



HR Training

THE CURRENT LAWS AND BEST
PRACTICES IN EIGHT CRITICAL AREAS OF
HUMAN RESOURCES RESPONSIBILITY

March 30-31, 2016
Northfield Inn
Springfield, Illinois





Agenda

Family and Medical Leave Act

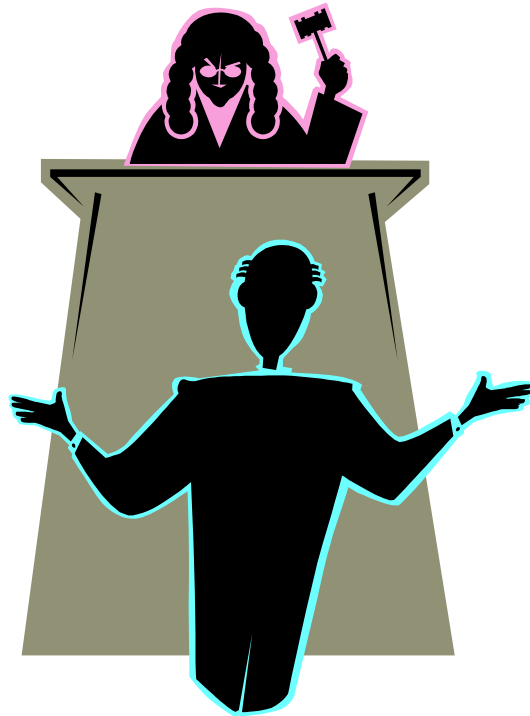
Fair Labor Standards Act

Affirmative Action Plan

COBRA Compliance

REMINDER

Compliance Issues



First!

I am not an
attorney!

Nothing I provide/say
today is intended to be
legal advice.

Share Using Hashtag #HRcirma

REMINDER



Family and Medical Leave Act

10-11AM

The Family and Medical Leave Act (FMLA) is intended to balance the demands of the workplace with the needs of families by allowing leave for certain qualifying reasons. Detailed regulations and numerous legislative and regulatory changes have made it extremely difficult to administer.

This session will help you maintain compliance and employee leave challenges while becoming more proficient in FMLA administration.

42/got thru 25



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Introduction to the FMLA

Topics of Discussion:

- Employer Coverage and Employee Eligibility
- Qualifying Reasons for Leave
- Amount of Leave
- *Employer* Rights and Responsibilities
- Employee Rights and Responsibilities
- Military Family Leave Provisions



Employer Coverage [§ 825.104](#)

- Private sector employers with 50 or more employees
- **Public Agencies**
- Public and private elementary and secondary schools

Employee's workweek
is basis for entitlement

Eligible employees may
take up to **12**
workweeks of FMLA
leave



Employee Eligibility

[§ 825.110](#)

- Employed by covered employer
- Worked at least 12 months
- Have at least 1,250 hours of service during the 12 months before leave begins
- Employed at a work site with 50 employees within 75 miles



Qualifying Family Members [§ 825.122](#)

- **Parent** - A biological, adoptive, step or foster father or mother, or someone who stood *in loco parentis* to the employee when the employee was a son or daughter. Parent for FMLA purposes does not include in-laws.
- **Spouse** - A husband or wife as defined or recognized in the state where the employee was married and includes individuals in a same-sex marriage or common law marriage.
- **Son or Daughter** - *For leave other than military family leave*, a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* who is either under 18 years of age, or 18 or older and incapable of self-care because of a mental or physical disability.



Qualifying Leave Reasons [§ 825.112](#)

- Eligible employees may take FMLA leave:
 - For the birth or placement of a child for adoption or foster care
 - To care for a spouse, son, daughter, or parent with a serious health condition
 - For their own serious health condition

– Military Family Leave

- Because of a qualifying reason arising out of the covered active duty status of a military member who is the employee's spouse, son, daughter, or parent (qualifying exigency leave)
- To care for a covered servicemember with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (military caregiver leave)

Qualifying Leave Reasons – For the Birth or Placement of a Child [§ 825.120-121](#)

- Both the mother and father are entitled to FMLA leave for the birth or placement of the child and/or to be with the healthy child after the birth or placement (bonding time)
- Employees may take FMLA leave before the actual birth, placement or adoption
- Leave must be completed by the end of the 12-month period beginning on the date of the birth or placement



Qualifying Leave Reasons – Serious Health Condition [§ 825.113](#)

Illness, injury, impairment or
physical or mental condition
involving:

- Inpatient Care, or
- Continuing Treatment by a Health Care Provider

Serious Health Condition – Inpatient Care [§ 825.114](#)

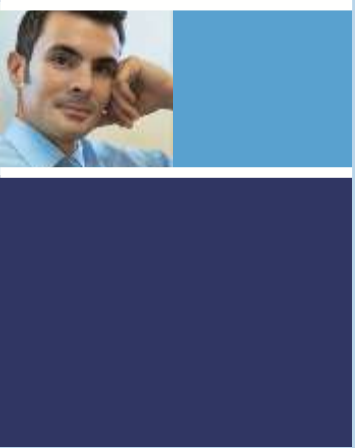
- An overnight stay in a hospital, hospice, or residential medical facility
- Includes any related incapacity or subsequent treatment



Serious Health Condition – Continuing Treatment [§ 825.115](#)

Continuing Treatment by a Health Care Provider

- Incapacity Plus Treatment
- Pregnancy
- Chronic Conditions
- Permanent/Long-term Conditions
- Absence to Receive Multiple Treatments



Incapacity Plus Treatment

Incapacity of more than three consecutive, full calendar days that involves either:

- Treatment two times by HCP (first in-person visit within seven days, both visits within 30 days of first day of incapacity)
- Treatment one time by HCP (in-person visit within seven days of first day of incapacity), followed by a regimen of continuing treatment (e.g., prescription medication)

Continuing Treatment by a Health Care Provider [§ 825.115](#)

Pregnancy

Incapacity due to pregnancy or prenatal care

Continuing Treatment by a Health Care Provider [§ 825.115](#)

Chronic Conditions

- Any period of incapacity or treatment due to a chronic serious health condition, which is defined as a condition that:
 - requires periodic visits (twice per year) to a health care provider for treatment
 - continues over an extended period of time
 - may cause episodic rather than continuing periods of incapacity

Continuing Treatment by a Health Care Provider [§ 825.115](#)

Permanent/Long-Term Conditions

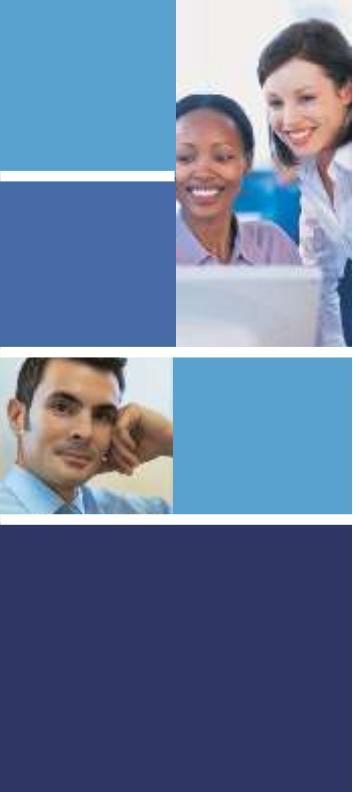
A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective



Continuing Treatment by a Health Care Provider [§ 825.115](#)

Absence to Receive Multiple Treatments

- For restorative surgery after an accident or other injury, or
- For conditions that, if left untreated, would likely result in incapacity of more than three consecutive, full calendar days



Amount of Leave (12 Workweeks Max)— Intermittent Leave [§ 825.202](#)

- Employee is entitled to take intermittent or reduced schedule leave for:
 - Employee’s or qualifying family member’s serious health condition when the leave is medically necessary
 - Covered servicemember’s serious injury or illness when the leave is medically necessary
 - A qualifying exigency arising out of a military member’s covered active duty status
- Leave to bond with a child after the birth or placement must be taken as a continuous block of leave unless the employer agrees to allow intermittent or reduced schedule leave
- In calculating the amount of leave, employer must use the shortest increment the employer uses to account for other types of leave, provided it is not greater than one hour *
- Shortest increment may vary during different times of day or shift
- Required overtime not worked may count against an employee’s FMLA entitlement

* Special rules apply for calculating leave for airline flight crew employees



Amount of Leave – Special Rules [§ 825.200 - 205](#)

- Physical impossibility
- Holidays
- Planned medical treatment
- Transfer to an alternative position
- Spouses may be limited to a combined total for certain leave reasons



12-Month Period [§ 825.200](#)

Method determined by employer

- Calendar year
- Any fixed 12-month leave year
- A 12-month period measured forward
- A rolling 12-month period measured backward



Substitution of Paid Leave [§ 825.207](#)

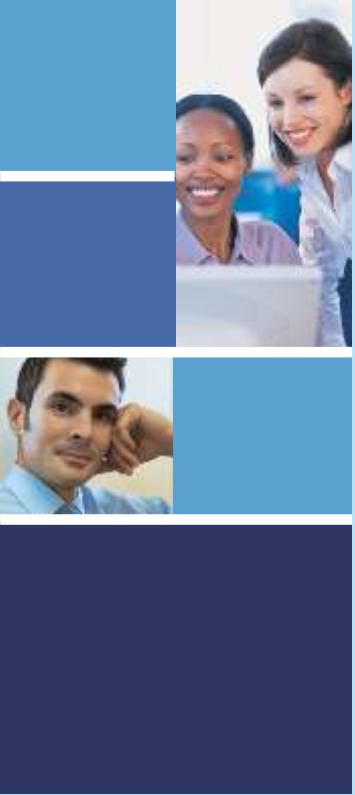
- “Substitution” means paid leave provided by the employer runs concurrently with unpaid FMLA leave and normal terms and conditions of paid leave policy apply
- Employees may choose, or employers may require, the substitution of accrued paid leave for unpaid FMLA leave
- Employee remains entitled to unpaid FMLA if procedural requirements for employer’s paid leave are not met



Substitution of Paid Leave-Limitations

[§ 825.207](#)

