Georgia Human Resources Manual

A Guide to Georgia and Federal Employment Laws and Regulations

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This publication is an attempt to summarize certain legal principles in the field of employment-related and labor laws and regulations, but should not be considered legal advice. Varying factual circumstances may require special consideration. Should you have any questions, you should contact legal counsel for advice related to specific topics and circumstances.

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This book, and the entire Human Resources Library, is dedicated to Dick Apland, who spoke his piece, shared a piece and was at peace. Thanks Dad.

The Georgia Chamber of Commerce

The Georgia Chamber of Commerce, one of the nation's oldest and largest state business organizations, is pleased to present the 2010 edition of **Georgia Human Resources Manual**. We hope it will help you operate your business more efficiently and avoid the hidden pitfalls that lurk among the maze known as HR.

Targeted, timely and comprehensive, this manual is considered the cornerstone guide of the compliance library. It covers more than thirty primary topics directly related to the employment process, from job descriptions through termination and beyond. Each includes practical advice on what should be done, solid advice on how to do it and a complete explanation of why it is important.

This updated and revised edition of the **Georgia Human Resources Manual** was not written as a response to employee-related problems, but to help you avoid them. The guidelines and checklists will make that easier and the examples, FAQ's and step–by-step instructions will give you the confidence to know that you are on solid ground.

This manual is part of a series of publications prepared exclusively for Georgia employers and made available by the Georgia Chamber of Commerce in a continuing effort to provide reliable and practical information for our members and the Georgia business community.

If you would like to know more about the Georgia Chamber of Commerce, we would welcome your call at 404-223-2264 or a visit to our web site at www.gachamber.com.

About Troutman Sanders LLP

Troutman Sanders LLP, founded in 1897, is an Atlanta-based international law firm with more than 750 attorneys serving clients from 15 offices in North America, Europe and Asia. With over 50 areas of legal practice, the full-service firm offers a broad array of practice areas including corporate, finance, real estate, litigation and public law.

The Troutman Sanders LLP Labor & Employment Practice Group consists of 45 attorneys located in the Firm's Atlanta, Chicago, New York, Norfolk, Orange County, Richmond, San Diego, Virginia Beach, and Washington, D.C. offices. The Labor and Employment Group provides clients with comprehensive advice and counsel in all areas of labor and employment law, including litigation, human resources consulting, and training, as well as business immigration law and traditional labor law. Likewise, the Compensation and Employee Benefits Practice Group at Troutman Sanders LLP provides legal and consulting advice on the full spectrum of federal laws impacting employee benefit plans, compensation, and privacy issues. Together, the Labor and Employment Group and Compensation and Employee Benefits Group represent numerous Fortune 500 companies across a wide variety of industries.

About the Editor

Seth T. Ford is a partner in the Atlanta office of Troutman Sanders LLP. Mr. Ford regularly advises clients on a host of labor and employment law matters under both state and federal law, including claims of all types of harassment and discrimination, employment contract and non-compete disputes, reductions in force and issues arising under disabilities laws and the Family Medical Leave Act. Mr. Ford provides advice on day-to-day issues confronted by management and has extensive experience in trial and appellate courts and before arbitration panels in traditional labor disputes. He is licensed in Georgia, Texas and Arkansas and has successfully litigated labor and employment matters in over a dozen states and throughout the Southeast.

Editor's Foreword

The landscape of labor and employment law is ever-changing and Georgia employers are consistently forced to re-evaluate their policies to keep them current. Recent passage of new laws prohibiting discrimination against employees based on their genetics and additional protections to employees on military leave are only a few of the developments which have lately forced Georgia employers to re-evaluate their policies, and more are sure to come. An up-to-date, comprehensive legal reference is therefore essential for every employer and human resources professional.

This book is intended to serve as such a reference. It affords an overview of all major labor and employment laws which impact the Georgia employer's workplace. Of course, no text can precisely contemplate all of the legal consequences which should be considered by a particular employer, and these pages are no substitute for consulting your legal counsel in evaluating the effect of the law upon a particular issue. I hope, however, that this reference will be your first step in considering most any legal issue important in the employment arena.

A remarkable collaborative effort produced this book. I wish to sincerely thank the following attorneys from the offices of Troutman Sanders for their substantial contributions: Matthew Almand, Chad Almy, Caroline Anderson, Tina DeNapoli, Laura McAlister, Kristina Klein, Jana Korhonen, and Tashwanda Pinchback. Thanks also to Shannon Monson and Hanna Ernst of American Chamber of Commerce Resources for their patient and expert assistance.

I welcome your questions or comments about the material presented in this publication. Please contact me at seth.ford@troutmansanders.com.

Seth T. Ford
Atlanta, Georgia
April 18, 2010

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Introduction

Features of the HR Library

Employment laws are modified every year and staying up to date on all the changes can be a full-time job – and is, for human resources professionals and employers. For the experienced attorneys who write our books, this manual is a way to help businesses stay on the right side of employment law, minimize the risk of litigation, and avoid costly penalties. This reference has been organized to fit your needs and outfitted with numerous features to help you make sure your policies and business practices are in compliance with the law.

