
The Evolving World of Employment Law Recent Changes and Developing Trends

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Important Notice

This presentation provides general information and updates regarding rights and obligations under state and federal law. These materials are not intended as legal advice.

Employers and their representatives should consult with their in-house counsel or an experienced employment attorney to determine whether they are in compliance with applicable state and federal law.



Where We Are

- An exciting and (and challenging) time for HR professionals
 - New administration in Washington
 - Has come out swinging on a number of HR fronts.
 - Changes on the Supreme Court
 - More conservative, but still some surprises.
 - Economic Challenges
 - RIFs are down, but efforts to protect employees will continue.
 - Increased scrutiny of employer actions.



Three Areas We Will Address

- Recent Statutory and Regulatory Changes
- Recent Judicial Decisions
- Employment Law Trends



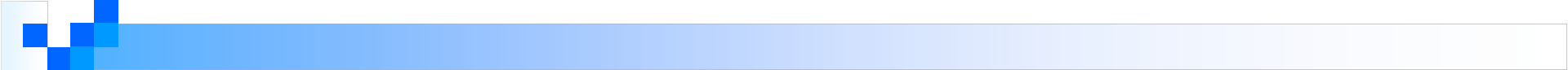
Recent Statutory and Regulatory Changes

■ The Federal Alphabet Soup


- ADAAA – Americans with Disabilities Act Amendment Act
- LLA – Lilly Ledbetter Act
- ARRA – American Recovery and Reinvestment Act of 2009
- FMLAR – Family and Medical Leave Act Regulations
- NDAA – National Defense Authorization Act
- PPACA – Patient Protection and Affordable Care Act
- GINA – Genetic Information Non-Discrimination Act

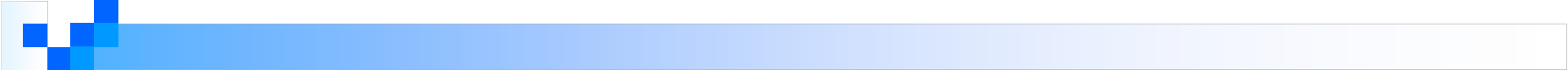


Recent State Law — The Highlights



Credit Checks —
Oregon (SB 1045)
Washington (RCW 19.182.020)


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- Oregon joins Washington in prohibiting employers from using an applicant's or employee's credit history when making employment decisions.
 - Exemptions include:
 - Federally insured banks and credit unions (Oregon only).
 - Employers that are required by law to use credit history for employment purposes (Oregon and Washington).
 - Employers of public safety officers (Oregon only).




When the use of such information is directly related to a *bona fide* occupational qualification, and when the information has a substantial relationship to the functions and responsibilities of the position (Oregon and Washington).

- Where the position involves access to and responsibility for business and personal financial information.
- Where the position involves check-writing authority.
- Where the position involves access to large amounts of cash.

■ Under both statutes written notice must be provided to the applicant or employee.



Paid Leave — Washington (RCW 49.86.005)

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- 2007 – Washington Legislature passed a bill requiring paid parental leave for employees to bond with a newborn or newly placed child (RCW 49.86.005).
 - Maximum benefit is \$250 per week for five weeks
 - 2010 – Washington Legislature delayed implementation to 2012 due to economy/budget constraints (ESB 6158).
 - But bills were also introduced in 2010 (HB 1609; SB 5679) to extend the payment requirement to serious health condition leave as well. It didn't pass.



Is Oregon Next?

- The 2009 Legislature introduced two bills (HB 3160 and SB 966) that would have established a “Family Leave Benefits Insurance Program.”
 - For parental leave and serious health condition leave.
 - Maximum benefit of \$300 per week for six weeks.
 - Funded by a \$.02 withholding from each hourly wage.
- Neither bill passed.



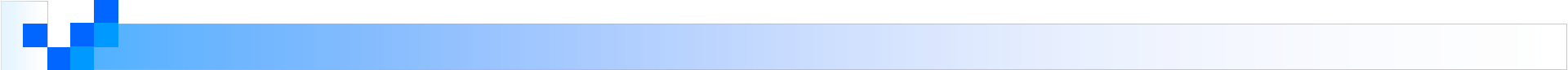
What Have the Feds Done?