- Workers’ compensation leave
 - may count against FMLA entitlement
 - “topping off” allowed if state law permits
- Disability leave
 - may count against FMLA entitlement
 - “topping off” allowed if state law permits
- Compensatory time off (public sector only)
 - may count against FMLA entitlement
 - subject to FLSA requirements



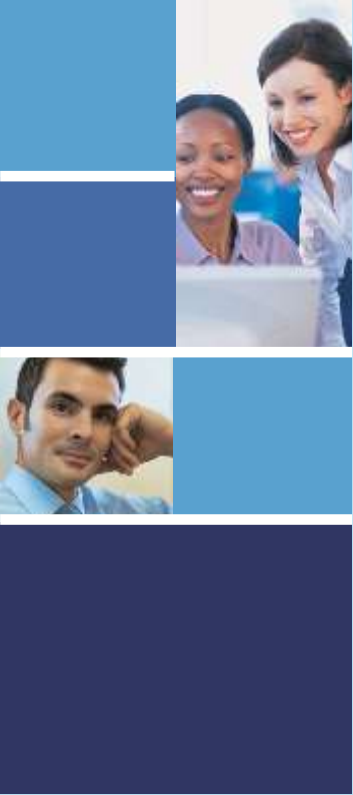
Employer Responsibilities

- Provide notice
- Maintain group health insurance
- Restore the employee to same or equivalent job and benefits
- Maintain records



Employer Responsibilities – Provide General Notice [§ 825.300](#)

- Employers must inform employees of FMLA:
 - Post a General Notice, and
 - Provide General Notice in employee handbook or, if no handbook, distribute to new employees upon hire
- Electronic posting and distribution permitted
- Languages other than English required where significant portion of workforce not literate in English
- \$110 CMP for willful posting violation



Employer Responsibilities – Provide Notice of Eligibility [§ 825.300](#)

- Within five business days of leave request (or knowledge that leave may be FMLA-qualifying)
- Eligibility determined on first instance of leave for qualifying reason in applicable 12-month leave year
- New notice for subsequent qualifying reason if eligibility status changes
- Provide a reason if employee is not eligible
- May be oral or in writing (recommended WH-381)

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Employer Responsibilities –

Provide Notice of Rights and Responsibilities [§ 825.300](#)

- Provided when eligibility notice required
- Must be in writing (recommended WH-381)
- Notice must include:
 - Statement that leave may be counted as FMLA
 - Applicable 12-month period for entitlement
 - Certification requirements
 - Substitution requirements
 - Arrangements for premium payments (and potential employee liability)
 - Status as “key” employee
 - Job restoration and maintenance of benefits rights



Employer Responsibilities – Provide Notice of Designation [§ 825.300-301](#)

- Within five business days of having enough information to determine leave is FMLA-qualifying
- Once for each FMLA-qualifying reason per applicable 12-month period (additional notice if any changes in notice information)
- Include designation determination; substitution of paid leave; fitness for duty requirements
- Must be in writing (recommended WH-382)
- If leave is determined not to be FMLA-qualifying, notice may be a simple written statement
- Employer must notify employee of the amount of leave counted against entitlement, if known; may be payroll notation
- If amount of leave is unknown (e.g., unforeseeable leave), employer must inform employee of amount of leave designated upon request (no more often than 30 days)
- Retroactive designation permitted provided that failure to timely designate does not cause harm to employee



Employer Responsibilities – Maintain Group Health Plan Benefits

[§ 825.209-213](#)

- Group health plan benefits must be maintained throughout the leave period
- Same terms and conditions as if employee were continuously employed
- Employee must pay his/her share of the premium
- Even if employee chooses not to retain coverage during leave, employer obligated to restore same coverage upon reinstatement
- In some circumstances, employee may be required to repay the employer's share of the premium if the employee does not return to work after leave



Employer Responsibilities – Job Restoration [§ 825.214 - .219](#)

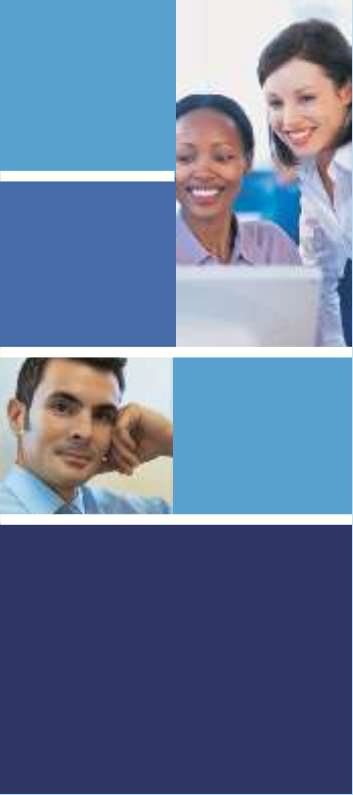
- Same or equivalent job
 - equivalent pay
 - equivalent benefits
 - equivalent terms and conditions
- Employee has no greater right to reinstatement than had the employee continued to work
- Bonuses predicated on specified goal may be denied if goal not met
- Key employee exception



Prohibited Employment Actions [§ 825.220](#)

Employers cannot:

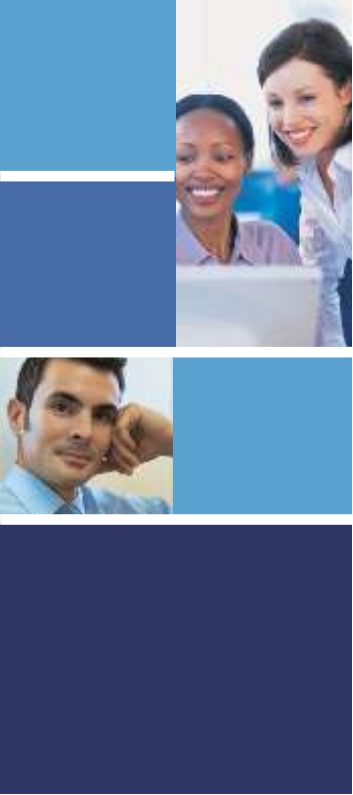
- interfere with, restrain or deny employees' FMLA rights
- discriminate or retaliate against an employee for having exercised FMLA rights
- discharge or in any other way discriminate against an employee because of involvement in any proceeding related to FMLA
- use the taking of FMLA leave as a negative factor in employment actions



Employer Responsibilities – **Maintain Records** [§ 825.500](#)

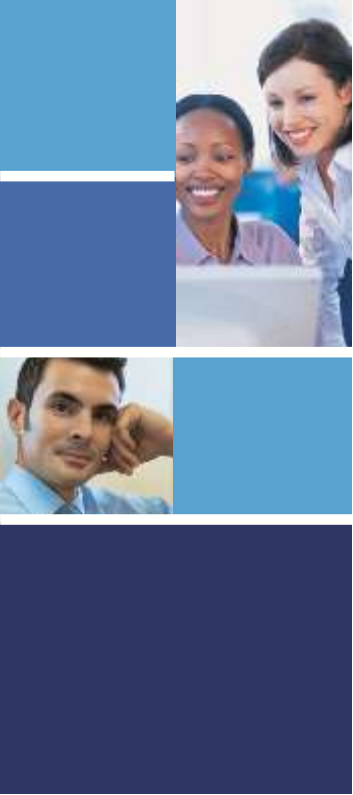


- Basic payroll information
- Dates FMLA leave is taken
- Hours of leave if leave is taken in less than one full day
- Copies of leave notices
- Documents describing benefits/policies
- Premium payments
- Records of disputes



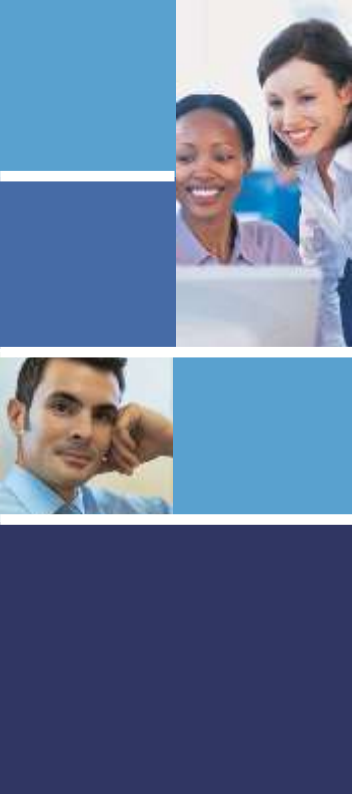
Employee Responsibilities

- Provide sufficient and timely notice of the need for leave
- If requested by the employer:
 - Provide certification to support the need for leave
 - Provide periodic status reports
 - Provide fitness-for-duty certification



Employee Responsibilities – Notice Requirements [§ 825.302 - .303](#)

- Provide sufficient information to make employer aware of need for FMLA-qualifying leave
- Specifically reference the qualifying reason or the need for FMLA leave for subsequent requests for same reason
- Consult with employer regarding scheduling of planned medical treatment
- Comply with employer's usual and customary procedural requirements for requesting leave absent unusual circumstances
- Timing of Employee notice of need for leave:
 - *Foreseeable Leave* - 30 days notice, or as soon as practicable
 - *Unforeseeable Leave* - as soon as practicable



Employee Responsibilities – Provide Certification [§ 825.305](#)

Medical Certification for serious health condition (recommended WH-380-E and 380-F)

- Submit within fifteen calendar days
- Employer must identify any deficiency in writing and provide seven days to cure
- Annual certification may be required
- Employee responsible for any cost



Employee Responsibilities – Provide Certification [§ 825.307](#)

- Employer (**not** employee's direct supervisor) may contact health care provider to:
 - **Authenticate:** Verify that the information was completed and/or authorized by the health care provider; no additional information may be requested
 - **Clarify:** Understand handwriting or meaning of a response; no additional information may be requested beyond what is required by the certification form
- Second and third opinions (at employer's cost)
 - If employer questions the validity of the complete certification, the employer may require a second opinion
 - If the first and second opinions differ, employer may require a third opinion that is final and binding



Employee Responsibilities – Provide Certification [§ 825.308, .311 & .313](#)

- Recertification
 - No more often than every 30 days and with an absence
 - If the minimum duration on the certification is greater than 30 days, the employer must wait until the minimum duration expires
 - In all cases, may request every six months with an absence
 - More frequently than every 30 days if:
 - the employee requests an extension of leave, or
 - circumstances of the certification change **significantly**, or
 - employer receives information that casts doubt on the reason for leave
- Consequences of failing to provide certification
 - Employer may deny FMLA until certification is received
- Employee must respond to employer's request for information about status and intent to return to work




Employee Responsibilities – Fitness-for-Duty Certification [§ 825.312](#)

- For an employee's own serious health condition, employers may require certification that the employee is able to resume work
 - Employer must have a uniformly-applied policy or practice of requiring fitness-for-duty certification for all similarly-situated employees
- If state or local law or collective bargaining agreement is in place, it governs the return to work
- Not permitted for intermittent or reduced schedule leave unless reasonable safety concerns exist
- Authentication and clarification
- Employee responsible for any cost



Fair Labor Standards Act

11:00-NOON



The Fair Labor Standards Act (FLSA) regulates minimum wage, overtime and equal pay for employees. FLSA is arguably the labor law that is most often violated by employers. This session explains the basic requirements of FLASA, including new proposed changes expected to go into affect later this year, and how to begin an audit process to make sure you are in compliance in time.