- **The snapshot and compliance threshold**
  To start the book off with a bang, we've gathered a list of questions (provided in Chapter 1) that will create a snapshot for you to use in determining whether or not you are complying with fundamental employment laws. If you do not know an answer to one of the questions, a page reference is provided so you can quickly find what you need to know and what you need to do. Chapter 2 is formatted to help you determine what you are responsible for depending on the number of employees you have and lists prevalent employment laws, their compliance thresholds, and where they are discussed in this manual.

- **The visual aids**
  To make this book a more functional resource, we've displayed lots of the subject matter in lists, tables, and charts. Don't miss:

  - the **Title VII vs. Section 1981** chart on page 193

    or

  - the **Guidelines** at the end of Chapter 14, **Privacy and monitoring**

    or

  - the table of **What you can and cannot ask** in an interview setting on page 11.

  And look out for:

  - sample forms on subjects ranging from hiring (page 30) to health care (page 378)

    and

  - a flowchart on page 314 to help you decide, **Is an injury recordable?**

- **The content**
  While we've worked to make this book as effective as possible – providing efficient ways to find specific content without expecting busy employers to sit down and read the text straight through – we want every chapter to be readable and uncomplicated, letting you know what to do, how to do it, and a little bit of why. In case you don't have time to read the whole book, here are some current hot topics we'd like to highlight:

  - Based on the recent passing of the Health Care Reform Act, Chapter 27. **Benefits**, has been expanded to help you understand the new laws impacting your health care plans.

  - There have been significant changes to the Family and Medical Leave Act (FMLA) this year, most importantly perhaps are the updates to military leave. To see the changes, check out Chapter 24, **Military leave**.

- **The connections**
  As there is a lot of information in this book that requires interaction with different professional parties, contact information – including websites, e-mail addresses, phone numbers, and fax numbers for many government departments and local organizations – is spread throughout the book. In-text mentions of external sources are followed by links to make it easier for you to apply our text to your own business. To continue the dialogue, look out for sections entitled, **Where to go for more information**, like on page 272. Think of it as the most detailed address book you've ever owned!

- **The appendices**
  We've tried to make every page of this manual useful, not just the beginning; so don't dismiss the appendices. At the end of the book there are a number of valuable resources for your use. The topics include recordkeeping and posting requirements, both complete with federal and state constraints. Find the exact information you need, compiled and at hand, ready for your use.

- **The digital download**
  Once you pay for the book, ACCR will e-mail you a link where you can download the book as a PDF. When you have the digital file saved to your desktop, you will be able to execute a search within the document so you can find the information you need without ever turning a page. Simply open the document, access the horizontal menu at the top of the page, click on "Edit," pull down to "Find," enter in a keyword, and start reading!

So relax – from hiring to firing, this manual will be your personal guide to managing your personnel and decreasing your company's liability under the law. Be confident that you are running a legitimate, functional business with your employment lawyer sitting on your bookshelf!

Chapter 1

Snapshot

The following list of questions will provide a snapshot of the more critical topics covered in this book. You can use this checklist to quickly determine whether you are complying with fundamental employment laws and regulations. You should know the answer to every one of these questions. Although a "No" answer does not necessarily mean you are in violation of any laws or regulations, you should understand why the answer is "No." The page number is provided for quick reference.

Yes	No		Page reference
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Chapter 2

Compliance thresholds

The following list does not include all federal and Georgia employment laws, but it does provide a snapshot view of how many employees an employer must have to be covered by these most significant laws. Remember, however, that coverage for some of the laws also depends on requirements other than the number of employees. If the number places your business on the borderline, consult further in the book for an explanation of additional requirements.

Minimum Employees	Law	Notes Regarding Applicability	Applicable Chapter
1	Employee Polygraph Protection Act (EPPA)	Very restricted use	**Recruiting and hiring** 3
1	Fair Labor Standards Act (FLSA) (includes child labor)	Applies to "enterprises" with related operations performed for a common business purpose	**Wages and hours** 9
1	Uniformed Services Employment and Reemployment Rights Act (USERRA)	Applies to all businesses, regardless of size	**Military leave** 24
1	Occupational Safety and Health Act (OSH Act)	Broad coverage includes nearly all private-sector employers	**Workplace safety and health** 25
1	Federal New Hire Reporting Requirements	The law does not currently provide a minimum number of employees for coverage	**Recruiting and hiring** 3
1	Laws relating to unemployment compensation	Applies to all employers doing business in Georgia	**Unemployment insurance** 29
2	Equal Pay Act	State and Federal statutes in place	**Wages and hours** 9
2	Health Insurance Portability and Accountability Act (HIPAA)	Employers usually not covered by HIPAA unless they operate any sort of health care facility	**HIPAA** 31

Minimum Employees	Law	Notes Regarding Applicability	Applicable Chapter
3	Georgia Workers' Compensation Law	Encompasses individuals, small businesses, corporations, and government bodies. Equally applicable to non-profit organizations.	**Workers' compensation** 28
15	Title VII of the Civil Rights Act of 1964	Applies to public and private employers	**Discrimination in employment** 17
15	Americans with Disabilities Act (ADA)	Applies to private employers	**Disabilities and reasonable accommodation** 19
20	Age Discrimination in Employment Act (ADEA)	Applies to public and private employers	**Discrimination in employment** 17
20	Consolidated Omnibus Budget Reconciliation Act (COBRA)	Applies to most employers	**Health care continuation** 30
50	Family and Medical Leave Act (FMLA)	Applies to public and private employers	**Family and medical leave** 23
100	Worker Adjustment and Retraining Notification Act (WARN)	Applies to any private for-profit and not-for-profit business enterprise	**Plant closings and mass layoffs** 22

Chapter 3

Recruiting and hiring

The hiring process, from the initial decision to hire through the selection process and the final decision of who to hire, can be one of the most important processes in building your workforce and, ultimately, a successful business. However, the numerous potential legal pitfalls that exist make the hiring process one of the most sensitive and potentially dangerous areas of the employer-employee relationship.

