alleged back

injuries.

In the Hirschfield case, the EEOC is alleging that the employee could perform the essential functions of the employer's job while the employer is taking the position that the employee cannot.

The facts and positions of the parties in this case illustrate one of the employer's most difficult problems in complying with the ADA. The employer sought competent medical evidence concerning the employee's condition and relied on that evidence. The employee claimed that he could perform the job functions, with the accommodation of using existing equipment, accommodation that would cost the company nothing. In these kinds of cases, the employer often is not only concerned that the employee might not be able to perform the job, but also that the employee might further injure himself or herself in attempting to perform the job or might injure others. The employer is, therefore, faced with interpreting a problem under the ADA that is presently unresolved.

Under EEOC regulations, an employer cannot take into account the possible affect of reinstating an employee on its liability insurance coverage, but it may deny employment if that employment would pose a significant risk of substantial harm to the health or safety of the employee or others. However, the language of the ADA itself is more restrictive and only permits an employer to exclude an employee who would pose a direct threat to the health or safety of others in the work place. Disability rights advocates argue that it is up to employees, not employers to determine what level of risk of injury they are willing to take for themselves. The reality for employers is, however, that worker injury results in high costs and the fact that an employee chooses to take the risk provides little help.

A prudent course of action for employers may be to permit the employee to attempt to perform the job with the requested accommodation while following all medical restrictions. If the employee cannot do the job, the employer then has hard evidence to present to a judge or jury that the employee could not perform the essential functions of the job.

Court Interpretations Of Reasonable Accommodation

Transfer Of An Employee In Violation Of Collective Bargaining Agreement Seniority Rights of Co-Workers

I n *Eckles v. Consolidated Rail Corp.*, 43 AD Cases 1134, (N.D.Ind. 1995), the court held that an employee with a disability is not entitled to a job assignment that would conflict directly with rights given other employees by a collective-bargaining contract.

The court reasoned that the ADA's requirement of reasonable accommodation did not entitle an epileptic employee to a position to which other employees had prior claims under a bona fide seniority system. The court in *Eckles* rejected the holding of the court in *Emrick v. Libbey Owens-Ford Co.*, 875 F.Supp. 1393 (DC Tex 1995), where the court held a reassignment that conflicts with a seniority system or collective bargaining contract may be a reasonable accommodation under the ADA.

The court in *Eckles*, however, cautioned that its reasoning does not apply to forms of accommodation that might violate a collective bargaining agreement without actually impairing the rights of other employees.

Reassignment To A Job Which The Employee Can Perform

In a situation where there was no collective bargaining agreement, the court in *Pedigo v. P. A. M. Transport, Inc.*, 1994 WL 814133 (D.Ark. 1994), held that the reasonable accommodation duties imposed by the ADA require an employer to consider reassignment of a disabled employee to a job which he or she could perform. Therefore, an employee could be a "qualified person with a disability," even when that employee would never again be able to perform their job. In *Pedigo*, the employee was unable to perform his job as a truck driver because of Department of Transportation regulations.

Indefinite Leave

In *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995), a bus driver had an extensive history of chronic heart disease, hypertension and diabetes. He failed a physical examination and was found unqualified for his job. He requested an indefinite leave of absence in order to bring his physical condition under control. His employer, a county, refused his request, terminated him, and he filed a lawsuit under the ADA.

The court stated that the ADA only refers to whether or not an employee "can" perform the job, meaning in the present tense. Nothing in the Act requires an employer to wait an indefinite period for a employee to get better. Rather, the court said, "reasonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question."

Movement To A Different Job

In *Fitzpatrick v. The Illinois Human Rights Commission*, 642 N.E.2d 486 (4th Dist. 1994), the Illinois Appellate Court held that in Illinois, the duty to accommodate only requires employers to accommodate a handicapped employee in the employee's present position. Employers are not required to reassign or transfer an employee whose handicap precludes the employee from doing the employee's original job.