Major Provisions

- Coverage
- Minimum Wage
- Overtime Pay
- Youth Employment
- Recordkeeping



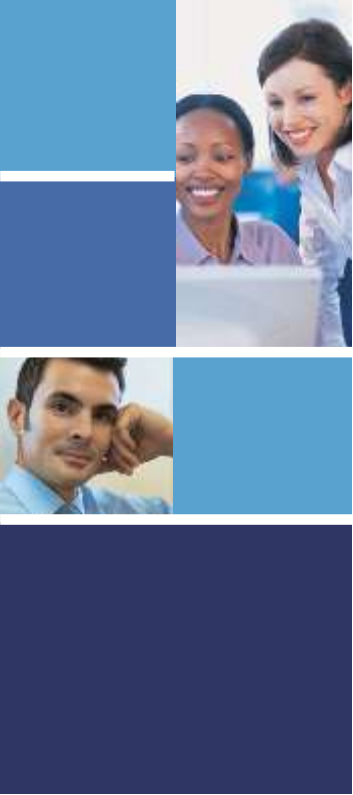
Employment Relationship

In order for the FLSA to apply, there must be an employment relationship between the “employer” and the “employee”



Coverage

FLSA



Coverage

More than 130 million workers in more than 7 million workplaces are protected or “**covered**” by the Fair Labor Standards Act (FLSA), which is enforced by the Wage and Hour Division of the U.S. Department of Labor

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Coverage

Two types of coverage

- **Enterprise coverage**: If an enterprise is covered, all employees of the enterprise are entitled to FLSA protections
- **Individual coverage**: Even if the enterprise is not covered, individual employees may be covered and entitled to FLSA protections

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Enterprise Coverage

- Enterprises with
 - At least two (2) employees
 - At least \$500,000 a year in business
- Hospitals, businesses providing medical or nursing care for residents, schools, preschools and ***government agencies*** (federal, state, and **local**)



The Bottom Line

- **Almost every employee in the United States is covered by the FLSA**
- Examples of employees who may not be covered
 - Employees working for small construction companies
 - Employees working for small independently owned retail or service businesses



Minimum Wage

FLSA

Cautions:

EMTs

Assistant Coroners

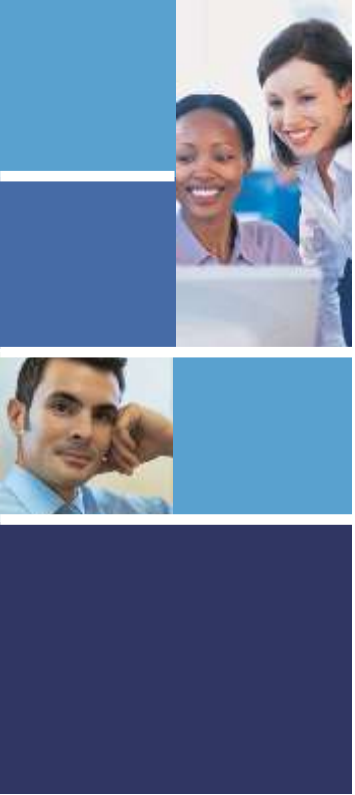
Seasonal Help

Drivers



Minimum Wage: Basics

- Covered, non-exempt employees must be paid not less than the federal minimum wage for all hours worked
- The minimum wage is \$7.25 per hour effective July 24, 2009
- Cash or equivalent – free and clear
- Yes the ILLINOIS minimum wage is higher and federal contractor minimum wage is even higher (both outside of FLSA)



Minimum Wage: Issues

- Compensation Included
- Deductions
- Tipped Employees
- Hours Worked

Compensation Included

- Wages (salary, hourly, piece rate)
- Commissions
- Certain bonuses
- Tips received by eligible tipped employees (up to \$5.12 per hour July 24, 2009)
- Reasonable cost of room, board and other “facilities” provided by the employer for the employee’s benefit



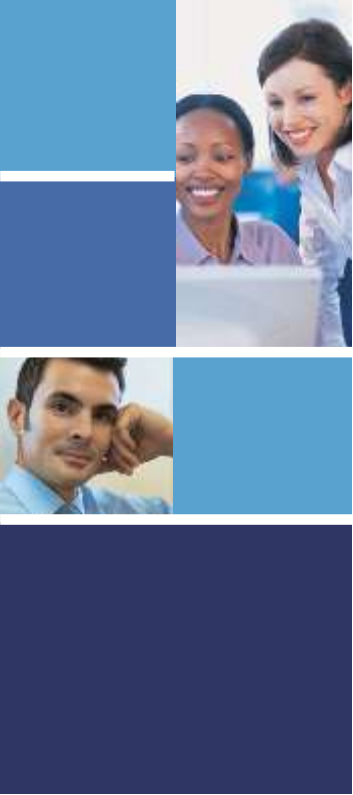
Board and Lodging

- Cannot exceed actual cost
- Cannot include a profit to the employer
- Employer’s method of determining reasonable cost should follow good accounting practices
- Employer cannot take a credit when no cost is incurred

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Deductions

- Deductions from pay illegal if
 - Deduction is for item considered primarily for the benefit or convenience of the employer; and
 - The deduction reduces employee's earnings below required minimum wage
- Examples of illegal deductions
 - Tools used for work
 - Damages to employer's property
 - Cash register shortages



Hours Worked: Issues

- Suffered or Permitted
- Waiting Time
- On-Call Time
- Meal and Rest Periods
- Training Time
- Travel Time
- Sleep Time

Suffered or Permitted

Work not requested but suffered or permitted is work time



Waiting Time

- Counted as hours worked when
 - Employee is unable to use the time effectively for his or her own purposes; and
 - Time is controlled by the employer
- Not counted as hours worked when
 - Employee is completely relieved from duty; and
 - Time is long enough to enable the employee to use it effectively for his or her own purposes



On-Call Time

- On-call time is hours worked when
 - Employee has to stay on the employer's premises
 - Employee has to stay so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes
- On-call time is not hours worked when
 - Employee is required to carry a pager
 - Employee is required to leave word at home or with the employer where he or she can be reached



Meal and Rest Periods

- Meal periods are not hours worked when the employee is relieved of duties for the purpose of eating a meal
- Rest periods of short duration (normally 5 to 20 minutes) are counted as hours worked and must be paid



Training Time

Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless

- Attendance is outside regular working hours
- Attendance is voluntary
- The course, lecture, or meeting is not job related
- The employee does not perform any productive work during attendance



Travel Time

- Ordinary home to work travel is not work time
- Travel between job sites during the normal work day is work time
- Special rules apply to travel away from the employee's home community



Sleep Time

- Less than 24 hour duty
 - Employee who is on duty for less than 24 hours is considered to be working even if allowed to sleep or engage in other personal pursuits
- Duty of 24 hours or more
 - Parties can agree to exclude bona fide sleep and meal periods



Overtime

FLSA



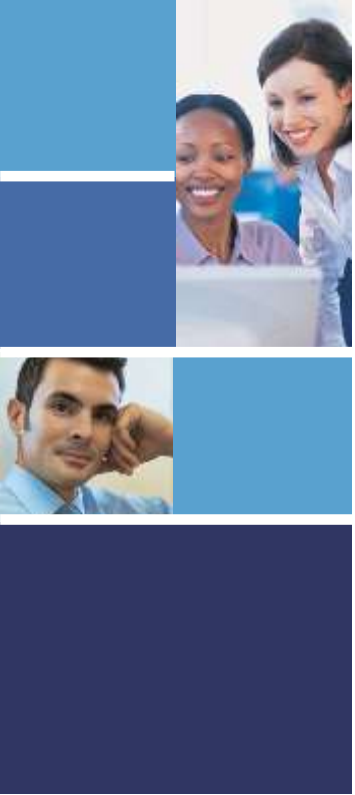
Overtime Pay

Covered, non-exempt employees must receive one and **one-half times the regular rate of pay for all hours worked over forty in a workweek**



Overtime Issues

- Each workweek stands alone
- Regular rate
 - Payments excluded from rate
 - Payments other than hourly rates
 - Tipped Employees
- Deductions



Workweek

- Compliance is determined by workweek, and each workweek stands by itself
- Workweek is 7 consecutive 24 hour periods (168 hours)



Regular Rate

- Is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
- May not be less than the applicable minimum wage



Regular Rate Exclusions

- Sums paid as gifts
- Payments for time not worked
- Reimbursement for expenses
- Discretionary bonuses
- Profit sharing plans
- Retirement and insurance plans
- Overtime premium payments
- Stock options



Deductions in Overtime Workweeks

FLSA

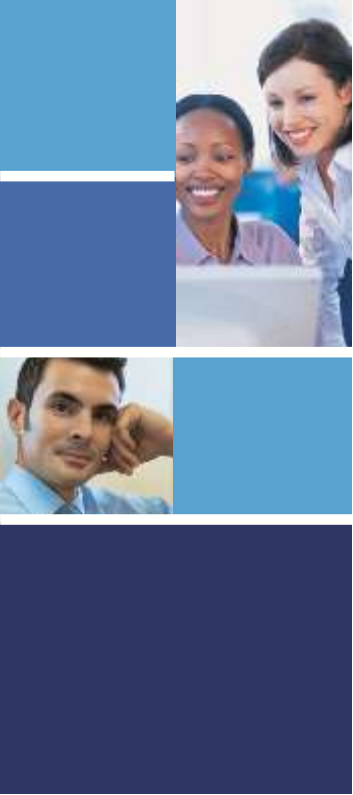


“White Collar” Exemptions



Exemptions and Exceptions

There are numerous exemptions and exceptions from the minimum wage and/or overtime standards of the FLSA