■ H.R. 626: Federal Employees Paid Parental Leave Act


- Four weeks of paid "administrative leave," in addition to paid vacation and sick leave, for federal employees.
- Limited to parental leave.
- Passed the House; stuck in the Senate.

■ H.R. 1723: Family Leave Insurance Act

- Provides eligible employees with a specified percentage of their wage for 12 work weeks.
- Would apply to any employer with two or more employees.
- Any FMLA-qualifying leave would be covered.
- Financed by employee and employer contributions.
- Stuck in the House.




Whistleblowing — Oregon (ORS 659A.199)




Existing Law — Public Sector (ORS 659A.203)

- It is an unlawful employment practice for a public employer to prohibit employees from disclosing any information that the employee reasonably believes is evidence of:
 - A violation of any state or federal law, rule or regulation.
 - Mismanagement, gross waste of funds or abuse of authority.
 - A substantial and specific danger to public health and safety.
- Prohibits public employers from taking or threatening to take disciplinary action against an employee for disclosing such information.



Pre-2009 Law — Private Sector (ORS 659A.230 and ORS 659A.030(1)(f))

- Prohibited discrimination or retaliation against private sector employees who in good faith:
 - Reported criminal activity by any person;
 - Caused a criminal complaint to be filed against any person;
 - Cooperated with a law enforcement agency conducting a criminal investigation;
 - Filed a civil action against the employer;
 - Opposed an unlawful employment practice; or
 - Testified in a criminal or civil proceeding, or at an unemployment compensation hearing, or before the Legislature.



2009 Amendment to ORS 659A.230 — HB 3162

- Prohibits an employer from discriminating or retaliating against an employee who has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation.
- Effect: private sector employees will enjoy the same protections as public sector employees, and will receive protections for reporting safety, wage and hour and other possible violations.
- Open Questions
 - What does "good faith" mean?
 - To whom must the employee report?



Is Washington Next?


- Existing Law – Public Sector

(RCW 42.40.020 - .910)

- Prohibits reprisal or retaliation against a state employee who in good faith reports alleged improper governmental action or participates in an investigation, or who is perceived to have done so.

- Existing Law – Private Sector

- None. However . . .



HB 2186, introduced in 2010, would have prohibited employers from taking action against employees who have opposed, or who are believed to have opposed employer violations of "public policy."

■ Examples

Opposing unlawful actions by employers

Attending jury duty

Testifying in court

Reporting crimes or "misconduct" to regulatory agencies

Opposing unsafe workplace conditions

■ Conduct does not have to be work-related.

■ Employee must have a reasonable belief.

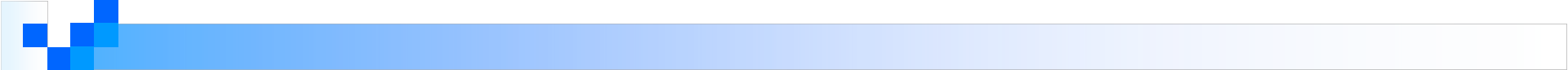
A related bill, SB 6725 would extend the protections to independent contractors.

Neither passed.



What Should You Do?

- Beware of the habitual Pot-Stirrer.
- Document all complaints (to identify potential whistleblower issues).
- Consider a policy requiring complaints about violations of the law to be directed to a specific person.



Mandatory Meetings — Oregon (ORS 659.780-.785)

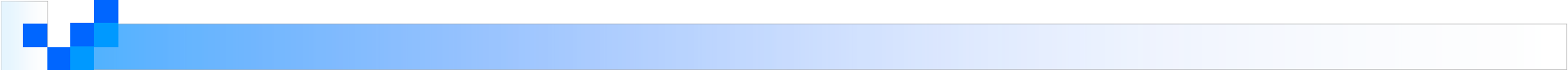


Federal Law

- National Labor Relations Act does not prohibit employers from requiring employees to attend meetings regarding unionization issues, so it is a relatively common practice.
 - Cannot be done within 24 hours of an election.
- Union supporters claimed they were a captive audience in those meetings—they could not refuse to attend out of fear they would be targeted for discipline.

