EPSTEINBECKERGREEN

Human Resources Officers' Desk Reference for Legal Issues and Employment Recordkeeping

EMPLOYMENT RECORDKEEPING

The following should be noted in connection with these record keeping requirements:

1. Statutes of limitation for filing lawsuits on state and local levels may be longer than applicable federal recordkeeping laws provide. As such, recordkeeping requirements may be extended accordingly. Further, employers that operate in more than one state should be particularly careful in establishing a record retention system that takes into account the many variations of state recordkeeping, reporting, and retention requirements. Human Resource officers are advised to consult legal counsel for the specific requirements in each jurisdiction in which they maintain facilities or have operations.

2. The Lilly Ledbetter Fair Pay Act of 2009 (the "FPA") amended several antidiscrimination laws under which disparate pay claims may be brought. Since the statute of limitation for filing an equal pay lawsuit now resets with each new discriminatory paycheck or pay practice, the FPA essentially eliminates the statute of limitations applicable to such pay discrimination claims. As a result, employees may file pay discrimination claims several years after the alleged underlying discriminatory decision occurred, so long as the charge of discrimination is filed within 300 days of the latest discriminatory paycheck (or within 180 days in a state without its own fair employment practices agency). Although backpay recovery is limited to two years from the filing of the charge of discrimination, all records applicable to defending a pay discrimination claim may be relevant indefinitely. We have identified the statutes amended by the FPA below.

3. Required periods of retention for various types of employment-related records may be extended if litigation, administrative proceedings, investigations or enforcement proceedings have been threatened or commenced.

4. Records and documents that can be considered medical records, including, but not limited to, certifications, re-certifications, and medical histories of employees or their family member(s) are to be maintained in separate files andtreated (with certain exceptions) as confidential medical records.

5. If employees are not subject to FLSA recordkeeping requirements for purposes of minimum wage or overtime compliance (i.e., they are not covered by or are exempt from the FLSA), employers need not keep a record of actual hours worked, so long as eligibility for FMLA leave is presumed for any employee who has been employed at least 12 months. For an employee who takes FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and put that agreement in a written record that is maintained in accordance with FMLA requirements.

Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, sex, color, religion and national origin.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
Personnel or employment records made or kept by employer, including but not limited to: application forms or test papers; applicant flow logs and data; records concerning hiring, promotion, demotion, transfer, layoff or termination; rates of pay and terms of compensation; and selection for training or apprenticeship. Reports are required from apprenticeship or training programs.	One year from date record is made or personnel action is taken, or termination of employment, whichever is later.	Documentation. Information on race, sex or national origin may be obtained by visual surveys of workforce or from post-hire records. Medical records and maintenance of permanent record as to racial or ethnic identification are to be kept separate from basic personnel records, and from other records available to those responsible for personnel decisions.
	In connection with equal pay claims under Title VII, and in light of the FPA, all records applicable to defending a pay discrimination claim may be relevant indefinitely.	

ADEA

Age Discrimination in Employment Act protects persons 40 years of age or older from age discrimination. Certain state statutes protect all persons from age discrimination, regardless of age.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
a) Payroll or other records containing employee's name, address, date of birth, occupation, rate of pay and compensation earned per week.	a) Three years.	a) Documentation. Records must be kept in a safe and accessible place.
b) Personnel and/or employment records relating to (1) job applications, resumes, job advertisements (which include applications for temporary positions) and records pertaining to failure or refusal to hire; (2) promotion, demotion, transfer, selection for training, layoff, recall or discharge; (3) job orders submitted to employment agencies or unions; and (4) advertisements or notices relative to job openings. An employment agency must keep records on placements, referrals, job orders by employers, applications, and test papers completed by applicants as part of the selection process.	b) One year from date of personnel action to which record relates.	b) Results of physical examinations that are part of the selection process, occupational health/ medical records and records as to age/date of birth are maintained apart from routine personnel data, with restricted access.
c) Employee benefit plans and written seniority or merit rating systems.	c) Full period the plan or system is in effect, plus one year after termination.	c) If plan or system is not in writing, retain summary memorandum for the full period the plan or system is in effect, plus one year after termination.
d) Personnel records relevant to enforcement action brought against employer.	d) Until final disposition of action.	d) Documentation.
e) Personnel records relevant to defending equal pay claims (including a) and b) above).	e) In light of the FPA, all records applicable to defending a pay discrimination may be relevant indefinitely.	e) Documentation.