“White Collar” Exemptions

The most common FLSA minimum wage and overtime exemption -- often called the “541” or “white collar” exemption -- applies to certain

- Executive Employees
- Administrative Employees
- Professional Employees
- Outside Sales Employees
- Computer Employees

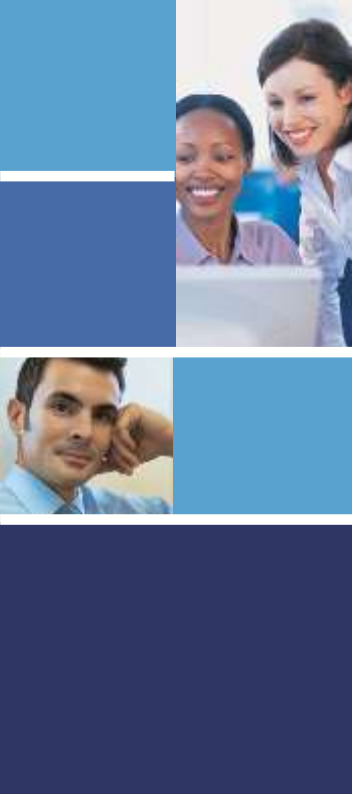


Three Tests for Exemption

Salary Level

Salary Basis

Job Duties



Minimum Salary Level: ~~\$455~~ \$970

- For most employees, the minimum salary level required for exemption is ~~\$455~~ per week
- Must be paid “free and clear”
- The ~~\$455~~ per week may be paid in equivalent amounts for periods longer than one week

- Biweekly: ~~\$910.00~~ \$1,940
- Semimonthly: ~~\$985.83~~ \$2,101.67
- Monthly: ~~\$1,971.66~~ \$4,203.33

DOL PROPOSAL: to raise the salary threshold from \$455 a week (the equivalent of \$23,660 a year) to about \$970 a week (\$50,440 a year) in 2016.¹



Salary Level- Computer Related Occupations

The employee must also receive either

- A guaranteed salary or fee of ~~\$455~~
per week or more, or \$970 OR \$50,444
- An hourly rate of not less than
\$27.63 per hour
ALREADY \$57,470.40



Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs *any* work
- Need not be paid for any workweek when no work is performed



Deductions From Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available

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Permitted Salary Deductions

Seven exceptions from the “no pay-docking” rule

1. Absence from work for one or more full days for personal reasons, other than sickness or disability
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences
3. To offset any amounts received as payment for jury fees, witness fees, or military pay
4. Penalties imposed in good faith for violating safety rules of “major significance”
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules
6. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act



Effect of Improper Deductions

- An actual practice of making improper deductions from salary will result in the loss of the exemption
 - During the time period in which improper deductions were made
 - For employees in the same job classifications
 - Working for the same managers responsible for the actual improper deductions
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee



Safe Harbor

- The exemption will not be lost if the employer:
 - Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism
 - Reimburses employees for any improper deductions; and
 - Makes a good faith commitment to comply in the future
- Unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints



Executive Duties

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight

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Administrative Duties

- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance



Professional Duties

- Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction
- Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor

The left side of the slide features a vertical strip of four images. From top to bottom: 1. A woman with dark hair smiling. 2. A woman with dark hair and a man with dark hair looking at a laptop. 3. A man with dark hair resting his head on his hand. 4. A man with dark hair in a light blue shirt. The images are set against a background of blue and dark blue rectangular blocks.

Computer Related Occupations

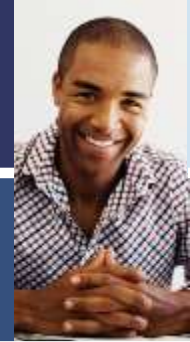
Primary duty is:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications
- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems
- A combination of the above requiring the same level of skills, and



Outside Sales

- Primary duty is
 - Making sales or
 - Obtaining orders or contracts for services or facilities for consideration paid by customer and
- Customarily and regularly engaged away from the employer's place(s) of business in performing such primary duty
- No compensation test



Youth Employment

FEDERAL YOUTH EMPLOYMENT RULES SET BOTH HOURS
AND OCCUPATIONAL STANDARDS FOR YOUTH



Youth Employment

- 16 Sixteen- and 17-year-olds may be employed for unlimited hours in any occupation other than those declared hazardous by the Secretary of Labor
- 14 Fourteen- and 15-year-olds may be employed outside school hours in a variety of non-manufacturing and non-hazardous jobs for limited periods of time and under specified conditions
- <14 Children under 14 years of age may not be employed in non-agricultural occupations covered by the FLSA

Enjoy a Lunch Break (45 minutes)

SPONSORED BY

*ARTHUR J. GALLAGHER
RISK MANAGEMENT SERVICES, INC.*

LUNCH BREAKS

48% of workers take a lunch that's 30 minutes or less



Source: OfficeTeam survey of 413 workers in the United States

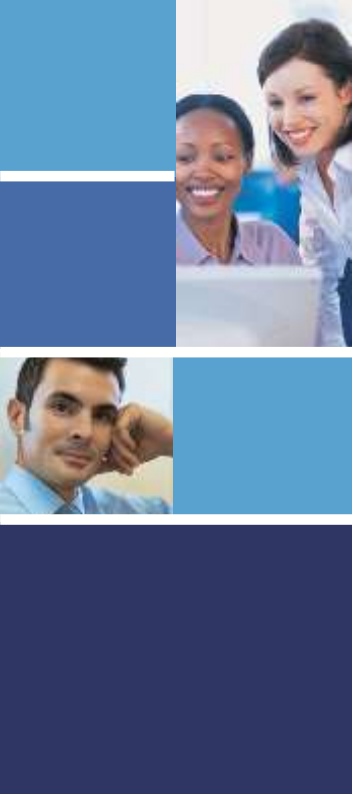
12-12:45pm



Affirmative Action Policy

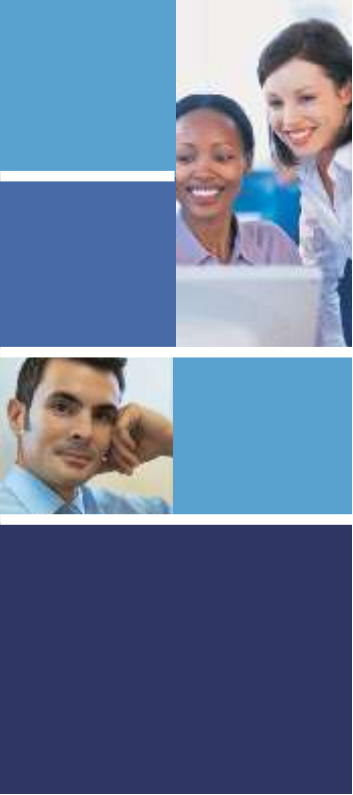
1-2PM

The federal government installed affirmative action policies to even out historical inequalities and ensure certain diversity employment standards. This session covers the equal employment opportunity (EEO) laws and categories protected by federal and state regulations, including a focus on the importance of adopting an affirmative action plan.



What is the Purpose?

- An Affirmative Action Plan (AAP) is a documented plan to employ people with disabilities, minorities, and veterans.
- Thus it is an “Affirmative Action to Employ”
- In other words your organization is taking steps to actively employ people who fall into these categories.



Civil Rights Act of 1964, Title VII

- **Established the Equal Opportunity Commission to enforce the act's provisions.**
- **Coverage**
 - All private employers with **15 or more** employees
 - All educational institutions, public and private
 - *State and local governments*
 - Public and private employment agencies
 - Labor unions with **15 or more** employees

Protected Class

Individuals within a group identified for protection under equal employment laws and regulation.

Race, Ethnic
Origin, Color

Gender

Age

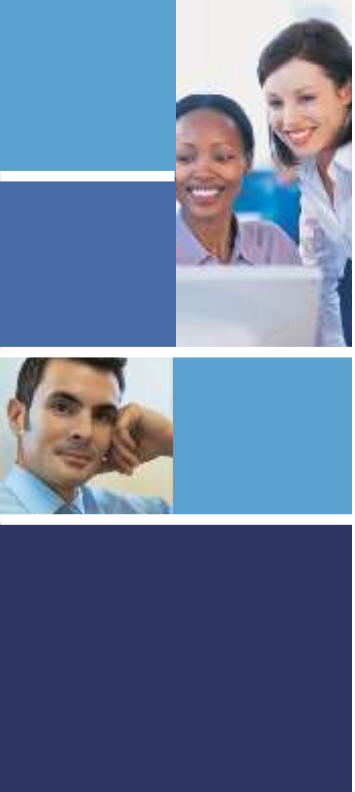
Disability

Military
Experience

Religion

Marital
Status

Sexual
Orientation





EEO Enforcement

Equal Employment Opportunity Commission

- EEOC is the enforcement authority for EEO laws.
- Composed of five members appointed by the President and confirmed by the Senate.
- Members (limited to no more than three from the same political party) serve seven year terms.

Office of Federal Contract Compliance (OFFCP)

Ensures that federal contractors have nondiscriminatory practices and take affirmative action to overcome the effects of past discrimination.

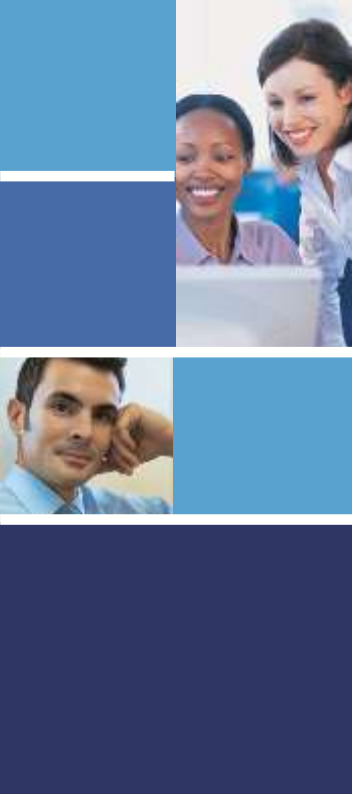
IDHR



New Language for Ads

- State that all qualified applicants will receive consideration for employment and will not be discriminated against on the basis of disability or protected veteran status
- Best to use “minority/female/disability/veteran”





When Must it be Prepared/Maintained?