The court in *Fitzpatrick* affirmed the decision of the Illinois Human Rights Commission to the effect that if the employee is incapable of performing his or her present job, the duty of a reasonable accommodation does not extend to giving the employer another job which that employee can perform.

Employers should note that unlike the Illinois rules, the EEOC has stated in its technical assistance manual on the employment provisions of the ADA that an example of reasonable accommodation is reassignment of an employee to a vacant position. Therefore, an employer's duty to accommodate may be different depending on whether the employee brings the action under the Illinois Human Rights Act or under the ADA.

Permanent Light-Duty Job

A federal district court held that the ADA may require an employer to put an employee covered by the ADA on a permanent light-duty job. The court in *Howell v. Michelin Tire Corp.*, 3 AD Cases 929 (D.Ala. 1994), ruled that an employee could challenge an employer's policy of assigning disabled employees to light-duty jobs only for a maximum of 13 weeks. The court in *Howell* agreed that a reassignment to a temporary light-duty job as an accommodation need be only for the temporary period of the job and that an employer need not convert a temporary job into a permanent one. However, the court found that if a light-duty job is a permanent one, the assignment of a disabled employee to it may be required for the entire time that it exists.

In *Van Zande v. Wisconsin*, 2 AD Cases 1846 (W.D.Wisc. 1994), the plaintiff, a paraplegic who used a wheelchair, developed pressure ulcers which required her to stay at home with the ulcers open to the air while they healed. She requested that her employer provide her with full-time employment at home. The employer did not have enough work to keep her busy full-time. During the eight weeks she was at home she was provided 95 percent of her full-time hours and was given 16.5 hours of sick leave, so that she in effect received full pay all the time she was at home. The court found that while the employer's accommodation fell short of perfection, it was reasonable, and that is all that the ADA requires.

In another case, *Eisfelder v. State of Michigan Department of Natural Resources*, 1993 WL 603162 (W.D.Mich. 1993), an employee suffering from multiple sclerosis requested a two-month leave of absence for her condition. She had already used up her allotted medical leave under a collective bargaining agreement. The employer refused to allow her to use two months of annual leave which

she had accumulated for her sick time. The court ruled that the employer failed to reasonably accommodate the employee. While a reasonable accommodation does not include reassigning tasks in a manner inconsistent with a collective bargaining agreement, the present request would not have required a reassignment of tasks or otherwise have affected the rights of other workers.

Lowering Kitchenette Counter

A paraplegic employee who complained that she was unable to reach the sink in an office kitchenette was adequately accommodated when the employer told her to use a sink in the women's bathroom to wash her coffee cup and utensils. The district court in *Vand Zande v. Wisconsin*, No. 93-C-0182-C (W.D.Wisc. 1994), decided that even though the employee wanted the counter lowered, the cost of rebuilding the counter was $1,000 to $2,000. The kitchenette sink was used primarily to wash coffee cups
and utensils. The court rejected the employee's claim that
making her use the bathroom sink violated the ADA's prohibition against classifying or segregating disabled employees in a manner that would affect their employment opportunities or status. The court in *Vande Zande* held that the employer's request did not inconvenience the employee since the bathroom was closer to her office than was the kitchenette.

EEOC Guidelines on Employee Health Care Insurance

In guidelines on the application of the ADA to employee health insurance, the EEOC states that employers may not refuse to hire people with disabilities because of the possible impact on health insurance. The guidelines state that disabled employees must receive "equal access" to any health insurance offered to other workers.

Some distinctions by employers are allowed. For example, providing more coverage for physical than mental conditions, or a lower level of benefits for eyecare than for other physical conditions, would not violate the ADA. But employers cannot provide lower benefits for a specific disability, like AIDS.

Treatments For Infertility

One of the questions employers face is whether their health-insurance plan excludes treatment for items which would result in handicap discrimination.