EPA

Equal Pay Act prohibits sex-based wage discrimination; requires equal pay for equal work.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
Employers covered by EPA are required to make and preserve identical records required of employers by FLSA, as well as records made in the course of business that relate to payment of wages, wage rates, job evaluations, job descriptions, merit and seniority systems, collective bargaining agreements, and descriptions explaining pay differentials between the sexes.	In light of the FPA, all records applicable to defending a pay discrimination may be relevant indefinitely.	Documentation.

ADA

Americans with Disabilities Act makes it unlawful to discriminate against a qualified individual on the basis of a disability.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
Personnel or employment records made or kept by employer, including requests for reasonable accommodation; application forms; applicant flow logs and data; and records concerning hiring, promotion, demotion, transfer, layoff, termination, rates of pay, terms of compensation selection for training or apprenticeship. Reports are required from apprenticeship or training programs.	One year from date record is made or personnel action is taken, or termination of employment, whichever is later. In connection with equal pay claims under the ADA, and in light of the FPA, all records applicable to defending a pay discrimination claim may be relevant indefinitely.	Documentation. Medical records are to be kept separate from basic personnel and other records available to those responsible for personnel decisions.

FMLA

Family and Medical Leave Act requires employers with 50 or more workers to provide up to 12 weeks of unpaid, job-protected leave for birth of child; placement of child for adoption or foster care; serious health condition of child, parent or spouse; an employee's own serious health condition; or because of a qualifying exigency arising out of the fact that the employee's spouse, child or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation. FMLA also requires covered employers to provide up to 26 weeks of unpaid, job-protected leave for certain reasons related to the illness or injury of a covered servicemember.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
Make and preserve the same records under the FMLA as are required under the FLSA. In addition to basic payroll data, the dates and hours (if less than a full day) of FMLA leave taken, copies of employer notices, documents describing employee leave benefits and policies, records of premium payments of employee benefits, and records of disputes with employees over FMLA benefits.	Three years.	Keep and preserve records in accordance with the FLSA. Documentation may be maintained and preserved on microfilm or other basic source document of automated data processing memory, provided adequate projection or viewing equipment is available, reproductions are clear and identifiable, and transcriptions are available upon request.

GINA

Genetic Information Nondiscrimination Act prohibits discrimination based on genetic information in hiring, promotion, discharge, compensation, fringe benefits, job training, classification, referral, and other terms, conditions or privileges of employment.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
No record is required. However, if information containing genetic information is in the employer's possession, the information must comply with the confidential medical records rules of the ADA.	Three years.	Any genetic information an employer possesses should be treated in the same fashion as "confidential medical records" as defined by the ADA. The ADA requires that employers keep confidential medical records separate from employment-related information and allow access only to authorized individuals. Genetic information must be maintained, whether in paper of electronic form, as a confidential medical record.

REHAB Act

Rehabilitation Act prohibits job discrimination and requires affirmative action to employ and advance in employment qualified persons with disabilities. Applicable to employers holding federal government contracts and subcontracts in excess of $10,000.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
a) Personnel or employment records made or kept by federal contractors and subcontractors, including, but not limited to, records relating to requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, interview notes, and other records as to hiring, assignment, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.	a) Two years from date record is made or personnel action occurred, whichever occurs later; one year for contractors and subcontractors with fewer than 150 employees or government contracts of less than $150,000.	Records must be accessible during normal business hours at place(s) of business, for purposes of on-site compliance reviews and complaint investigations, and for inspection and copying of documents, including computerized records and other material relevant to matter under investigation. Records containing medical information are to be kept separate from personnel files.
b) Records of employees involuntarily terminated.	b) Two years from date of termination; one year if contractor or subcontractor has fewer than 150 employees or does not have contract for at least $150,000.	
c) Records relevant to complaints, compliance reviews and enforcement actions.	c) Until final disposition of the complaint, compliance review or enforcement action.	
d) Contractors and subcontractors with 50 or more employees and with at least one contract of $50,000 or more are equired to develop a written Affirmative Action Plan ("AAP").		AAP must be available for inspection by the Office of Federal Contract Compliance Programs ("OFCCP"), or to any employee or applicant, upon request.