- As soon as you are aware that your organization meets the requirements set up by the Federal Government that it is required
- Annually thereafter

What is an AAP - Am I Required?

10k State

- A requirement for federal government contractors with more than 50 employees and over \$50,000 in government contracts annually **to formally document** the inclusion of women and racial minorities in the workforce AND...disabilities and veterans.
- Covered employers must submit **plans describing their attempts to narrow the gaps** between the composition of their workforces and the composition of labor markets where they obtain employees.
- Focuses on **hiring, training, and promoting protected-class members who are *under-represented*** in an organization in relation to their availability in the labor markets from which recruiting occurs.



What is an AAP? -Terms

- **Availability analysis (Feeder Pools)**

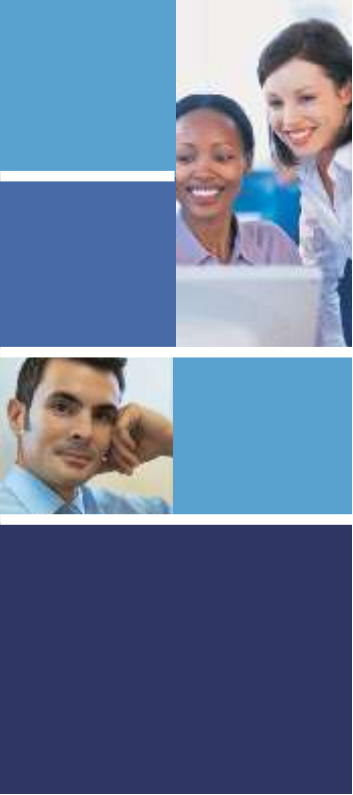
Identifies the number of protected-class members available to work in the appropriate labor markets for given jobs.

- **Utilization analysis**

Identifies the number of protected-class members employed in the organization and the types of jobs they hold.

- **Reverse Discrimination**

Occurs when a person is denied an opportunity because of preferences give to protected-class individuals who may be less qualified.



Where is it Kept?

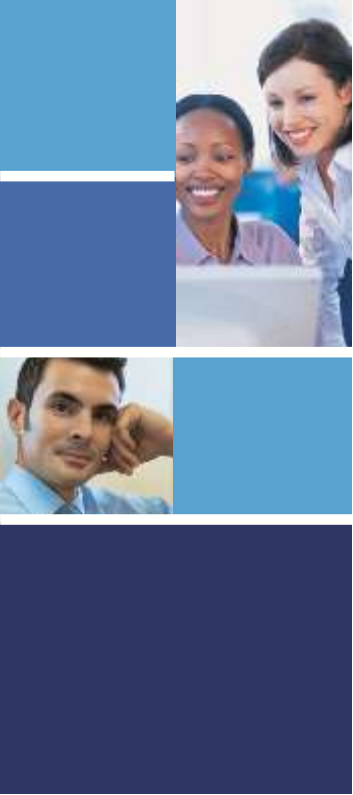
- In the Office of Preparer
- General location for all potentially Auditable Documents
 - Affirmative Action Plan
 - Emergency Evacuation Plan
 - Hazardous Communication Plan
 - Exposure Control Plan
 - Disaster Preparedness Plan



What exactly do I have to do for an
AAP?

THE REPORT

1. Track
2. Measure
3. Plan
4. Implement
5. Develop



How & Where Do I Start?

- EEO-4
- VETS-4212
- AAP
- Collect Data
 - Internally
 - Externally
- Time without Distraction
- Spreadsheets with Formula or Software Calculator
- Analysis Skills
- Writing Skills



Dear AAP Annual Update Clients:

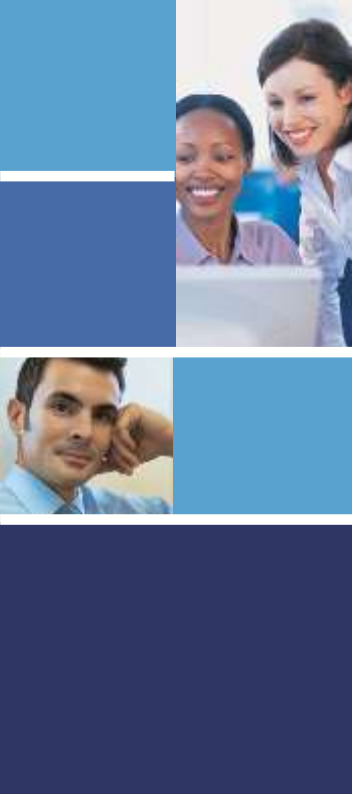
To begin the Affirmative Action Plan for 2016, I need the following after you have submitted your EEO-1 & Vets 4212 reports. Both reports are due September 30, 2015, however, there was recently an extension for the EEO-1 report:

<http://www.affirmativeactionlawadvisor.com/2015/09/update-eeo-1-filing-deadline-extended-until-october-30/>

My suggestion if you have not already started either report is to work on your Vets 4212 Sept 30 deadline then follow with the EEO-1 Oct 30 deadline using the same payroll period. It is also important to use the same reporting period for all of the following AAP reports needed so all the numbers make sense in the reports that make up the plan.

- Just in case you need it, here is the links for filing the reports:
 - Vets 4212: <https://vets4212.dol.gov/vets4212> a pdf of the report to complete on paper first is here: <http://www.dol.gov/vets/programs/fcp/vets-4212.pdf> If you have any questions here is their email: VETS4212-customersupport@dol.gov.
 - EEO-1: <http://www.eeoc.gov/employers/eeo1survey/> a pdf of the report to complete on paper first is here: <http://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf> If you have any questions here is their email: e1.techassistance@eeoc.gov

- Once you have this done this is a list of everything I need:
 1. A copy of your completed EEO-1 & Vets4212 Reports
 2. A full current employee census as of same payroll period used for reports above that includes all categories of minorities, females, disability, and veterans.
 3. Applicant tracking report covering 12 month period prior to and including the payroll period used for reports above to include categories of minorities, females, disabilities, and veterans. In addition, position titles, and EEO-1 job categories for jobs candidate applied for to include who was hired from those applicants.
 4. A list of all new hires, promotions, transfers, and termination for the same payroll period and 12 months preceding. The terminations need to be identified as voluntary and involuntary termination. This can be part of the census requested in #2 above if your system can pull all the data needed into one report.
 5. A copy of any policies that have changed since the last plan was written that are included in the plan such as harassment, Sex discrimination guidelines, EEO, Confidentiality, Org Chart, History, and anything else you think I should know related to the company's progress toward affirmative action.
 6. The name of any additional counties you have employees living in beyond those already identified in last years plan.
 7. The address of any new locations, if any, since last plan.
 8. Information on any changes made to your application and hiring process (new website, new software, in person vs online applicant process, etc.).
 9. Updated pay scale if compensation has changed since the last plan.
 10. Copy of any letters used for recruiting, vendors, suppliers, etc. communicating you are an affirmative action/eeo employer.
 11. If you have any questions, let me know. I plan to start in the project October depending on receipt of above and have finished by the holidays for a January 1 to December 31, 2016 plan year.

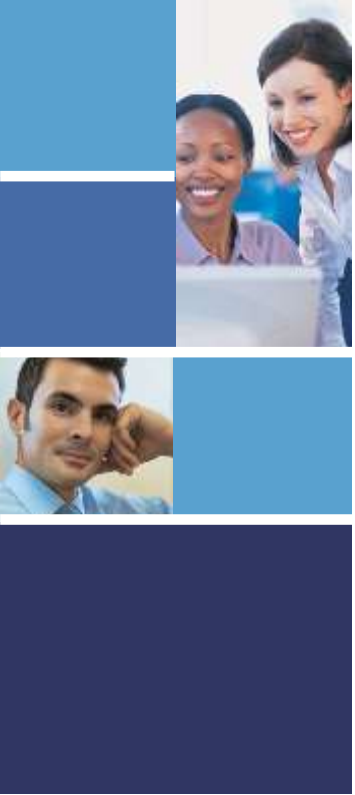


What exactly do I have to do for an AAP?- #1 Track

- Track and compile hiring metrics and measures
- This data serves as the foundation of your plan



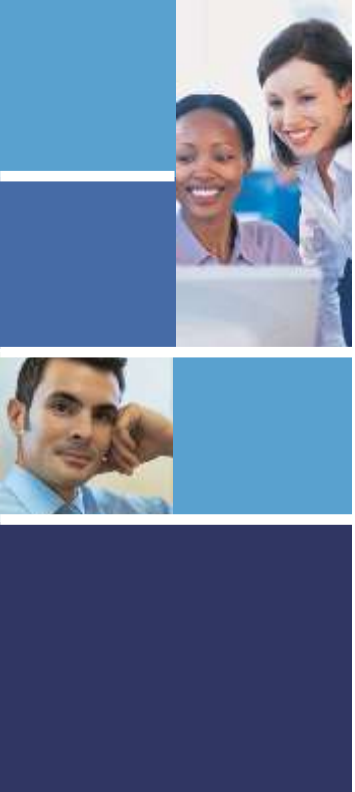
External Analysis



What counties do you currently have employees commute from?