In *Krauel v. Iowa Methodist Medical Center*, 4 AD Cases 1734 (D.Ia.) the court held that the company's health-insurance plan, which excluded treatments related to infertility, did not violate either the ADA nor Title VII of the Civil Rights Act of 1964. The court ruled that procreation and "caring for others" are not "major life activities" within the meaning of the ADA, that, therefore, excluding "fertility or infertility problems" from the health-insurance plan did not discriminate on the basis of disability, and that treatment for infertility is not treatment for a medical condition "relating" to pregnancy or child birth. Therefore, the exclusion of treatment related to infertility also does not violate Title VII as amended by the Pregnancy Discrimination Act.

B. The Rehabilitation Act of 1973
29 U.S.C. Sec. 790 et seq.

The Rehabilitation Act of 1973 was enacted to prevent discrimination against the handicapped. Two sections of the Act, Sections 503 and 504, are directly concerned with employment issues.

Section 503 prohibits discrimination in the employment of qualified individuals by government contractors and subcontractors. Section 504 prohibits discrimination against qualified individuals under any program or activity receiving federal financial assistance.

Under Section 503, any employer who has a contract with the federal government for the procurement of
personal property or non-personal services (including a
construction contract) for $10,000 or more is prohibited from discriminating against the handicapped "in employing persons to carry out such contract. (29 U.S.C. Sec. 793 (a)). This also applies to employers holding subcontracts of $10,000 or more if the subcontract is necessary to the performance of the primary government contract. In cases where an employer has a government contract for $50,000 or more and has 50 or more employees, then the employer must develop a written affirmative action program with respect to the handicapped. (41 C.F.R. Sec. 60-741.5(a))

Under Section 504, employers under any program or activity receiving federal financial assistance are prohibited from discriminating against handicapped individuals. Section 504 extends into all areas which the federal government finances or conducts activities or programs. For example, hospitals receiving Medicare and Medicaid payments or banks which participate in a Small Business Administration guaranteed loan program are subject to coverage under Section 504. This section also often applies to state and local governmental agencies as well as colleges, universities and public schools who receive federal
funding.

It should be noted that if an organization or facility is federally funded, all of the operations of that organization or facility are covered by Section 504's requirements.

The Rehabilitation Act provides a broad definition of the term "handicapped individual." It is any person who:

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;
(ii) has a record of such an impairment; or
(iii) is regarded as having such an impairment.

Temporary or transient impairments have been excluded from coverage under the Act. The Act's protections do not extend to alcoholics or drug abusers whose current alcohol or drug use prevents them from performing their job or would render their employment a threat to the property or safety of others. (29 U.S.C. Sec. 706 (7)(b))

The handicapped individual must be qualified to perform the job in order to be covered under the Act. A
two-step process is involved in determining whether an
individual is qualified: (1) the employer must determine whether the individual can perform the "essential functions" of the job or meets "essential eligibility requirements;" and (2) if the individual is not qualified under that standard, the employer must determine whether a reasonable accommodation would enable the individual to become qualified.

A reasonable accommodation would not be required if the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the business. Factors taken into account in determining the extent of the employer's accommodation obligation are business necessity and financial considerations. Employers are required to bear some costs to provide reasonable accommodation but at what point an accommodation would be deemed too expensive or impractical to the business operation depends on the circumstances of each case.

In order to justify the failure to hire an otherwise qualified individual because of a handicap, an employer bears the heavy burden of showing that such exclusion is required for the safe and efficient operation of the employer's business. The absence of an intent to discriminate is not a defense in determining whether there has been a violation of the law by an employer. An employer can be found guilty of discriminating against the handicapped even if there is no showing of intent to discriminate.

Enforcement

Section 503 is enforced by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor and Section 504 is enforced by the various federal agencies providing financial assistance. The Office of T h e Attorney General is responsible for coordinating the implementation and enforcement of Section 504 by the various federal agencies. The Department of Health and Human Services has issued guidelines for the implementation of Section 504 by federal agencies providing financial assistance. Those are found at 45 C.F.R. Sec. 84.1 *et seq*.