VEVRAA

Vietnam Era Veterans' Readjustment Assistance Act prohibits job discrimination and requires affirmative action for employment of qualified disabled veterans; veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized; veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985; and recently separated veterans. Applicable to employers holding federal government contracts and subcontracts of $100,000 or more entered into after December 1, 2003.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
a) Personnel or employment records made or kept by federal contractors and subcontractors, including but not limited to requests for reasonable accommodations, results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, interview notes, and other records concerning hiring, assignment, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.	a) Two years from date record is made or personnel action occurred, whichever occurred later; one year for contractors and subcontractors with fewer than 150 employees or government contracts of less than $150,000.	Records must be accessible during normal business hours at place(s) of business for purposes of on-site compliance evaluations and complaint investigations and for inspection and copying of documents, including computerized records and other material relevant to matter under investigation. Records containing medical information are to be kept separate from personnel files.
b) Records of employees involuntarily terminated.	b) Two years from date of termination; one year if contractor or subcontractor has fewer than 150 employees or does not have contract for at least $150,000.	
c) Records relevant to complaints, compliance evaluations and enforcement actions.	c) Until final disposition of the complaint, compliance evaluation or enforcement action.	
d) Contractors and subcontractors with 50 or more employees and with at least one contract of $100,000 or more are required to develop a written AAP.		AAP must be available for inspection by the Office of Federal Contract Compliance Programs ("OFCCP"), or to any employee or applicant, upon request.

Executive Order 11246

E.O. 11246, as amended, prohibits job discrimination and requires affirmative action based on race, color, religion, national origin or sex. Applicable to employers holding federal government contracts and subcontracts in excess of $10,000 in one year.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
a) For covered federal contractors and subcontractors, any personnel or employment records required to be made or kept include, but are not necessarily limited to, records pertaining to hiring, assignment, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; and records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes, and any and all expressions of interest	a) Two years from date record is made or personnel action occurred, whichever occurred later; one year for contractors and subcontractors with fewer than 150 employees or government contracts of less than $150,000.	Records must be made available to the OFCCP upon request.

through the Internet or related electronic data technologies by the contractor or subcontractor in considering the individual for a particular position, such as online resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position (note that for purposes of recordkeeping with respect to internal resume databases, the contractor and subcontractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and, corresponding to each search, the substantive search criteria used and the date of the search; for purposes of recordkeeping with respect to external resume databases, the contractor and subcontractor must maintain a record of the position for which each search of the database was made and, corresponding to each search, the substantive search criteria used, the date of the search and the resumes of job seekers who met the basic qualifications for the particular position and who are considered by the contractor and subcontractor), regardless of whether the individual qualifies as an Internet applicant under 41 C.F.R. 60-1.3, and regardless of tests, test notes and interview notes. For any record required to be maintained by a covered federal contractor or subcontractor, such contractors or subcontractors must be able to identify (i) the gender, race and ethnicity of each employee; and (ii) where possible, the gender, race and ethnicity of each applicant or Internet applicant as defined in 41 C.F.R. 60-1.3, whichever is applicable to the particular position.		
b) Records of employees involuntarily terminated.	b) Two years from date of termination; one year if contractor or subcontractor has fewer than 150 employees or does not have contract for at least $150,000.	
c) Records of complaints, compliance evaluations and enforcement actions.	c) Until final disposition of the complaint, compliance evaluation or enforcement action.	
d) Non-construction contractors and subcontractors with 50 employees or more and with at least one contract of $50,000 or more are required to develop a written AAP (including a workforce analysis or organizational display, job group analysis, availability analysis, comparison of incumbency to availability, placement goals, identification of problem areas, action-oriented programs, and internal audit and reporting systems).	d) Must maintain the current AAP and the AAP for the immediate preceding year.	

Common Law (Breach of Contract)

A breach of contract is defined as a party's failure to perform some contracted-for or agreed-upon act, or failure to comply with a duty imposed by law. In connection with employment, such claims can be raised in connection with employment contracts, restrictive covenant agreements (such as covenants not to compete or solicit), or other more general obligations, such as the fiduciary duty an employee may have to his or her employer.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
Employment agreements; other agreements between employers and employees such as agreements pertaining to confidentiality, non-competition, nonsolicitation of clients, employees or others, inventions, intellectual property, or periods of notice; employment applications; employee handbooks.	Period of employment plus six years (the statute of limitations in many states for contract claims is six years (including NY), but employers should check applicable statutes in states where they do business).	Documentation, including existing contracts.