- Sangamon
- Menard
- Christian
- Morgan
- Macoupin
- Cass
- Macon





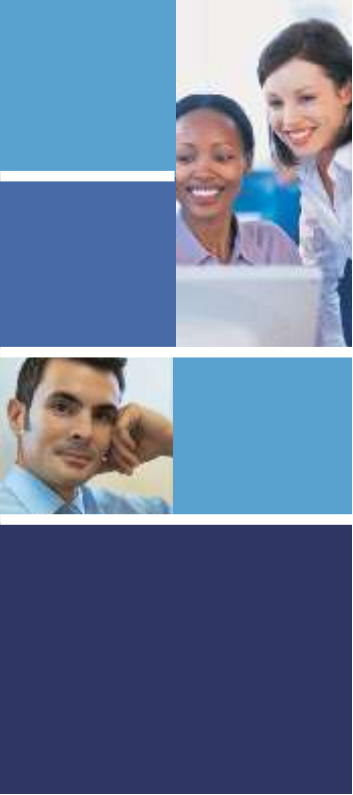
What exactly do I have to do for an AAP?- #2 Measure

- **Promotion or Pass Rate**

This rule says the pass or promotion rate of any group (e.g., minority, female, disability, veteran group) should be at least 80% (or 4/5ths) the same rate as another group (e.g., white or male group).

- **Selection:**

If my availability analysis says I have 50% women in my hiring pool, then my selection rate of women should be no LESS than 40%. If it is lower, there is evidence of adverse impact.

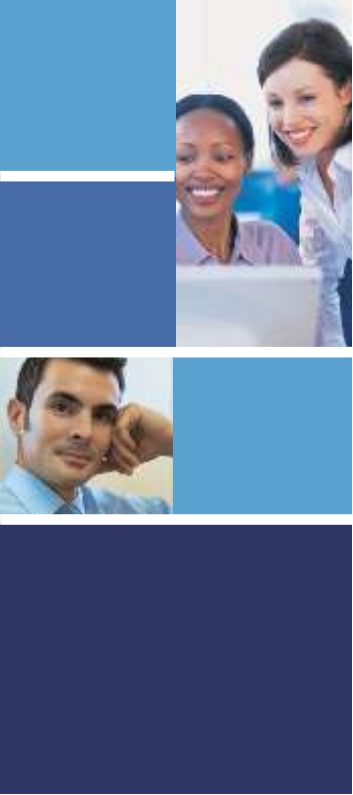


What exactly do I have to do for an AAP?- #2 Measure

Two different types of comparisons for the 4/5ths rule:

Internal Selection (e.g., promotions)- cutoff is 4/5ths the rate of the non-protected group's selection rate.

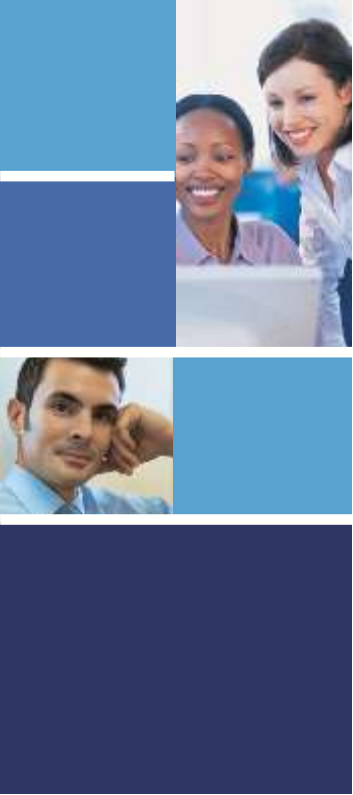
External Selection- cutoff is 4/5ths the percentage of availability.



What exactly do I have to do for an AAP?- #2 Measure

When I am going to measure the 4/5ths rule I ask myself?

- Is this internal selection (e.g., promotions, layoffs, selection tests, salary)? If so, I will use a **COMPARISON GROUP**.
- Is this external selection (e.g., hiring from outside the company)? I will use **AVAILABILITY ANALYSIS**.

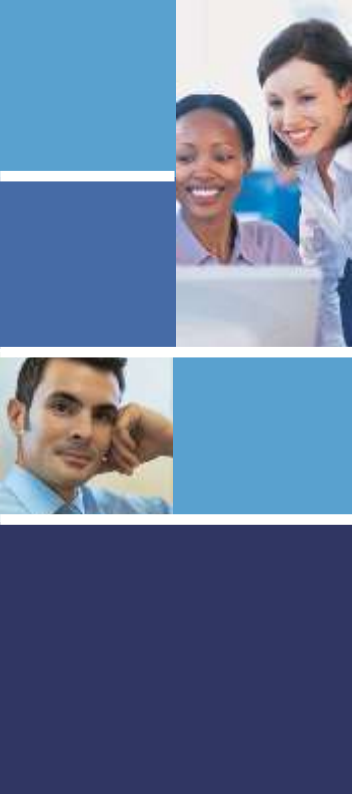


What exactly do I have to do for an AAP? #3 Plan

What are your feeder pools?

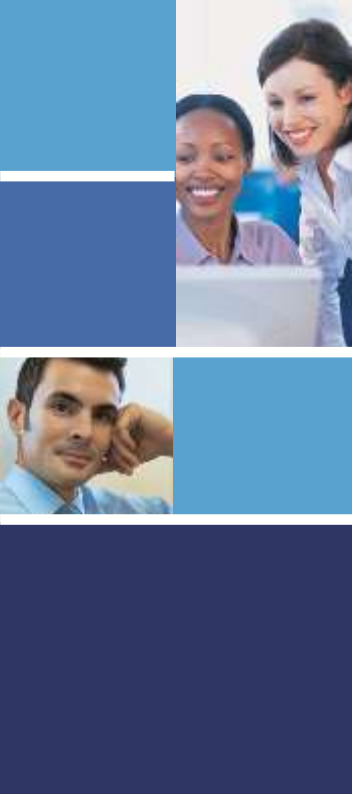
- Selection to the job?
- Promotions?
- Promotion/Selection to Executive levels?





What exactly do I have to do for an AAP? #3 Plan

- Once the feeder pools are identified, derive plans to develop individuals from UNDER-REPRESENTED populations to become appropriately “represented”.
- These plans may include employee development such as mentorship to break the glass ceiling or an emphasis on diversity in executive succession plans.
- These plans may also include modification of selection tests or diverting compensation to become compliant.

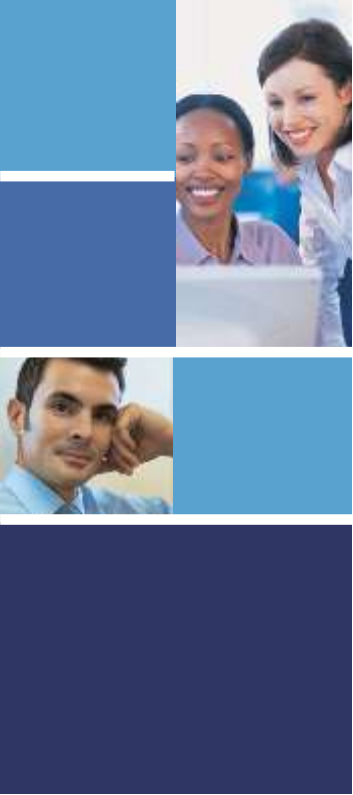


What exactly do I have to do for an AAP? #4 Implement

Implement the plans you made in Step #3.

Examples:

- From the top down revisit executive succession plan lists with an emphasis on identifying individuals from under-represented groups that may qualify.
- Work with managers to provide assignments and/or rotation to those individuals who may qualify.



What exactly do I have to do for an AAP? #5 Demonstrate

- Continual re-analysis of data (e.g., monthly)
- Track progress
- Adjust plan and implementation strategies
- Include the data in the affirmative action plan submitted to the EEOC
- Include the data where appropriate on company websites and annual reports.
- Have top management team sign commitment to diversity in the annual report.
- Remember there will need to be compliance at every level in every job category in every division...overall at a company level doesn't cut it.
- Remember this is selection, promotions, compensation, layoffs, terminations....everything must be tracked.



What exactly do I have to do for an AAP? #5 Demonstrate

What if you do all this and it doesn't work?

- The EEOC/OFCCP is most interested in a good faith effort, not punishing organizations.
- The key components for them are:
 - A good plan (e.g., SMART goals)
 - Progress toward these goals.
- If this is done, there is typically no problem.



#5 Demonstrate

- The Ethics of AAPs
- There is strong temptation to cross lines of reverse discrimination in order to avoid litigation.
- This is accomplished through reserving money for distribution (e.g., salary issues) or reserving a quota (e.g., selection test passing and promotions).



Resources

Office of Federal Contract Compliance Programs (OFCCP)

SAMPLE AFFIRMATIVE ACTION PROGRAMS (AAPs)

The following sample AAPs are for illustrative purposes only and do not represent the only styles and formats that meet regulatory requirements. While these sample AAPs have been constructed around a company with less than 150 employees, thereby allowing the AAP job groups to be formulated using the EEO-1 categories as authorized by 41 CFR 60-2.12(e), they may be used as a guide for larger employers.

When preparing AAPs, they should be customized to reflect an employer's organizational structure, policies, practices, programs, and data. Usually separate AAPs are required for each establishment. In appropriate circumstances, an establishment may include several facilities located at two or more sites if the facilities are in the same labor market or recruiting area.

In addition to the records an employer is required to compile and maintain to support the AAPs [41 CFR 60-1.12, 60-2.17(d), 60-300.80, and 60-741.80]; the employer should also keep materials evidencing its affirmative action efforts. This may include items such as copies of collective bargaining agreements and other documents that indicate employment policies and practices; copies of letters sent to suppliers and vendors stating the EEO/affirmative action policy; copies of letters sent to recruitment sources and community organizations; and copies of contract language incorporating the regulatory equal opportunity clauses 41 CFR 60-1.4, 60-300.5, and 60-741.5.

Executive Order 11246

[Sample AAP](#)

Section 503

[New Contractor/Transition Year AAP](#)

VEVRAA

[New Contractor/Transition Year AAP](#)



Resources

- [Affirmative Action: Internal AAP Checklist](#)
- [Affirmative Action: Sample](#)
- [Affirmative Action Program \(AAP\)](#)
- [Affirmative Action: Voluntary Self Identification Form](#)
- [Affirmative Action: Voluntary Self-Identification of Disability](#)

- [Applicant Flow Log II](#)
- [Applicant Flow Log AAP Compliant #2 \(using OFCCP categories\)](#)
- [Applicant Flow Log - EEO-1 Compliant #1 \(using EEO-1 categories\)](#)
- [Applicant Interview Log](#)
- [Applicant Tracking Log for Veteran Status](#)
- [Applicant Tracking Log for Veteran Status #2](#)

- [Utilization Analysis Availability](#)
- [Utilization Analysis Incumbents in Job Groups](#)

- [Workforce Analysis-](#)

SUMMARY


- EEO Enforcement
- Protected Class
- Title VII
- Steps





COBRA Compliance

2-3PM



The Consolidated Omnibus Budget Reconciliation Act (COBRA) gives workers and their families who lose their health benefits the right to choose to continue benefits provided by their group health plan for limited periods of time under certain circumstances. With changing rules, regulations and court cases, being COBRA compliant is extremely complex. This program covers the basics to advanced concepts, and will provide answers to your questions regarding COBRA administration and compliance.