Recruiting tools

There are a number of avenues available for recruiting applicants for a job position, including:

- internal job postings
- employee referral programs
- advertisements
- the use of professional employment and temporary employment agencies
- recruitment programs at educational institutions and community organizations
- employment-search web sites.

Regardless of whether a company utilizes internal or external methods of attracting potential candidates, any job postings or advertisements designed to attract candidates should be carefully drafted to avoid any indication of discrimination. Postings and advertisements that are not crafted carefully may give rise to claims of discrimination, even unintentionally, if they refer to:

- race
- sex
- religion
- national origin
- age
- disability.

For instance, a posting or advertisement seeking "recent college graduates" or "young and energetic" people likely would be found to have a discriminatory effect against older persons. Similarly, language in a posting or advertisement that specifies a physical ability required for the job, such as a lifting requirement or language proficiency, may be found to discriminate against disabled persons or cultural groups.

Therefore, when crafting a posting or advertisement, an employer should clearly and briefly describe the position and any qualifications for the position without making reference to attributes that are usually associated with one race, gender, etc. It is also a good idea to include a statement that the employer is an "Equal Opportunity Employer."

Job descriptions

Once the need for new employees is established, one of the most important aspects of screening and selecting a new employee is to develop a job description that clearly defines the fundamental requirements and functions of the position. In addition to the obvious function of identifying the employer's hiring needs, the job description performs an important legal function by providing an objective standard by which a prospective employee's qualifications can be measured. A prospective employee who does not meet the standard typically does not have a basis for a claim of unlawful discrimination. For this reason, the job description may become an important document in the event of a dispute between the employer and the employee and should be maintained in the permanent employment record.

Employment applications

Neither federal law nor Georgia law requires an employer to use an employment application. However, the law requires employers to maintain certain information about their employees and an employment application is an efficient way of gathering and maintaining some of this necessary information. The employment application is also a good starting point for finding the most qualified candidates for the job position.

Whether the employer uses an application or some other means of collecting information about prospective employees, an employer must seek only information that is required for the position or positions for which the individual is applying.

What you can ask

Generally, an employment application should contain the following information:

- name
- address and telephone number
- Social Security number
- whether the applicant is over the age of 18 (While Georgia law requires that employers report employees' dates of birth, it does not require employers to

report the birth dates of applicants. Thus, questions regarding an employee's actual age should be avoided during the hiring process because it is against federal law to discriminate against persons over the age of 40.)

- date of hire
- position sought and availability
- past employment history
- references
- name of immediate supervisors
- reasons for leaving prior positions
- educational history.

An employer may also want to know whether the applicant has any criminal convictions. In order to avoid disparate impact claims, employers should generally base hiring decisions on whether a conviction is relevant to the job duties at issue. However, there is no law in Georgia prohibiting an employer from making this inquiry. In fact, Georgia employers are allowed to conduct criminal background checks, and some employers, such as nursing homes and day cares, are required by law to conduct the check.

If an employer chooses to use an employment application, the employer must ask the applicant whether or not he or she is legally eligible for employment in the United States. Additionally, an employment application should indicate that it is not an offer of employment or contract, and that, if hired, the employment will be "at-will" subjecting the employee to termination at any time for any reason. Employers should also include a statement on the application that the employer is an Equal Opportunity Employer and will not unlawfully discriminate against anyone.

A proper Equal Opportunity statement includes language such as:

> It is the Company's policy to provide equal opportunity for all applicants and employees without regard to race, color, religion, sex (including pregnancy), national origin, ancestry, age, disability, marital status or any other basis protected by federal, state or local laws. Any form of discrimination or harassment related to these factors is expressly prohibited. This policy applies to all terms and conditions of employment, including, but not limited to, hiring, placement, transfer, promotion, termination, layoff, leaves of absence, compensation and training.

What you cannot ask

There is some information that an employer should avoid asking on an employment application or through any other means of communicating with a prospective employee. The following topics should be avoided because inquiries on these topics could lead to a claim of discrimination by a prospective employee:

- marital status
- sex
- parenthood
- citizenship
- days available to work (Georgia law requires employers that operate on Saturday or Sunday to accommodate employees' religious beliefs so they may enjoy the same benefits as employees in other occupations)
- economic status
- physical or mental limitations in other occupations.