FLSA

Standards Act requires covered employers to pay nonexempt employees minimum hourly rates, plus time and a half after 40 hours ("overtime"); FLSA also contains child labor restrictions and addresses equal pay coverage.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
a) Records containing employee information, payroll records, individual contracts or collective bargaining agreements, applicable certificates and notices of wage/hour administrator, and sales and purchase records.	a) Three years from the last date of working time entry for payroll records. For all certificates, agreements, plans and notices, three years from last effective date. Note: IRS may require longer retention period (six to seven years).	Documentation, including any reasonable reproducible computer records. Records must be kept in a safe and accessible place at the place of employment. A central recordkeeping place is permissible, so long as such records are made available within 72 hours. Microfilm is permissible if employer is willing to provide adequate viewing facilities and make any extension, recomputation or transcript of film that may be requested. Punched tape is permissible if records can be converted readily to reviewable form.
b) Basic employment and earnings records from the date of last entry; wage rate tables from the last effective date; work time schedules and actual hours worked from last effective date; order, shipping and billing records; records of additions to or deductions from wages paid; time records and documentation of basis for payment of any wage differential between employees of opposite sex in same establishment.	b) Two years.	
c) Payroll, compensation and hours worked documents.	c) Three years from the last date of work. Note: NY Labor Law has a six year statute of limitations for wage/hour actions.	

ERISA

Employee Retirement Income Security Act sets minimum standards for pension plans and health plans in private industry. ERISA does not require any employer to establish a pension plan or health plan. It only requires that those who establish plans meet certain minimum standards. It requires plans to regularly provide participants with information about the plan including important information about plan features and funding. It provides participants a right to sue for benefits and breaches of fiduciary duty.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
a) Records of any description, report or certification of information that has been filed with the IRS or DOL or that would have been filed if not for an exemption or simplified reporting requirement. Records include documents and reports subject to ERISA's reporting and disclosure requirements (e.g., annual reports, SARs, SPDs, SMMs) and supporting documents with enough detail to allow verification or clarification (e.g., vouchers, worksheets, receipts).	a) Not less than six years after filing the report or document (based on information contained therein), or six years after the report or document would have been filed if not for an exemption or simplified reporting requirement.	Records may be kept electronically if the recordkeeping system has reasonable controls to ensure its integrity, accuracy, authenticity and reliability; the electronic records are maintained in reasonable order so they may be readily inspected; the electronic records can be readily converted into readable paper copy; adequate record management practices are established and implemented; and the electronic recordkeeping system is not subject to any agreement or restriction limiting the ability to comply with ERISA's reporting and disclosure requirements. Original paper reports may be disposed of after they are transferred to an electronic recordkeeping system that meets the above requirements, except original records may not be discarded if they have legal significance or inherent value as original records such that electronic reproduction would not constitute a duplicate record (e.g., notarized documents, insurance contracts, stock certificates and documents executed under seal).
b) Records pertaining to each employee for determinations of benefits that are due or may become due.	b) As long as is relevant to the determination of benefit entitlement, but not less than six years (or with respect to a benefit claim if longer, the expiration of the analogous statute of limitations under state law, typically, for a contract claim). Three years after hiring or one year after date of termination, whichever is later.	

IRCA

Immigration Reform and Control Act requires employers to verify that employees are eligible to work in the United States.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
USCIS Form I-9, Employment Eligibility Verification Form.	Three years after hiring or one year after date of termination, whichever is later.	Form I-9s may be maintained electronically, provided that the employer follows government requirements. Those kept manually should be stored in a secure location, separate from the employee's personnel file, so that they are available to the government on three day's notice.

OSHA

Occupational Safety and Health Act requires employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
Covered employers as defined by 29 C.F.R. 1904 must retain a), b) and c). All employers are subject to d).		
a) Log of Work Related Injuries and Illnesses, briefly describing recordable cases of injury and illness, including the extent and severity of each case.	a) Five years following end of calendar year that the forms cover.	a) OSHA 300 Form–Log of Work Related Injuries or Illnesses.
b) Summary that indicates the total injuries and illnesses for each year at each establishment.	b) Five years following end of calendar year that the forms cover.	b) OSHA 300A Form–Summary of Work Related Injuries and Illnesses.
c) Supplemental record, which provides more detailed information for each injury and illness, including circumstances surrounding the injury or illness.	c) Five years following end of calendar year that the forms cover.	c) OSHA 301 Form–Injury and Illness Incident Report. Note: Substitute forms, such as workers' compensation or insurance reports, may be used to satisfy this requirement if they include all the information required by OSHA 301 Form.
d) To the extent an employer makes, maintains, contracts for or has access to employee exposure or medical records pertaining to employees exposed to toxic substances or harmful physical agents, the employer must retain all such medical and exposure records.	Exposure records must be retained for 30 years. Medical records of employees must be retained for duration of employment, plus 30 years, except that records of employees employed for less than one year need not be retained after employment (but only if such records are provided to the former employee in question).	OSHA does not mandate the form, manner or process by which an employer must preserve such records, except that chest X-rays must be preserved in their original form.