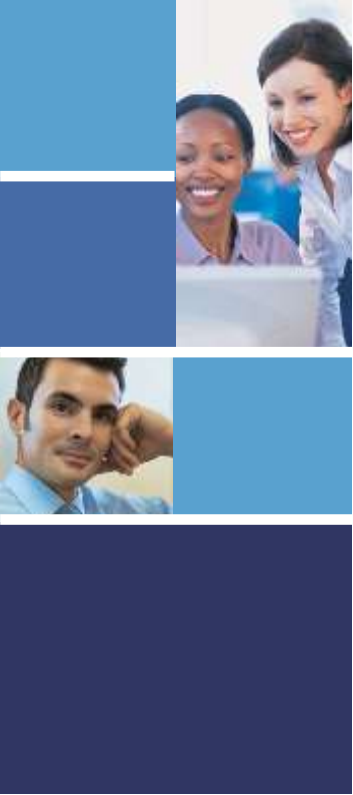
WHAT IS COBRA?

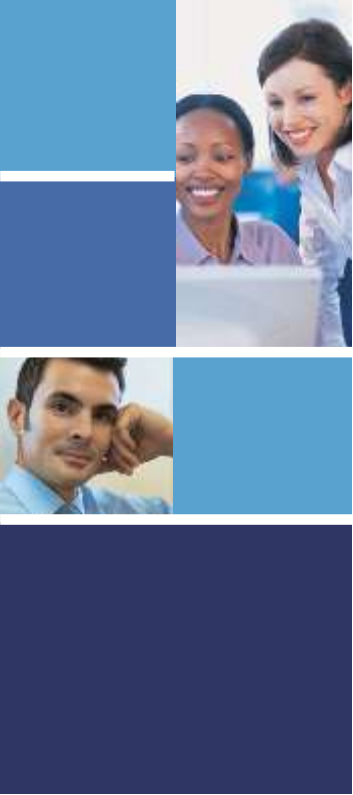
- Consolidated Omnibus Budget Reconciliation Act (COBRA).

- Passed by Congress in 1986.

Amends the Employment Retirement Income Security Act (ERISA), the Internal Revenue Code and the Public Health Service Act.

- Provides certain employees with health care continuation coverage.
- Applies to the private sector, state and local governments.
- Does not apply to the federal government and certain church-related organizations.





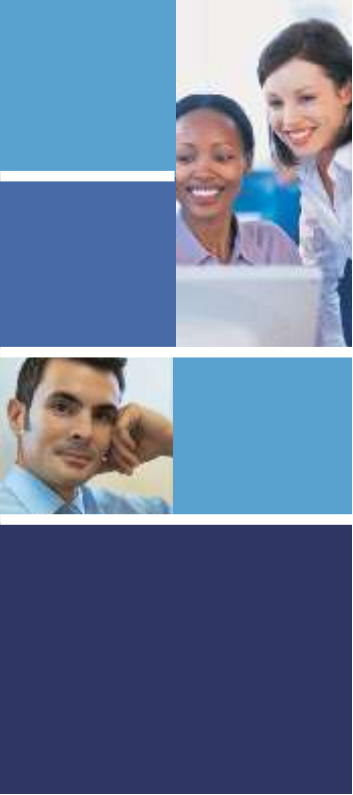
WHAT IS A COVERED EMPLOYER?

- **Group health plans with 20 or more employees on more than 50% of the working days in the previous year.**
 - “Employees” include all full-time and part-time employees when determining employer coverage.
 - “Employees” may also include the self-employed, independent contractors and corporate directors.
 - These individuals can be considered employees if their relationship to the employer allows them to be covered under the plan.

WHO IS A QUALIFIED BENEFICIARY?

- Any individual covered by a group health plan on the day before a “qualifying event.”
- May be the employee, the employee’s federally recognized spouse and dependent children, a retired employee, or the retired employee’s spouse or dependent children.



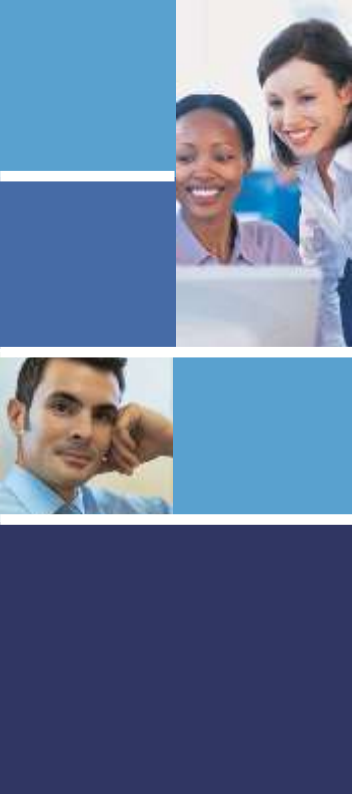


WHAT IS A QUALIFYING EVENT?

- Event that causes that causes an individual to lose health coverage.
- The type of event will determine how long the qualified beneficiaries will receive coverage.

QUALIFYING EVENTS FOR EMPLOYEES

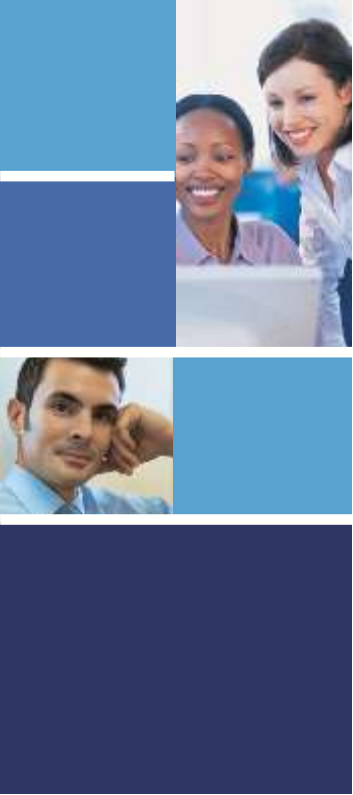
- Voluntary or involuntary termination for reasons other than “gross misconduct.”
- Reduction in the number of hours of employment such as strike, layoff or leave of absence.



DEFINITION OF “GROSS MISCONDUCT”

- **COBRA does not define “gross misconduct.”**
- **Courts have provided guidance:**
 - “The nature of the conduct itself is reasonably outrageous to the employer.”
 - “So outrageous that it shocks the conscience.”



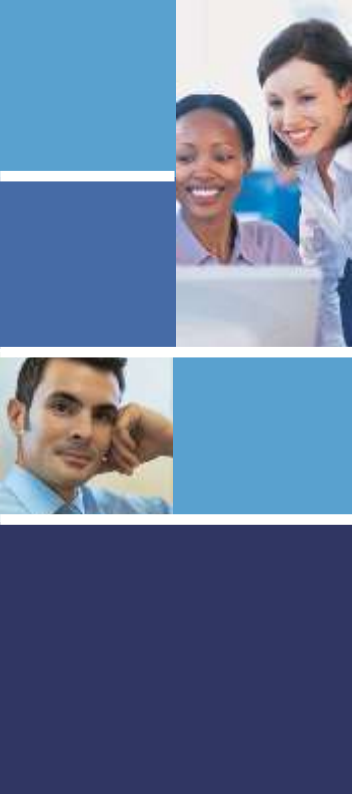


QUALIFYING EVENTS FOR SPOUSES

- Termination of employee for any reason other than “gross misconduct.”
- Reduction in hours worked by employee.
- Employee becomes entitled to Medicare and voluntarily chooses to cancel group coverage.

The employer cannot require cancellation of group coverage for a current employee.

- Divorce or legal separation of employee.
- Death of employee.

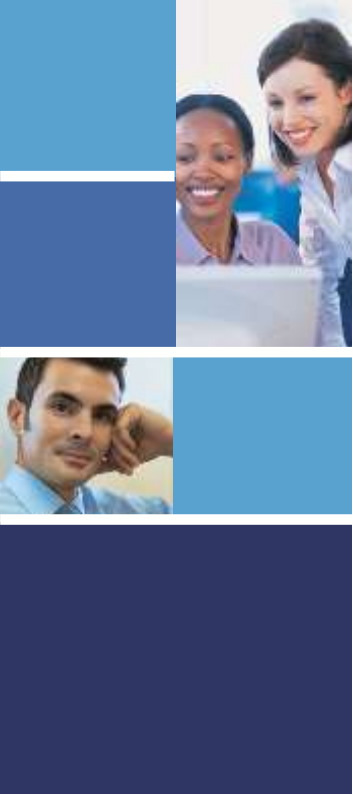


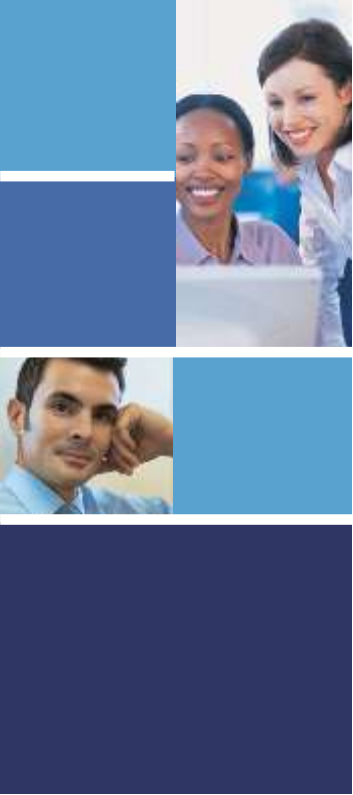
QUALIFYING EVENTS FOR DEPENDENT CHILDREN

- Termination of employee for any reason other than “gross misconduct.”
- Reduction in hours worked by employee.
- Employee becomes entitled to Medicare and voluntarily chooses to cancel group coverage.
 - The employer cannot require cancellation of group coverage for a current employee.
- Divorce or legal separation of employee.
- Death of employee.
- Loss of “dependent child” status under the plan rules.