ORS 659.780 -.785

- Prohibits an employer from requiring employees to attend meetings or engage in other communications with the employer involving the employer's opinions on political or religious matters.
 - Defines "religious matters" to include religious affiliation or the decision to join, not join, support or not support a bona fide religious organization.
 - Defines "political matters" to include:
 - " Political party affiliation, campaigns for legislation or candidates for political office and the decision to join, not join, support or not support any lawful political or 'constituent group' or activity."
 - "Constituent groups" include labor organizations.
 - Ergo: mandatory unionization meetings now prohibited.

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- Prohibits retaliation against employees who decline to attend those meetings or who report violations of this law.
 - Requires employers to post a notice apprising employees of their right not to attend meetings about unionization.
 - Employees must file civil lawsuits within 90 days.
 - Remedies include reinstatement, back pay, triple the amount of lost wages and attorney's fees.



Will it Survive?

- The NLRA preempts states from legislating industrial and labor relations matters.
- US Supreme Court struck down a similar California law.
- An Oregon federal court recently dismissed a lawsuit challenging the law based on lack of standing.
- In the meantime:
 - Meetings are not prohibited, they just cannot be mandatory.
 - Some employees want to know about unionization.
 - Informally educate managers and supervisors regarding union issues.



Is Washington Next?

- Several bills in the last session addressed the same issue (including unions); none passed.
- Those bills specified that employees have a First Amendment right not to attend meetings.



Family Leave Laws




Recent Changes to Oregon Regulations

- Same sex domestic partner – An individual joined in a domestic partnership that has received a Certificate of Registered Domestic Partnership from the State of Oregon.
- An employee who calls in sick with no further information will not be considered to have provided sufficient notice to trigger employer's OFLA obligations.
- When an employee fails to respond to a reasonable request for medical verification to determine whether leave qualifies for OFLA, the employer may deny OFLA leave until medical verification is received.



Family Military Leave



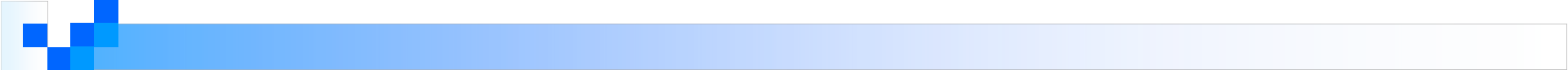
Oregon (ORS 659A.090-.099) Washington (RCW 49.77.010-.900)


- In 2008 FMLA was amended to include service member leave for qualifying exigencies and injured service members.
- Washington added a similar provision in 2008, and Oregon added a similar provision in 2009, but both states limited the leave to deployments.




Military Leave for Spouses

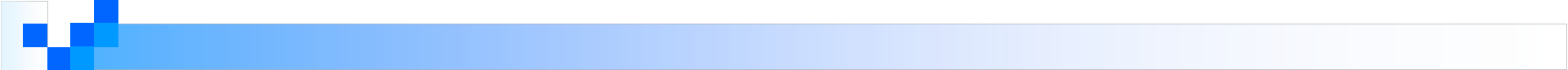
- What? During periods of military conflict, spouses of members of the Armed Forces, National Guard or military reserves are entitled to up to 14 days of unpaid leave for each deployment.
- When? The military leave must occur before the servicemember is deployed or when the servicemember is on leave from deployment.
- Paid? The spouse-employee may use paid leave.

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- Notice? The spouse-employee must provide notice of intent to take leave at least 5 business days of receiving notice of the qualifying event.
 - Who qualifies? In Washington, any employee who works an average of 20 hours or more per week. In Oregon, the Act covers any employee who works at least 20 hours per week for an employer with at least 25 employees for a minimum of 20 weeks per year.




Domestic Violence Leave –
Oregon (ORS 659A.270-.285)
Washington (RCW 49.76-010-.900)

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- In Oregon, it covers any employer with six or more employees; in Washington, it covers all employers.
 - In Oregon, employees must meet the OFLA eligibility requirements; in Washington, all employees are covered.
 - Both states provide "reasonable" leave to employees dealing with domestic violence situations.
 - Notice of leave and verification may be required.

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- Both states recently enacted rules addressing employer requirements.
 - Employers are required to maintain confidentiality of need for leave and details.
 - That restriction will implicate the employer's duty to maintain a safe workplace.