Lilly Ledbetter Fair Pay Act

amends several antidiscrimination laws under which disparate pay claims may be brought. The Act clarifies that the statute of limitations for filing an equal pay law suit resets with each new discriminatory paycheck or pay practice.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
Recordkeeping requirements of the statutes amended by the Lilly Ledbetter Fair Pay Act (Title VII, ADEA, ADA and the Rehab Act) include: Personnel or employment records made or kept by the employer including, but not limited to: application forms, test papers, applicant flow logs and data; records concerning hiring, promotion, demotion, transfer, layoff or termination; rates of pay and terms of compensation; and selection for training or apprenticeship. Reports are required from apprenticeship or training programs. Payroll or other records containing employee's name, address, date of birth, occupation, rate of pay and compensation week. Personnel and/or employment records relating to the hiring process including: (1) job applications, resumes, job advertisements, (including applications for temporary positions) and records pertaining to failure or refusal to hire; (2) promotion, demotion, transfer, selection for training, layoff, recall or discharge; (3) job orders submitted to employment agencies or unions; and (4) advertisements or notices relative to job openings. An employment agency must keep records on placements, referrals, job orders by employers, applications, and test papers completed by applicants as part of the selection process. Records relating to employee benefit plans and written seniority or merit rating systems. Records of employees involuntarily terminated. Records relevant to complaints, compliance reviews and enforcement actions.	Indefinitely.	Documentation: electronic or paper.

FOR NEW YORK EMPLOYERS ONLY

NY Labor Law Section 195.1 as amended by the Wage Theft Prevention Act, requires NYS employers to provide newly-hired workers with written notice of: their pay rate(s) and the basis thereof (i.e. whether paid by the hour, shift, day week, salary, piece, commission, etc.), hourly rate and overtime pay rate (if they qualify for overtime pay), allowances, if any, claimed as part of the minimum wage, regular payday, applicable exemption(s) for exempt employees, and such other information as the Department of Labor deems material and necessary. Additionally, the notice must include the name (including any "doing business as" names), address and telephone number of the employer. Employers must also provide notice between January 1st and February 1st of each year containing the above information to all employees.

RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
Written annual notice, and notice upon hire must be provided in English and the primary language identified by the employee, if English is not the primary language. The notice and acknowledgment of same must be maintained by the employer. If the employee's primary language is a language for which a template is not available from the Commissioner of Labor, an English-language notice shall be sufficient.	Six Years.	The New York State Department of Labor has made model forms available on its website.

HUMAN RESOURCES OFFICERS' DESK REFERENCE FOR LEGAL ISSUES

The following is a brief summary of legal issues that often are presented to Human Resources officers. The laws of each state and certain local jurisdictions vary, and Human Resource officers are advised to consult legal counsel for the specific requirements in each jurisdiction in which they maintain facilities.

EQUAL OPPORTUNITY

To refuse to hire or to discharge any individual, or to otherwise discriminate against any individual as to the terms and conditions of employment because of such person's race, color, religion, national origin, sex (including pregnancy), age, genetic information or veteran or military status is prohibited by federal law. The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability, including AIDS and AIDS-related conditions, and requires covered employers to make reasonable accommodations for disabled individuals under certain circumstances. Covered federal government contractors and subcontractors are also prohibited from discriminating against covered veterans and the disabled, as well as, against other protected categories discussed herein. Under federal law, persons 40 years of age or older are also protected from age discrimination, and certain state statutes protect all persons from age discrimination, regardless of age. Many states have added to the list of protected classifications, including, for example, for marital status or political affiliation. Several jurisdictions also prohibit discrimination based on sexual orientation. Illegal discrimination may also be found where a neutral practice or policy has, albeit unintentionally, an adverse impact on a particular protected group of employees. Sex-based wage discrimination for equal work is prohibited. Differences in wages are permitted, however, where determination of wages is made pursuant to a bona fide seniority or merit system, or a system that measures earnings by quality or quantity of production. New York State (NYS) law specifically prohibits discrimination based on marital status, sexual orientation, creed, military status, domestic violence victim status, and genetic predisposition. Like federal law, NYS law also prohibits age discrimination, but NYS age discrimination law covers persons age 18 and over. New York City also maintains anti-discrimination law with additional protections.