Interview

The interview is an extremely important part of the recruiting and hiring process because it enables an employer to convey important information about its operations and to learn valuable, first-hand information regarding an applicant for employment. However, to avoid potential discrimination claims, it is crucial that an employer understand what types of questions should and should not be asked during an interview. In light of the beneficial information that can be obtained about an applicant during a properly conducted interview, as well as the potential legal claims that can result from an improperly conducted interview, employers should, where possible, centralize the interviewing function to individuals trained to conduct an effective and appropriate interview, such as a human resources professional. Employers who do not have the luxury of centralizing interview responsibilities to a full-time human resources professional and other high-level officials should train employees who interview applicants about the kinds of inquiries that are proper, as well as those that are not permissible in an interview setting. Employers may even consider developing a checklist of permissible inquiries to distribute to interviewers. See pages 11-19, **What you can and cannot ask**, for a list of proper and improper employment inquiries.

Conducting the interview

An interviewer should focus on questions that are related to the applicant's skills, qualifications, employment history, and ability to perform the requirements of the job in question. To conduct an effective interview, the interviewer must be familiar with the relevant job description, essential job functions, company policies, the application, and

the applicant's resume and references. By reviewing such documents and information prior to the interview, the interviewer can be sure to ask specific and focused questions designed to obtain information necessary to determine if the applicant is a good fit for the position.

Interview notes

During the interview, the interviewer should feel free to take notes regarding the applicant's qualifications and responses to questions. Employers may make notes about an applicant's general appearance (that is, professional or unprofessional), interpersonal communication skills, attitude, and other subjective factors concerning the applicant's ability to perform the job in question. However, employers should be careful about the type of notes they write down concerning an applicant because such notes likely will be subject to disclosure in any later lawsuit or charge of discrimination. Notes relating directly or indirectly to an applicant's specific age, race, gender, marital status, disability, religion, or other protected status category are unlawful and must be avoided. Only factors relevant to an applicant's ability to perform the job may be considered and/or recorded during the hiring process.

What you can and cannot ask

Below is a table with some sample questions in sensitive areas which may be protected under federal or state law. Both improper and proper forms of the questions are provided.

Subject	Proper	Improper
Address or duration of residence	Applicant's place of residence. How long have you been a resident of this city or Georgia? How long do you intend to stay in Georgia?	Questions on this topic are proper.
Age	Are you at least 18 years of age or older? If not, how old are you? How many years of experience do you have in this field? Dates of education and employment can be asked if used for verification of information given, but it is good practice not to	How old are you? What is your date of birth? What are the ages of your children? How old is your spouse? Questions which tend to identify applicants over age 40. Questions asked for the purpose of determining age (date of completion of high school or college).

Subject	Proper	Improper
	ask the date of graduation or completion of high school or college unless necessary.	
Arrest/ criminal record	Have you ever been **convicted** of a crime? Please give the details of your conviction. Questions designed to determine if the **conviction** relates to a trait necessary to perform the job. Have you ever pled guilty or no contest? Have you ever been placed on probation? (Don't overlook these related issues; however, in Georgia, employers are prohibited from disqualifying an applicant whose criminal record has been cleared after serving a term of probation or under Georgia's First Offender statute unless they would be working with minor children, in a nursing home, or with people who are mentally ill or mentally retarded.)	Have you ever been **arrested?** (Any questions concerning **arrests** instead of **convictions.**)
Birth date	Are you at least 18 years of age or older? If not, how old are you?	Applicants should not be required to produce proof of age in form of birth certificate or baptismal record. This information can be requested after hiring for reasons such as insurance.

Subject	Proper	Improper
Birth place	In what other cities, states and nations have you lived? Can you, after employment, submit verification of your legal right to work in the U.S.?	Birth place of applicant or applicant's family is improper if designed to determine national origin of applicant.
Bonding	Statement that bonding is a condition of hire.	Questions regarding refusal or cancellation of bonding.
Child care	If required for job: Is there any reason why you cannot work nights or weekends? On occasion overtime work is required, is there any reason why you would not be available?	Who cares for your children? What are the ages of your children? Who will care for your children if they get sick?
Citizenship	Are you authorized to work in the United States? If you are not a U.S. citizen, do you have permission to live and work in the U.S.?	Are you a naturalized or native born citizen? What date did you acquire citizenship? Are your family naturalized or native born citizens? On what date did your parents acquire citizenship?

Subject	Proper	Improper
Disability/ handicap/ physical condition	The Americans with Disabilities Act allows pre-employment inquiries concerning the ability of an applicant to perform job-related functions. Applicants can be asked to describe or demonstrate how they can perform specific job functions or duties (although it is good practice to ask these questions of all applicants). If the applicant has an obvious disability or voluntarily discloses the disability, an employer may ask about whether the applicant will need a reasonable accommodation and what type of accommodation would be needed. All pre-employment medical examinations and inquiries are prohibited with the exception of a conditional post-job offer medical history or examination that is subject to certain requirements. An employer can also ask about the lawful medications the applicant is taking pursuant to a drug test.	Most public and private Georgia businesses are prohibited by the Americans with Disabilities Act from inquiring of an applicant whether he/she has any physical or mental impairment or asking other questions that are designed to elicit information about a disability; Do you have a disability? Are you handicapped? Do you think a handicapped person could do this job? What medications are you taking? Why are you in a wheelchair? Will you need an accommodation to perform this job (unless the applicant has an obvious disability or voluntarily discloses the disability)? Have you ever filed a workers' compensation claim?