ADAAA

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- Recent changes to Oregon's regulations make Oregon's disability laws broader than ADAAA.
 - List of major life activities includes:
 - Drinking; twisting; cognitive functioning; education; remembering; socialization; sitting; reaching; interacting with others; sexual relations; and transportation.
 - Deleted the provision addressing temporary conditions.
 - Focus is supposed to be on nature of impairment rather than duration.

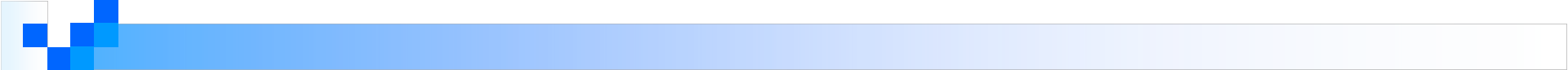


Religious Accommodations— Oregon (ORS 659A.033)



Prior Law

- Oregon law had been consistent with federal law, which provides that employees are entitled to practice their religion unless it is unduly burdensome.
- The standard of “unduly burdensome” in this context is fairly low.
- Washington follows the federal rule.



ORS 659A.033

- Scope of protection is expanded in two areas:
 - Leave
 - Wearing religious clothing
- Applies to employers with one or more employees.
- Must be affiliated with a *bona fide* religion.




Leave:

- Employers cannot restrict employee's use of vacation or other available leave to engage in religious practices unless it would impose an undue hardship on the employer's operations (applies only to unrestricted leave). Employees must be allowed to alter or adjust their work schedule/assignment.
- Employers cannot restrict employee's ability to take time off for a holy day or to participate in a religious practice if the activity has only a tangential or temporary impact on employee's ability to perform essential functions of the job.
- Reasonably accommodating the employee cannot impose an undue hardship on the employer's operation.



Clothing:

- Employers cannot restrict an employee's ability to wear religious clothing unless the reasonable accommodation imposes an undue hardship on employer's operations and the wearing of clothing has more than a tangential or temporary impact on employee's ability to perform his/her essential functions of the job.

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- A reasonable accommodation imposes an undue hardship if the accommodation requires significant difficulty or expense. Factors to consider:
 - Overall nature and cost of accommodation needed.
 - Overall financial resources of the facility involved in providing accommodations, the number of employees at the facility, and the effect on expenses and resources at the impacted facility.
 - Overall financial resources of the employer, the overall size of the employer's business, the number of employees, and the number and location of facilities.
 - Type of business operations conducted by the employer.
 - Safety and health requirements of the facility—including safety of employee, coworkers and others adversely affected by requested accommodation.




Recent Judicial Decisions



Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 129 S.Ct. 846 (2009)

- An employee who cooperates in an internal investigation under Title VII is protected from retaliation because answering an investigator's questions constitutes "opposition" to an unlawful practice.



Quon v. Arch Wireless Operating Co., Inc, 560 U.S. ____ (2010)

- Whether or not public employee had a right to privacy in sexually explicit text messages sent on government device, employer's search of device was reasonable because it was motivated by a legitimate work-related purpose.



Trends You Need to Prepare For



Social Networking/ Computer Use Policies

- According to a recent CareerBuilder survey:
 - Companies using social media to promote their business – 35%
 - Connecting with clients and finding new business – 25%
 - Recruiting and researching potential employees – 21%
 - Strengthening their brands – 13%



■ On the other side of the coin: Employees

- Facebook: 78 Million users in the U.S.; 300 Million users worldwide.
- MySpace: 67 Million users in the U.S.; 123 Million users worldwide.
- Twitter: 17 Million users in the U.S.
- LinkedIn: 11 Million users in the U.S.
- There are 200 Million blogs.
- Over 4 Billion text messages are sent every day.
- 50% of adults text during any given week.
- 54% of bloggers post or tweet daily.
- 30% of Facebook and LinkedIn users said they could "probably do without" the popular networks.
- 35% said they could live without MySpace.
- 43% could live without Twitter.

Source: Anderson Analytics



Best Practices




Pre-Employment Screening

- Exercise caution when using social media for pre-employment purposes.
 - Discrimination laws apply.
 - Privacy/ record retention issues.
- If you decide to use social media for recruiting/research purposes:
 - Create and enforce background use policy;
 - Apply policy consistently;
 - Separate reviewer and decision maker;
 - Consider authorizations.