SEXUAL HARASSMENT

Any unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual's employment, (2) submission to or rejection of such conduct is the basis for employment decisions affecting the individual, or (3) such conduct has the purpose or effect of creating a hostile work environment for the individual. In addition, an employer that permits a hostile atmosphere in the workplace may be liable to affected employees, whether or not they are specific or intended victims of harassment. An employer that has in place well-publicized anti-harassment policies and training programs may be able to defend against sexual harassment claims, or limit damages in connection with a claim, by taking prompt action to investigate and resolve concerns raised by an employee in accordance with such policies.

EMPLOYEES WITH DISABILITIES (ADA)

The ADA and a growing number of state laws make it unlawful to discriminate against a qualified individual with a disability, and require covered employers to make reasonable accommodations for qualified disabled applicants and employees, unless such accommodations pose an "undue hardship" for the employer, or the individual poses a direct threat to the health or safety of other workers. "Qualified" is defined in the ADA as being able to perform essential job functions with or without reasonable accommodation.

The definition of "disabled" includes not only persons with disabilities that substantially limit one or more major life activities, persons with a record of having been disabled and persons perceived as being disabled, but also individuals related to or associated with persons in one of those three categories. The ADA covers employers with 15 or more employees. NYS law prohibits discrimination based on disability as well as genetic predisposition to a disability. NYS law has a broader definition of disability in that the impairment need not limit a major life activity. Thus, an impairment or medically diagnosable condition may be a disability whether or not it limits a major life activity.

EMPLOYMENT-AT-WILL

Under the traditional "employment-at-will" rule, employees may quit or be dismissed from employment with or without notice, for any (or no) reason not prohibited by statute. The rule applies to employees who are not covered by collective bargaining agreements or who do not have individual employment contracts. In some states, however, courts have limited the employment-at-will rule, holding, that in certain circumstances, employees may not be terminated contrary to the terms of employment manuals or other employer policy statements, in violation of "public policy," without good cause, or for other reasons. NYS courts have declined to adopt exceptions to the at-will rule based on general concepts of public policy. NYS law does, however, consider exceptions that involve whistleblower laws and/or other statutory provisions that prohibit discrimination and prohibit discharge based on jury duty service, appearing as a witness in a criminal case, etc.

RETALIATION

Various federal, state and local statutes provide that an employer may not take certain types of retaliatory personnel action against an employee who discloses or threatens to disclose an employer's policy or practice that violates a particular statute or, more generally, presents substantial dangers to public health or safety. Such disclosure may include giving information to, or testimony before, any public body investigating an employer's violation(s) of law. Certain statutes require that an employee first present concerns to appropriate officials of the employer before taking the grievance public. Antidiscrimination statutes prohibit retaliation against an employee who asserts claims of discrimination or assists others in pursuing such claims, whether or not such claims are meritorious. In addition, many states' workers' compensation statutes prohibit retaliation against persons who file claims or testify on behalf of claimants.

JURY DUTY

Federal law (concerning federal courts) and many state laws prohibit discharging or taking adverse action against employees summoned for jury duty. Absent specific statutes, courts have held that taking adverse action constitutes wrongful employer conduct. An employer's obligation to pay its employees' salaries for time spent on jury duty varies by jurisdiction. NYS law prohibits penalizing or discharging an employee based on serving jury duty. Further, NY employers with more than ten employees may not withhold the first 40 dollars of the juror's daily wages during the first three days of jury service.

LIE DETECTOR TESTS

Use of polygraph tests to screen job applicants or to randomly test employees generally is prohibited by federal law. Although federal law permits polygraphs to be used under strictly controlled conditions during investigations of thefts or losses, adverse employment decisions may not be based solely on the test result. Some state laws entirely prohibit use of polygraphs or other devices. NYS law prohibits the administration of "psychological stress evaluator examinations" to employees or prospective employees.

FINGERPRINTING

Some jurisdictions prohibit by statute the requirement that an employee or prospective employee be fingerprinted. There are exceptions for persons employed in particular regulated industries, such as

the securities, firearms and pharmaceutical industries, and for state or municipal employees and some hospital workers. NYS law prohibits fingerprinting employees or prospective employees unless these employees or candidates are included in the above-mentioned exceptions.

DRUG TESTING

Private employers generally are permitted to conduct preemployment, post-offer drug screening, and may require current employees to take a test for use of controlled substances. A number of states have enacted statutes and regulations restricting such tests. The National Labor Relations Board (NLRB) has ruled that drug testing is a term or condition of employment that must be bargained for before union members may be subjected to testing.

ARRESTS AND CONVICTIONS

Inquiry into arrest records generally is prohibited. State laws vary considerably as to the conditions under which inquiry concerning convictions may be made. Most jurisdictions allow inquiry into the subject of convictions but limit the use of the information.