Subject	Proper	Improper
Driver's license	(If related to the job) Do you possess a valid Georgia driver's license (or driver's license for the state in which the employee will work)? Do you possess a chauffeur license?	Unless there is a job-related reason, applicants should not be required to produce a valid driver's license for other than identity purposes.
Economic status	If job related, a statement that credit checks are performed on all applicants, for certain positions.	Questions regarding applicant's current or past arrests, liabilities, credit rating, bankruptcies or garnishments.
Education	All inquiries into the applicant's academic, vocational or educational background, public or private schools, are permissible. Inquiries into grades received, completion of course of study and requirement of transcript are proper if education or training is job-related.	Isn't that a girl's school? What year did you graduate from high school or college (unless relevant to the job or necessary for verification purposes)?
Height or weight	Height, weight and other physical questions can be asked after hiring for business reasons such as insurance.	Questions concerning height or weight of applicant should not be asked, unless job related and proven as a factor relevant to applicant's ability to perform job.
Language	Inquiries into languages applicant speaks or writes fluently. If required for the job, applicant can be asked if he/she speaks and/or writes English.	What is your native language? Inquiries into how applicant acquired ability to read, write or speak a foreign language. What is your native tongue?

Subject	Proper	Improper
Marital status	Where does your spouse work? What is his/her position?	Are you married? Do you wish to be addressed as Miss? Mrs.? Ms.? Are you single? Divorced? Separated?
Military experience	Inquiries into applicant's military experience in the U.S. Armed Forces or National Guard. Inquiries into applicant's service and particular branch of military. What type of discharge did you receive (if relevant to job requirements)?	Type of military discharge should be treated the same as conviction records on page 11. Type and reason for military discharge should relate to job requirements, for example, honesty. Inquiries into an applicant's military experience other than in the U.S. Armed Forces or National Guard should be avoided.
Name	Have you ever been known by a different name? Is additional information concerning a change of name, different names or nick names necessary to enable a check of your work record? If yes, explain.	Applicants should not be questioned as to their original names or names from a foreign origin. Don't ask a female applicant her maiden name.
National origin	Do you have a legal right to remain permanently and work in the U.S.? Languages applicant reads, speaks or writes (if job related).	Inquiry into applicant's ancestry, national origin, lineage, parentage or nationality. Nationality of applicant's parents, spouse or relatives. What is your native tongue? How did you acquire the ability to read, write or speak a foreign language? That is an interesting last name – what origin is that?

Subject	Proper	Improper
Notify in case of emergency	Name and address of person to be notified in case of accident or emergency. It is proper to request this information after hiring.	This information is not related to job ability. The answer the applicant or employee provides could be information that is the basis for a charge of discrimination (for example, contact my mother who lives at the Islamic retirement home) so requests for emergency contact information should be carefully phrased to avoid responses containing extraneous information, i.e., name, address and phone number only.
Organizations/ activities	Inquiry into applicant's membership in job-related organizations which the employer considers relevant to the ability to perform the job. Have you ever held any positions of leadership that are relevant to your ability to perform this job?	List all clubs, societies, lodges and organizations to which you belong (unless the applicant voluntarily discloses this information on resume or application, although interviewers should proceed with caution due to the types of information that may be learned).
Photographs	It is permissible to collect a photograph of persons after they are hired.	Photographs should not be taken or collected of applicants prior to hiring.
Pregnancy and family planning	Questions about pregnancy or family planning are improper.	Are you pregnant? Are you likely to become pregnant? Questions as to number of children, plans for future children, views on abortion or birth control are improper.

Subject	Proper	Improper
References	By whom were you referred for a position here? Names of persons willing to provide professional and/or character references of applicant.	Questions of applicants' former employers or acquaintances which elicit information specifying the applicant's race, color, religion, creed, national origin, handicap, sex, age, or marital status. Avoid asking a reference anything that would be improper to ask of an applicant.
Residence	Questions about address or duration of residence in the area are proper.	Do you own or rent your home?
Race or color	Questions about race or color are improper.	Questions as to applicant's race or color. Any comments or questions concerning complexion, color of skin or coloring.
Relatives	What persons (other than your spouse) do you know who work here? (Names of applicant's relatives other than spouse already employed by the employer.)	Does your wife work here? Is that girl in the warehouse your wife?
Religion or creed	Is there any reason why you cannot work overtime on weekends?	Does your religion prevent you from working weekends? What religious holidays do you observe? Inquiry into applicant's religious denomination, religious affiliations, parish or church, religious holidays observed.

Subject	Proper	Improper
Sex	Ask if applicant can perform duties or functions required of job.	Questions which elicit certain information that can lead to an adverse hiring decisions based on an applicant's sex, such as questions about the applicant's marital status; provisions for child care, pregnancy, child bearing or birth control.
Union membership or affiliation	Who were your prior employers?	Have you ever belonged to a union? At your former employer, were you a union member or were the employees represented by a labor union? What is your opinion of unions?
Work experience	Any inquiries into prior employment and duties with prior employers are proper.	Any inquiries into prior employment and duties with prior employers are proper.

Negligent hiring

In Georgia, employers should be aware of their potential liability for negligent hiring and/or retention when their employees cause injuries to other employees or third parties. Indeed, under Georgia law, the employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetence or propensity to cause harm to or endanger others. Employers can be held liable for hiring or retaining an employee the employer knows or should have known was not suited for the particular employment.