Under both Sections 503 and 504, if a violation is found at the administrative level, an attempt is made to obtain voluntary compliance. If that proves unsuccessful then a hearing is held before an administrative law judge. If a violation is found to have occurred, a Section 503 contractor may suffer cancellation of current contracts, withholding of progress payments and debarment from future contracts. Similar sanctions may be imposed on recipients of financial assistance under Section 504. OFCCP may assert the right to recover back pay under Section 503 for those persons who have been the victim of discrimination. In addition to administrative remedies, Sections 503 and 504 may be enforced by actions brought by the appropriate government agencies in federal district court.

There is no private right of action by aggrieved individuals under Section 503. (*D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985)) Enforcement of the non-discrimination provisions against government contractors is wholly dependent on the efforts of the OFCCP. There is a private right of action under Section 504. The enforcement procedures of Title VI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d, *et seq*) are followed.

VII. Plant Closings, Layoffs and "Downsizing"

The Worker Adjustment and Retraining Notification Act of 1989 (WARN)

In this era of mass layoffs, payroll cut-backs and corporate "downsizing," employers must be cognizant of the fact that in addition to coping with issues of economic survival, companies undergoing intense downsizing must also comply with the requirements of a 1989 federal statute which imposes significant conditions and restrictions upon the manner in which plant closings or mass layoffs are
managed.

The Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101 *et seq*. (WARN), obliges certain employers of 100 or more full-time employees to provide at least 60 days advance written notice of an intended plant closing or anticipated mass layoff to the affected employees, as well as to the state and local agencies (such as state unemployment offices, welfare departments or other so called "state dislocated worker units") which will be impacted by the plant closing or layoff.

The principle purposes of the WARN Act are to give affected employees sufficient time either to find another job in the same field or to seek retraining for a new occupation, as well as to give the state and local governmental agencies which are affected by the mass layoffs or plant closings a period of time in which to prepare for the assistance which will be required by affected workers.

Under the WARN Act, written notification of an intended business closing or anticipated "mass layoff" (defined as one involving at least one-third of the work force and expected to last six months or longer), must be given to the individual employees who may be affected. If the employees are organized, such notification must be given to the appropriate union representatives.

The notice to the employees or their union representatives must set forth the name and address of the location at which the plant closing or mass layoff will occur; the
nature of the planned action, i.e. whether it is a plant closing or a layoff, and whether the action is expected to be permanent or temporary; the anticipated date on which the plant closing or mass layoff

will commence; and the name, address and telephone number of a company official to contact for further information. In addition, the employer must provide information concerning available assistance for the affected workers and must disclose the estimated duration of the closing or layoff if it is expected to be temporary.

In addition to notifying the employees or their representatives, a similar notice must also be provided in writing to the state and local dislocated worker units which are designated to assist the affected employees.

The existence of certain circumstances will relieve the employer of the 60-day advance notification requirement under the WARN Act. Such exceptions include the more obvious such as the occurrence of a natural disaster, i.e. a flood, earthquake or other unforeseen act of nature which directly causes the layoff or plant closing, along with unforeseen business circumstances, defined in the statute as a sudden, dramatic and unexpected action or condition outside the employer's control, such as a strike at a major parts supplier or the unexpected termination of a contract with a major customer. Another recognized exception to the 60-day advance notice requirement for plant closings or mass layoffs includes situations in which an ongoing but financially troubled company is actively seeking new business or additional finances, and there is a reasonable basis to believe that providing the required 60-day notice would prevent the company from obtaining the additional business or procuring the finance which it needs to remain viable. See *Jurcev v. Central Community Hospital*, 7 F.3d 618 (7th Cir. 1993) for a discussion by the 7th Circuit of t h e "unforeseeable business circumstances" exception to the WARN Act advanced notification requirements.

The administration and enforcement provisions of the WARN Act state that employers who fail to give the required advance notice of a plant closing or a mass layoff are liable to the affected employees for back pay and benefits for any portion of the 60-day period for which the employees did not receive compensation. The statute also provides for penalties for up to $500 per day for the employer's failure to provide the necessary advance notice of the layoff or plant closure to the appropriate state or local government agencies responsible for dealing with the dislocated workers.