SMOKING

A growing number of jurisdictions, including cities and counties, have recognized the rights of nonsmokers. These jurisdictions have designated certain public areas, including restaurants, as nonsmoking areas and have required that employers limit smoking in the workplace and address the rights of nonsmokers. Some jurisdiction (including NY) prohibit discrimination against employees in the terms and conditions of their employment based on their use of tobacco products outside the workplace. NYS has enacted a tough antismoking law that prohibits smoking in nearly every restaurant, bar and workplace. Under the NYS ban, smoking is restricted to a handful of indoor sites such as private hotel rooms, cigar bars and membership clubs with no paid employees.

SAFE WORKPLACES (OSHA)

The federal Occupational Safety and Health Act (OSHA) and various state statutes require that an employer provide each of its employees a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm. This also often includes an environment free from workplace violence. Under OSHA's hazard-communication rule, employers are required to alert employees who work with hazardous chemicals of the risks involved and safety precautions to be taken. Employers must also maintain a Material-Safety Data Sheet (MSDS) for each hazardous substance at the workplace. The MSDS provides information regarding the health hazards, safe handling, and emergency procedures for each substance.

WORKSITE ENFORCEMENT

Employers must verify the identity and employment authorization of all new employees (including U.S. citizens) on the Form I-9 and make sure that all Form I-9s have been completed and are maintained properly. In this process, employers must be sure not to commit any unfair immigration-related employment practices or to discriminate on the basis of citizenship or national origin. Immigration Custom and Enforcement has stepped up audits of employer's Form I-9s so compliance with these requirements should be considered an important component of an organization's risk management policies.

WORKERS' COMPENSATION/ DISABILITY COMPENSATION

In most states, employers must secure, pay, or provide compensation for their employees' disability or death arising out of or in the course of their employment, without regard to fault. Some jurisdictions also require employers to provide short-term disability insurance for employees.

PAY

Under federal law, employers must pay each of their employees no less than the established statutory

minimum wage. In certain states, the minimum wage is higher than the federally-mandated minimum wage. Generally, employees — other than executives, professionals, administrators and outside salesmen — are entitled to overtime pay. Most states require that wages be paid periodically, depending on the employee's classification, or on regular paydays designated in advance. In addition, employees in most states must receive a statement showing gross pay, deductions and net pay on each payday (some states, such as New York, require that wage statements include additional information as well). City, state, federal and Social Security taxes must be deducted irrespective of the nationality of the employee or the employer. Many jurisdictions limit the type of deductions employers can take from employees' wages.

EMPLOYEES' FINANCIAL MATTERS

Federal and state laws protect from dismissal or other adverse actions an employee who has had his or her salary or wages garnished. Federal law prohibits termination of or discrimination against employees who have filed for bankruptcy protections or who have been adjudicated bankrupt. Employers are required to disclose in writing to a job applicant that they intend to procure a consumer report or investigative consumer report from a consumer reporting agency concerning the applicant's general character, reputation or mode of living, and must divulge the nature and scope of the investigation upon written request of the applicant. The employer must obtain written authorization from an applicant or employee prior to obtaining a consumer report or investigative consumer report. The employer must advise the applicant if employment is denied in whole or in part because of the information received, and must identify the consumer reporting agency to the applicant.

ACCESS TO PERSONNEL RECORDS

Some states have constitutional and/or statutory restrictions governing the contents of a personnel file, and access to personnel files. Several states guarantee an employee the right to examine his or her personnel file, copy documents, or comment on adverse entries. Such rights vary by jurisdiction.

SEPARATION BENEFITS (or COBRA)

Federal law, the Consolidated Omnibus Budget Reconciliation Act (COBRA) and the majority of states require employers to offer employees and their dependents the right to continue any health plan coverages offered by the employer (including HMO, flexible benefits, EAP, vision, dental and prescription plans). Coverage continues for an extended period after a "triggering event," such as a separation from employment (other than due to gross misconduct), reduction in hours, loss of dependent coverage, divorce or legal separation, or death. Employers must provide notice of these rights to employees and their dependents.