WHEN EMPLOYER AND EMPLOYEE MUST NOTIFY PLAN

- Employers must notify the plan administrator **within 30 days after** an employee's death, termination, reduced hours or Medicare entitlement.
- Employees and qualified beneficiaries must notify the plan administrator **within 60 days after** a divorce or legal separation or after a child ceases to be a dependent under plan rules.
- Employees and qualified beneficiaries must notify the plan administrator **within 60 days after** a disability determination but before **expiration of 18 months** COBRA continuation.





DURATION OF COVERAGE

- **Termination of employment**
(Employee, spouse, dependent child) – 18 months
- **Reduction in hours**
(Employee, spouse, dependent child) – 18 months
- **Medicare entitlement of employee**
(spouse/dependent child) – 36 months
- **Divorce/legal separation**
(spouse/dependent child) – 36 months
- **Death of employee**
(spouse/dependent child) – 36 months
- **Loss of dependent child status**
(dependent child) – 36 months
- **Disabled under Title II or XVI of the Social Security Act**
Qualified disabled beneficiaries when disabled during the first 60 days of COBRA become eligible for an additional 11 months (in cases where the duration of coverage is 18 months)—therefore, a total of 29 months.

The slide features a vertical decorative strip on the left side. It contains two photographs: the top one shows two women smiling and looking at a laptop screen, and the bottom one shows a man in a light blue shirt resting his head on his hand. The background of the slide is white, with blue and dark blue rectangular accents on the left side.

NOTICE PROCEDURES

General Notice

- A **general notice** informing employees of their rights under COBRA and describing provisions of the law must be furnished to all employees who are eligible for group coverage.
- COBRA information is required to be in the summary plan description (SPD) supplied to all participants.
- The SPD must be furnished 90 days after a person becomes a participant or a beneficiary begins receiving benefits.
- Plans can satisfy general notice requirements by including in the plan's SPD and furnishing it to the employee and spouse within the 90-day time limit.



SPECIFIC NOTES

Election Notice

- Employers must notify plan administrators within 30 days after a qualifying event.
- The plan administrators must send an election notice to the employee or family member(s) within 14 days of receiving notice of the qualifying event.
- If the employer is also the plan administrator, the election notice must be sent to the employee within 44 days.

COBRA Notice of Unavailability

- Used when a plan determines the qualified beneficiaries are not entitled to COBRA coverage.
- The beneficiaries must be notified within 14 days of the plan administrator receiving notice of the event that caused the loss of the benefit.

Notice of Termination

- Used when COBRA coverage is terminated before the end of the 18-, 29- or 36-month period.
- This notice is to be provided “as soon as reasonably practicable” following the determination that coverage will terminate.



ELECTION OF COBRA

- Qualified beneficiaries have a 60-day period to elect coverage.
- The 60-day period is measured from the loss of coverage date or the date the election notice is sent, whichever is later.
- Coverage is retroactive to the date coverage was lost.
- An employee or an employee's spouse may elect COBRA on behalf of any other qualified beneficiary.
- Each qualified beneficiary, however, may independently elect COBRA coverage.
- Qualified beneficiaries may make the same changes to coverage as active employees during an open enrollment period.

PAYING FOR COBRA



- Beneficiaries may be required to pay the entire premium for coverage.
- The premium cannot exceed 102% of the cost to the plan (2% administrative fee).
- Premiums reflect the total cost of the coverage (employer and employee).
- The initial premium must be made within 45 days after the date of the COBRA election.
- Premiums for successive periods of coverage are due on the date stated in the plan document.
- For successive periods of coverage, there is a 30-day grace period for payment.
- The plan is not obligated to send monthly premium notices.



SUMMARY

- COBRA is a federal law enacted in 1985.
- The act requires covered employers with group health plans to offer health insurance continuation coverage to their covered employees, federally recognized spouses and dependents in certain situations when a loss of coverage occurs.
- Although covered employers must offer COBRA, they do not have to cover the cost associated with the coverage.
- Individuals who qualify for COBRA may be responsible for the entire cost of the continuation benefit premium as well as for an administration fee.



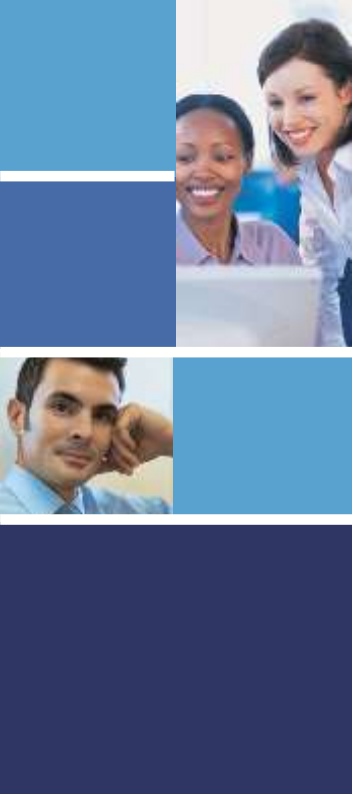
Common Errors to Avoid

FLSA



Common Errors to Avoid

- Assuming that all employees paid a salary are not due overtime
- Improperly applying an exemption
- Failing to pay for all hours an employee is “suffered or permitted” to work
- Limiting the number of hours employees are allowed to record
- Failing to include all pay required to be included in calculating the regular rate for overtime
- Failing to add all hours worked in separate establishments for the same employer when calculating overtime due
- Making improper deductions from wages that cut into the required minimum wage or overtime. Examples: shortages, drive-offs, damage, tools, and uniforms
- Treating an employee as an independent contractor
- Confusing Federal law and State law



The FLSA Does Not Require

- Vacation, holiday, severance, or sick pay
- Meal or rest periods, holidays off, or vacations
- Premium pay for weekend or holiday work
- A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
- Any limit on the number of hours in a day or days in a week an employee at least 16 years old may be required or scheduled to work
- Pay raises or fringe benefits



Enforcement

- FLSA enforcement is carried out by Wage and Hour staff throughout the U.S
- Where violations are found, Wage and Hour advises employers of the steps needed to correct violations, secures agreement to comply in the future and supervises voluntary payment of back wages as applicable
- A 2-year statute of limitations generally applies to the recovery of back pay. In the case of a willful violation, a 3-year statute of limitations may apply

In the event there is not a voluntary agreement to comply and/or pay back wages, the Wage and Hour Division may:

- Bring suit to obtain an injunction to restrain the employer from violating the FLSA, including the withholding of proper minimum wage and overtime
- Bring suit for back wages and an equal amount as liquidated damages



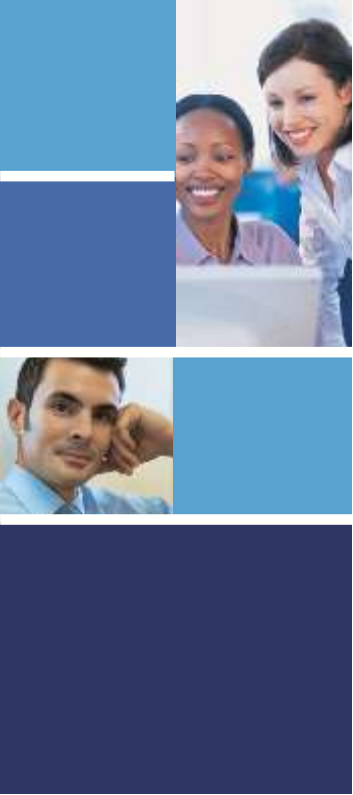
Employee Private Rights

An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs



Penalties

- Employers who willfully violate the Act may be prosecuted criminally and fined up to \$11,000
- Employers who violate the youth employment provisions are subject to a civil money penalty of up to \$11,000 for each employee who was the subject of a violation
- Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to \$1,100 for each such violation



“Suffer or Permit” Standard

- The FLSA definition of employ, which includes “to suffer or permit to work,” was specifically designed to broadly cover as many workers as possible.
- Most workers are employees under the FLSA.



The Problem: Misclassification

- A common problem arises where employers misclassify workers who are employees under the law as independent contractors.
- Studies suggest that 10 to 30 percent of employers may misclassify their employees as independent contractors.
- Workers misclassified as independent contractors are wrongfully denied access to important benefits and protections, such as:
 - Minimum wage and overtime pay
 - Workers' compensation
 - Family and medical leave
- Misclassified employees may still be eligible for unemployment insurance, but misclassification complicates their ability to collect these benefits.

Employee or Independent Contractor?

- There is no single test for determining whether a worker is an employee (like most workers) or an independent contractor under the FLSA.
- A worker is an employee if he or she is economically dependent on the employer, whereas a worker is an independent contractor if he or she is in business for himself or herself.
- The *economic reality* of the worker's relationship with the employer determines whether the worker is economically dependent on the employer (and therefore, an employee) or is in business for himself or herself (and therefore, an independent contractor).
- Courts generally apply a number of "economic realities" factors as guides when making the determination, but the factors applied can vary and no one set of factors is exclusive.



Caution!



Overarching Considerations

- No single “economic realities” factor determines whether a worker is an employee or an independent contractor.
- The six factors discussed in this presentation are not exclusive.
- Courts may consider additional factors that shed light on whether a worker is an employee or an independent contractor.
- The factors should not be applied as a checklist or scorecard.
- What matters is whether the totality of the circumstances indicates the worker is an employee or independent contractor.



“Economic Realities” Factors

We generally consider the following factors when determining if a worker is an employee or independent contractor:

1. Is the work an integral part of the employer’s business?
2. Does the worker’s managerial skill affect his or her opportunity for profit and loss?
3. Relative investments of the worker and the employer
4. The worker’s skill and initiative
5. The permanency of the worker’s relationship with the employer
6. Employer control of employment relationship



That's all for Today!

TOMORROW'S TRAINING BEGINS AT 10:00 A.M.