It is essential that employers perform reasonable investigations of their employees upon hiring to ensure that each employee's past does not indicate a tendency that would render the employee unsuitable for his position. The nature and responsibilities of the position, the thoroughness of the investigation, and the extent of prior conduct indicating relevant tendencies will often determine the employer's liability if an employee harms another employee or third party. Employers must be mindful that certain positions will require more thorough investigations based on the level of responsibility and potential for injury. Keeping in mind the employee's level of responsibility and potential to injure others while performing duties, the employer should seriously consider background checks to investigate references, job history, criminal records, driving records, and credit rating.

The adequacy of the employer's investigation will be evaluated based on the risks associated with the position, as discussed above, the extent of the investigative measures employed, and the availability of the employee's past conduct or history that would indicate a tendency that would render the employee unsuitable for his position. The employer should be detailed and accurate in documenting its investigative practices and policies in order to demonstrate a record of consistent use of reliable and adequate information in its hiring and retention decisions. For more information see Chapter 5, **Background checks**.

In addition, the prompt and consistent investigation and discipline in the case of employee misconduct can also help shield employers from liability for negligent hiring and retention. By taking prompt and consistent measures, the employer demonstrates its concern for maintaining qualified and competent employees. Should an employer face a negligent hiring or retention claim, the employer would be able to point to a record of its history of taking employee misconduct seriously, thereby demonstrating its ability to discover certain propensities if possible to do so.

Pre-employment testing

Medical examinations

Pre-offer

At the pre-offer stage, an employer cannot require a job applicant to have a medical examination. However, an employer can require a physical agility test as long as it is given to all similarly situated applicants regardless of disability. If a test screens out individuals with disabilities, the test must be job related.

Post-offer

At the post-offer stage, an employer may conduct medical examinations to get any information it believes to be relevant to an applicant's ability to perform a job. An employer may also condition a job offer on the satisfactory result of a post-offer medical examination if this is required of all entering employees in the same job category. A post-offer medical examination does not have to be job-related. However, if an individual is not hired because a post-offer medical exam reveals that the applicant has a disability, the reason for not hiring that individual must either:

- be job related and necessary for the business

  or

- involve avoiding direct threat to health or safety.

Before basing an hiring decision on an employee's status as a "direct threat," however, keep in mind that proving an employee has become a direct threat, and therefore not protected by the ADA, is very difficult to do and cannot be based on unsupported stereotypes or assumptions about the employee.

If the employee is disqualified from employment due to a disability, the employer also must show that no reasonable accommodation was available that would have enabled this individual to perform the essential job functions.

Confidentiality requirements

An employee's medical information must be kept confidential. The ADA has narrow exceptions for disclosing limited information to supervisors and managers, first aid and safety personnel, and government officials investigating compliance with the ADA. All information obtained from post-offer medical examinations and inquiries must be collected and maintained on separate forms.

> **Note**
> Georgia law prohibits the disclosure of the results of any AIDS-virus test except in extremely limited circumstances.

Applicant performance and aptitude testing

An employer may decide to use a pre-employment test as a way to predict the future job performance of an applicant. While these tests are legal, employers should still exercise caution. For example, pre-employment tests that tend to screen out individuals with disabilities may constitute discrimination under the ADA unless they are job-related and necessary for the business or protect the workplace for individuals who pose a direct threat to the safety of others. Tests must accurately reflect the skills, aptitude, or other factors being measured and not the impairments (such as manual, speaking or sensory impairments) of an applicant with a disability (unless those are the skills the test is designed to measure). For example, a psychological test is permitted as long as its purpose is to measure honesty, habits or other traits of an individual applicant and not to determine whether the applicant has a mental condition. A skills test is also permissible as long as the testing is related to the essential functions of the particular job.

Scored tests

Employers often use scored tests to assist in making hiring decisions. Scored tests include paper-and-pencil tests or other scored measures that purport to evaluate an applicant's knowledge, skill, or ability level. Private employers often use these tests to measure not only cognitive ability, but also to assess personal characteristics such as integrity, self-initiative, conscientiousness, and responsibility.

The scores of these tests can be used in a variety of ways. For example, scores can be used to rank candidates, for screening purposes to determine which candidates meet a predetermined minimum level of qualifications, or for use as one objective piece of information to be considered with all the other available relevant information.

Section 703(h) of Title VII specifically authorizes employers to use professionally developed scored tests. These professionally developed tests, however, must be job-related and cannot show bias towards any race, color, sex, religion, age, disability or other

protected class. Further, Georgia law prohibits employers from limiting, segregating or classifying employees in a way that discriminates against individuals.

Duty to accommodate

Under the ADA, the duty to reasonably accommodate disabilities extends to the development, administration and scoring of pre-employment tests. The ADA requires employers to select and administer pre-employment tests in a way that ensures that individuals with disabilities have a fair opportunity to demonstrate the job-related skills the tests seek to measure. Employers must offer reasonable accommodations to disabled applicants to enable them to demonstrate their qualifications during the hiring process. However, an employer does not have to provide an applicant a reasonable accommodation or alternative method of testing if the pre-employment test is measuring skills necessary to perform an essential function of the job.