During Employment



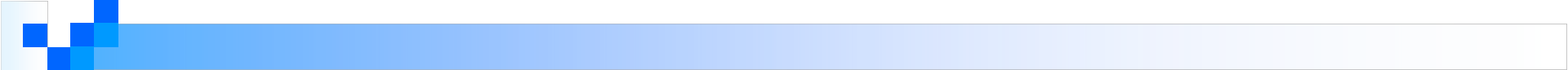
Implement a comprehensive policy to address appropriate/inappropriate uses.

- Absolute prohibitions are both unworkable and counterproductive.
- Instead, focus on acceptable/unacceptable uses and media.
 - Which media will your policy cover?
 - Will it address off-duty activities?
 - Can company resources be used to access social media?



- Adopt a written policy and disseminate it regularly.

- You own everything.
- Right to review and monitor all electronic transmissions.
- No expectation of privacy/expansive definition of company equipment.
- Prohibit personal use during work time/on company devices.
- Establish guidelines for business use.
- Require that all communications comply with other company policies (e.g. harassment, confidentiality).
- Forbid use of company name, logo, trademarks.
- Violations of policies or abuse of system will result in discipline.
- Obtain signed acknowledgment.



- Use caution when accessing employee accounts or groups.

- Pietrylo v. Hillstone Restaurant Group*

- Stengart v. Loving Care Agency, Inc.*



Post-Employment Restrictions

- Prohibit the provision of on-line references (e.g. the manager who provides a LinkedIn reference on behalf of a former employee).
 - The manager's statements are attributable to the company.
 - The company can be held liable for false or inaccurate information.
 - The manager's statements may be inconsistent with the company's formal position.



Train Your Managers

- The importance of taking your policy seriously.
- Their obligation to monitor use.
- Their obligation to report complaints and seek guidance when appropriate.
- Discipline them for failing to comply with their responsibilities.