REPORTING/AFFIRMATIVE ACTION

All employers subject to Title VII of the Civil Rights Act of 1964 with 100 or more employees, or federal government contractors or "subcontractors" (a term that includes any employer that provides goods or services essential to the performance of government contracts) with 50 or more employees and contracts amounting to $50,000 or more, must submit EEO-1 reports to the federal government annually, stating the number of minority and female employees in the workforce by job categories. Federal government contractors or subcontractors covered by the Vietnam Era Veterans' Readjustment Assistance Act must submit a VETS 100 annual report, which identifies covered veterans in the workforce by job categories. In addition, covered employers must develop for each of their establishments written affirmative action programs (AAPs) that state the employer's agreement to employ, or advance in employment, minorities, women, disabled persons and covered veterans. AAPs concerning minorities and women must contain, among other required elements, certain statistical information relevant to workforce utilization of such groups and, where necessary, must contain placement goals. These AAPs are subject to audit by the federal government. Certain

employers doing business with some state or local governments also may be required to submit reports to local agencies.

WORKFORCE REDUCTION (or LAYOFF)

Workforce reduction refers to the termination of a group of employees in a department, division or unit of the employer's workplace that is generally the result of reorganization, cost reduction or other business necessity. In implementing a workforce reduction, the employer should consult legal counsel to ensure compliance with various federal, state and local plant-closing laws (e.g., The Worker Adjustment and Retraining Notification Act "WARN"), Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, as amended by the Older Workers Benefit Protection Act. In a unionized workplace, workforce reductions generally must also be implemented pursuant to the terms of the collective bargaining agreement.

FAMILY AND MEDICAL LEAVE (FMLA)

The Family and Medical Leave Act (FMLA) requires employers (including public agencies) who employ 50 or more employees to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons, and up to 26 weeks of unpaid, job-protected leave for certain reasons related to the illness or injury of a covered servicemember. Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months. Unpaid leave must be granted for any of the following reasons:

- to care for the employee's child after birth or after a placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent who has a serious health condition;
- due to the employee's own serious health condition that makes the employee unable to perform the functions of the employee's job;
- to care for a covered servicemember with a serious injury or illness; or
- because of any qualifying exigency arising out of the fact that the employee's spouse, child or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

Upon return from FMLA leave, most employees must be restored to their original or equivalent position with equivalent pay, benefits, and other employment terms. FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave. The United States Department of Labor is authorized to investigate and resolve complaints of violations, and eligible employees may bring a civil action against an employer for violations.

EMPLOYEE ASSISTANCE PROGRAMS (EAP)

As a result of increased sensitivity on the part of employers regarding problems associated with alcoholism and drug use, including absences, tardiness and low productivity on the job, employers are increasingly establishing EAPs to deal with these and other concerns. EAPs are designed to assist employees with problems that affect job performance. Company EAPs vary with respect to the services that they offer to eligible employees, and range from those that exclusively handle drug and alcohol abuse to those that offer a wide array of services, such as marital and family counseling and financial counseling. In some cases, the EAP services are provided by an EAP counselor who is typically a member of the company's Human Resources Department or Medical Department. Under the ADA, an employer is not required to provide an opportunity for rehabilitation in place of discipline or discharge (some states, however, do require such an opportunity for rehabilitation in certain circumstances). However, the ADA may require reasonable accommodation of a qualified employee who is a rehabilitated drug addict or alcoholic. Such accommodation may be a modified work schedule to permit the employee to attend an ongoing self-help program.

RESTRICTIVE COVENANTS, TRADE SECRETS AND INTELLECTUAL PROPERTY

The enforcement of agreements that restrict employees from competing with their former employers, soliciting

employees, clients or customers, or subsequently utilizing confidential information obtained while on the job, varies widely from state to state: even in states where restrictive covenants are enforceable, courts tend to disfavor them because they are thought to discourage competition and to curtail an individual's right to earn a living. In seeking to enforce restraints on a former employee's ability to compete, an employer must demonstrate that a particular geographic or temporal restriction is necessary to safeguard bona fide trade secrets or other protectable commercial information, and that the restrictions are reasonable based on the totality of the circumstances. In order to safeguard "protectable" information, such as detailed listings of customer information or other internal data, an employer also should be prepared to demonstrate the extent to which the information is known by or disclosed to others, the measures taken to safeguard the information, the cost of development and/or value of the information, and the difficulty of acquiring it (i.e., showing that it is not readily ascertainable from other sources). These steps should be documented and in place long before any enforcement action is contemplated.

MILITARY LEAVE (USERRA)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) guarantees reemployment rights to all eligible employees who leave their civilian jobs to enter military service, in all but a few exceptional circumstances. It also prohibits employers from discriminating or retaliating against anyone with respect to any term, condition, or privileges of employment because of his or her membership in, prospective membership in or obligations to a uniformed service. Most states have laws that provide similar protections but vary widely both in scope and coverage.