An employer is allowed to request, in its test announcement or application form, that individuals inform the employer within a specified amount of time before the test period if they require a reasonable accommodation in order to take the test. The employer is also permitted to request documentation of the need for the requested accommodation. The employer then may seek independent verification of the need rather than rely solely on the individual's treating physician. However, should the applicant fail to notify the employer of his or her need for the accommodation before the test, the employer is still responsible for providing the accommodation if the individual first becomes aware of the need during the test administration. Because an employer must make a reasonable accommodation for a qualified individual's **known** physical or mental limitations, the duty of determining whether an employer needs to make a reasonable accommodation is not triggered until there is a request from the applicant (unless the disability and need for a reasonable accommodation are obvious to the employer).

The testing accommodations must be geared to the particular individual's needs. For example, an applicant with dyslexia may be entitled to an oral test, unless reading skills are required to perform an essential job function. Likewise, if an applicant is hearing impaired, an employer may need to provide written questions to the applicant instead of conducting an oral interview. Testing accommodations may include ensuring accessibility to the testing site, providing the test in an alternate format, providing readers or interpreters, or permitting additional time to complete the test. An employer may consult with the individual, as well as other sources of information such as the Georgia Division of Rehabilitation Services, for suggested accommodations.

The employer does not have to implement an accommodation that would impose an undue hardship. An undue hardship is an action requiring significant difficulty or expense based on a variety of factors, including the nature and cost of the accommodation and the overall financial resources of the employer. If more than one possible non-hardship accommodation exists, the employer may choose which accommodation to use. The employer may select the simpler or less expensive accommodation so long as it provides meaningful equal employment opportunity. While the choice of the applicant is a

primary consideration, employers are not required to provide applicants the accommodation of their choice so long as the accommodation reasonably enables the applicant to perform the test. Employers should keep in mind, however, that the individual applicant's active participation in identifying and selecting accommodations is an important factor in any lawsuits that may result over an employer's refusal to provide an accommodation.

Drug and alcohol testing

Federal law does not prevent an employer from issuing a pre-employment drug test, and it is not a violation of the ADA for employers to use drug tests to find out if applicants are currently using illegal drugs. Under the ADA, a drug test is not considered a "medical examination" and therefore is not prohibited during the hiring process. Alcohol tests, however, are considered medical examinations under the ADA. Therefore, an employer may test for alcohol use only after making a conditional offer of employment. An individual who abuses alcohol may be considered disabled if he is a recovering alcoholic. However, an employer can withdraw the offer based on the test result if failing the alcohol test establishes that the applicant is unable to perform his or her job.

The ADA specifically provides that any applicant who is currently an illegal drug user is not a qualified individual with a disability. However, people who have been rehabilitated and do not currently use drugs illegally may be protected by the ADA. An employer should follow three general requirements for drug tests:

1. the drug test must be mandatory for all incoming employees without taking into consideration any specific disability

2. the employer must store the information and test results in confidential medical files

3. the results must be in accordance with the ADA as a whole.

If an applicant's test results are positive for illegal drug use, the employer may ask the job applicant whether he or she uses lawful drugs or if there are other possible explanations for the positive result. The employer's ability to test is limited to only testing for illegal drugs or the use of lawful drugs in a manner that is inconsistent with a prescription.

Like many employment actions, drug testing can also trigger Title VII claims, which prohibit discrimination on the basis of race, color, religion, sex or national origin. If drug tests are not administered equally, it could generate a claim of discrimination on the basis of one of these protected categories. Accordingly, employers should implement drug testing policies that are administered uniformly across the board, without regard to any protected characteristic. Ultimately, whatever policy is in place must be applied fairly and equally to all employees.

Providing notice

Neither the Georgia courts nor the Georgia legislature has created any laws directly prohibiting or regulating private employer drug testing in the State of Georgia. Therefore, Georgia law permits pre-employment on-site drug testing. Employers, however, should still provide prior notice of their testing policies and follow reasonable drug testing procedures to ensure individual applicant privacy as required by federal law.

While Georgia does not have a mandatory drug-testing law, an employer may choose to voluntarily comply with the procedures set forth in the Georgia Workers' Compensation Premium Reduction Act. Under the Act, employers receive a minimum seven and one-half percent discount on workers' compensation premiums if they implement and maintain a certified drug-free workplace program in compliance with the Act. To qualify, employers are required to make post-offer drug tests a condition of employment.

The Act requires that employers give job applicants a general notice of testing at least once prior to testing. Employers must notify job applicants by:

- including a notice of substance abuse testing on vacancy announcements for positions in which testing is required

  and

- posting a notice of substance abuse testing in an appropriate and conspicuous location on employer's premises

  and

- by making copies of the policy available to employees and job applicants in the employer's personnel office or other suitable location.

If an employer wishes to limit the job applicants that are tested, the employer may do so if this limitation is based on a "reasonable classification of job positions." For example, an employer may limit testing to full-time rather than part-time employees or for employees involved in areas that require a high degree of trust and confidence (like national security or safety employees).

Federal contracts

Employers who receive federal contracts for $25,000 or more are subject to the Federal Drug Free Workplace Act. Georgia has also implemented a drug-free workplace statute in order to maximize productivity and reduce the costs associated with substance abuse by employees. The contractor/employer must:

- provide all employees a policy stating that illegal drug use is prohibited in the workplace

and

- detail the consequences of a violation.