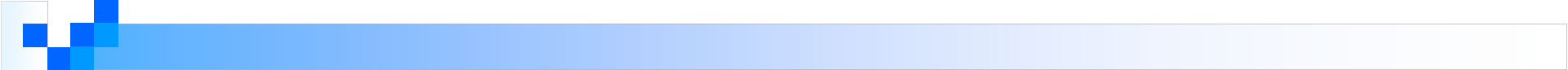


Family Responsibilities Discrimination

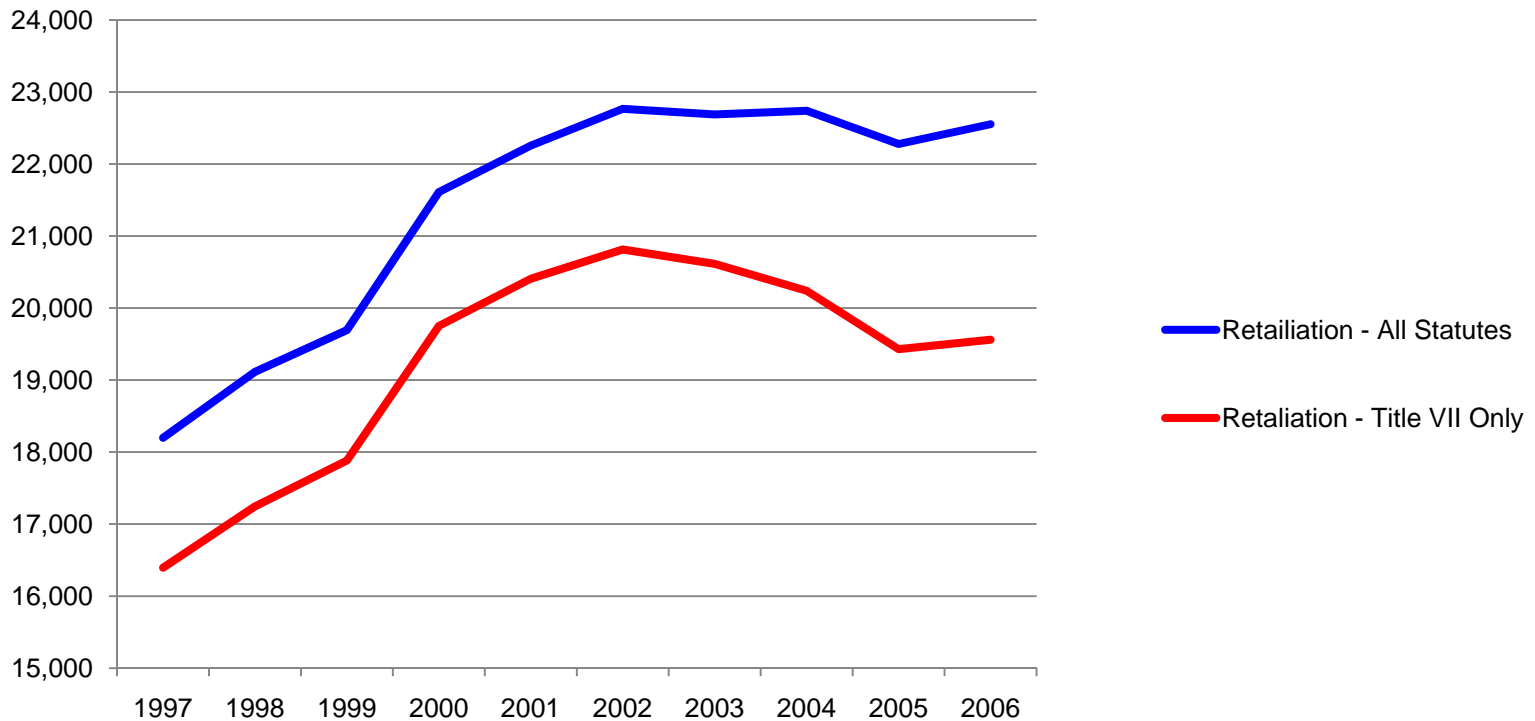
- Although many local governments prohibit discrimination against caregivers, only four states do so, and no federal law directly addresses the issue.
- However, in 2007, the EEOC issued a "Guidance" on discrimination against caregivers.
- Legal complaints increased nearly 400% from 1995 to 2005 (Source: Center for WorkLife Law).
- Courts are beginning to find ways to protect those who are burdened with caregiving responsibilities.
 - *Chadwick v. WellPoint, Inc.*, (1st Cir 2009)
- Employers need to train their managers to avoid the pitfalls of caregiving discrimination.
- Employers may not make employment decisions based on caregiving assumptions.




Retaliation and Whistleblower Claims

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- Oregon, Washington and other states are expanding whistleblower protections.
 - The BP/Deepwater Horizon disaster, the Enron fiasco and other corporate misdeeds will fuel the whistleblower fire.
 - Retaliation claims are some of the easiest employment claims to prove:
 - a. Employee engaged in protected activity;
 - b. Employee suffered an adverse employment action;
 - c. There is a causal connection between a. and b.

Retaliation claims are the fastest growing category of claims before the EEOC



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- What you can do to help minimize risk:
 - Adopt appropriate policies.
 - Train your managers so they understand how to recognize workplace complaints and what retaliation looks like.
 - Train your employees to follow your complaint process.
 - Develop a legitimate, centralized complaint-and-review function using the highest levels of HR.
 - Adopt a comprehensive performance management process that includes feedback.



A More Aggressive EEOC



The "Old" EEOC

- Lost 23% of its workforce between 2001 – 2009.
- A 2009 survey of EEOC employees found that 59% considered morale within the agency to be at the lowest possible level.
- The union representing EEOC workers gave the agency an "F" rating in 2008.
- In 2009 a federal arbitrator found that the agency had been violating the FLSA by failing to pay its employees overtime compensation.
- Early this year a judge required the EEOC to pay \$4.5 Million in attorney's fees to a trucking company after concluding that the EEOC had acted hastily in filing charges, and had not conducted a reasonable investigation.





The "New" EEOC

- In 2010 the EEOC requested and received a \$23.4 Million budget increase – the largest increase since 1999.
- It hired 155 new employees in 2009 and plans to hire an additional 100 investigators through 2011.
- It has pledged to conduct more thorough and expedient investigations.
- What it means for you:
 - More investigations, and more "cause" determinations;
 - Aggressive requests for documents and other information;
 - More on-site visits by investigators; and
 - Higher costs.




Wage and Hour Violations


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- According to the U.S. Department of Labor, seven of 10 employers are out of compliance with wage and hour laws.
 - Between 2003 and 2006, FLSA complaints filed in federal court doubled. In 2007 complaints increased nearly 60%.
 - In 2008 the DOL collected \$9.9 Million in civil penalties and \$140 Million in back wages.
 - Average class action settlements have reached \$23.5 Million under the FLSA, and \$24.4 Million under state wage-and-hour laws.
 - Congress calls it "wage theft;" Plaintiff's attorneys call it a slam dunk.

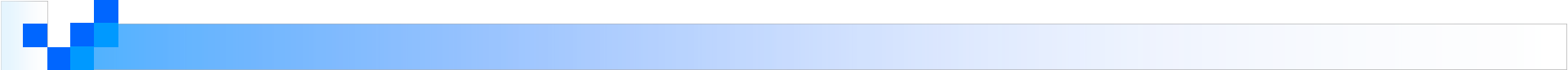
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- The Department of Labor has made wage and hour enforcement a priority, and expanded the types of industries it will target.
 - Initiated the "We Can Help" Campaign.
 - Hired hundreds of additional field investigators
 - Increased its budget.
 - Focus is on meal period violations; donning and doffing; travel time.
 - Misclassifications of exempt/non-exempt employees.



Employee/Independent Contractor Classifications

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- The tighter economy has forced employers to cut personnel expenses.
 - We have a more labor-oriented administration.
 - Governments are looking for new revenue sources.
 - According to the Department of Labor, "tens of thousands" of employers misclassify employees as independent contractors.
 - Multi-Agency Exposure
 - DOL
 - IRS
 - BOLI
 - WCD
 - ORD
 - OED

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- The IRS recently announced that it will randomly audit 6,000 businesses for employee misclassifications.
 - Claims that it loses \$39 Billion each year as a result of underpayments by misclassified workers.
 - President Obama has directed the IRS and DOL to create a joint enforcement taskforce with 100 investigators to target non-complying employers.
 - Oregon recently developed an interagency task force to share misclassification information, creating a domino effect.



- Plaintiff's attorneys are filing and winning class action lawsuits:

- UPS – \$12.8 Million settlement

- FedEx – \$26.8 Million settlement

- Baby Trend, Inc. – \$8.4 Million jury verdict

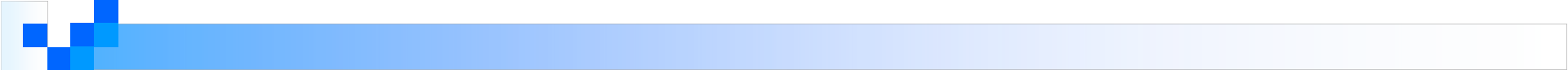


■ Employee Misclassification Prevention Act (H.R. 6111; S.B. 3648)

- Amends the FLSA to specifically prohibit the misclassification of employees.
- Imposes additional record-keeping burdens on employers.
 - Providing written notice to employees of their exempt/non-exempt status.
 - Requiring "employment-type" records for independent contractors.
 - \$5,000 fine for each violation, plus triple damages for willful violations.

■ Taxpayer Responsibility, Accountability and Consistency Act (H.R. 3408; SB 2882)

- Would eliminate a long-standing loophole that permitted employers to treat workers as contractors if they are customarily treated that way in the industry.

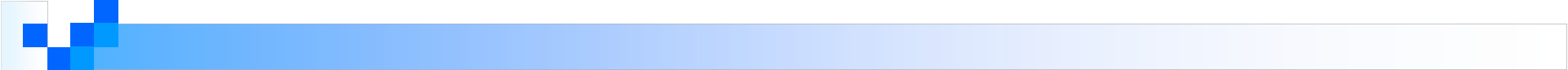


Employers need to take wage
and hour compliance as
seriously as they do harassment
and other "headline" HR issues.



Best Practices

- Conduct a comprehensive audit of existing wage and hour policies and practices.
 - Assume employees are entitled to overtime, and justify the exemption objectively.
 - Analyze the duties test for white collar exempt employees;
 - Review industry-specific exemptions carefully;
 - Comply with "salary basis" requirements.
 - For independent contractors, focus on control, and consider legal review.
 - Use written independent contractor agreements.

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- Train managers and HR regarding timekeeping, documentation and work requirements.
 - Verify compliance practices and keep required records.
 - If you're in trouble, negotiate – most state and federal agencies will forego penalties to encourage compliance.

Questions?



Thank you!