Also, the employer must establish a drug-awareness program to educate employees about the drug-free workplace policy, the dangers of drug abuse, the availability of counseling programs, and the penalties for violating the policy.

Lie-detector tests

As a general rule, an employer cannot require a job applicant to take a lie-detector test as a condition of his or her employment. Federal law governs the use of lie-detector tests in the workplace. The Employee Polygraph Protection Act (EPPA) prohibits most private employers from using lie detector tests for pre-employment screening. A lie-detector test is broadly defined as a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or any similar device, whether mechanical or electrical, which is used to measure the honesty or dishonesty of an individual.

The EPPA does authorize lie detector tests under very limited circumstances. Specifically, the Act permits polygraph tests to be used in the private sector, subject to restrictions, with respect to certain prospective employees of security service firms (armored car, alarm and guard) and pharmaceutical manufacturers, distributors and dispensers.

In the instance where polygraph tests are permitted, they are subject to numerous strict standards concerning the conduct and length of the test. Further, examinees have a right to written notice before testing, the right to refuse or discontinue testing, the right not to be asked degrading or unnecessarily intrusive questions, and the right not to have the results disclosed to unauthorized persons.

Federal, state, and local governments are not affected by the EPPA. Also, the Act does not apply to tests given by the federal government to certain individuals engaged in national security-related activities. The Act does not preempt any provision of any state or local law or any collective bargaining agreement that is more restrictive with respect to lie detector tests.

Fingerprinting

There are no federal or state restrictions preventing a private employer from requiring applicants to undergo fingerprinting. However, should an employer decide to fingerprint applicants, it should create a policy that is uniformly applied to all applicants in a job category.

Preserving at-will-employment status

Georgia strongly adheres to what is called the employment-at-will doctrine. Employment at-will means that when an employee is hired for an indefinite duration either the employer or the

employee may terminate the employment relationship for any lawful reason, or for no reason at all, upon reasonable notice.

Georgia law presumes that employment relationships are at-will, unless the parties enter into a specific oral or written agreement to the contrary. The terminating party generally is not required to justify the termination of the employment relationship. The motive for termination is not relevant as long as the reason for the termination is not prohibited by law (for example, termination based on race).

For employers, the employment at-will doctrine is particularly important because it limits the claims that can be brought by employees against their former employers. Specifically, this means that an employee cannot sue an employer for breach of contract or wrongful discharge in Georgia as a result of his/her termination unless he or she can show that an employment contract of a definite duration existed or that another exception to the employment at-will doctrine applies.

Employment contracts

While employers may wish to contract with certain employees, such arrangements often are not desirable, in part because an employee then has a potential breach of contract claim if the employment relationship is terminated in a manner inconsistent with the terms of the contract or if the employer fails to satisfy all of the terms of the contract. By comparison, employment contracts may be beneficial to an employer, for example, if the employer wants to make sure that an employee is committed to working for the employer for a set duration.

To avoid any potential confusion about whether or not an employment contract is at-will, employers who wish to create only at-will employment relationships with their employees are advised to include specific written statements in all of their basic employment documents (for example, offer letters, employee handbooks, and handbook acknowledgment forms) that clearly state the employment is at-will.

For example, in the case of an employee handbook, the employer could include the following statement:

> Neither this handbook nor any of the provisions in this handbook constitute a contract of employment or any other type of contract.

Offer letters

A common way that employers communicate information to potential hires about an employment position is through offer letters. Offer letters generally contain items such as starting salary, start date, bonus information, and other information about the compensation and benefits available as soon as employment begins. Such letters also may be used to advise the potential hire of any remaining steps that must be taken or any obligations that must be met before employment can begin (for example, drug testing, criminal background checks, and fitness-for-duty tests).

Employers should be mindful that offer letters can be a "trap for the unwary." For example, if an employer uses language in an offer letter that suggests permanence or a specific duration for the employment relationship, such language might be interpreted as creating an employment contract for a definite or fixed term. Based upon the letter, the employee may claim to have an enforceable contract. Employers should safeguard against such potential claims by always including a specific at-will disclaimer in offer letters and by avoiding language that suggests a specific duration of employment (for example, annually). Employers also should not use language that suggests a permanent employment relationship will be created, such as "as long as you perform satisfactorily, you will have a job" or "we consider your employment to be part of an enduring employment relationship."

Chapter 4

Employee eligibility and immigration

Immigration laws applicable in Georgia consist not only of significant federal regulations, but also state laws that impose a variety of additional requirements upon many Georgia employers. This chapter:

- outlines employer requirements under the Georgia Security and Immigration Compliance Act
- discusses employment eligibility verification requirements and E-Verify for federal contractors
- provides an overview of corporate/employment-based immigration law, including nonimmigrant visas, labor certification and permanent residency.

Employment eligibility verification (Form I-9)

The Immigration Reform and Control Act of 1986 (IRCA) prohibits the hiring or continued employment of persons whom employers know are unauthorized to work in the United States. To comply with the law, employers must verify the employment eligibility and identity of all employees hired after November 6, 1986 by completing Form I-9 for all employees, including U.S. citizens.

Employers must retain Form I-9 for each employee either for:

- three years after the date of hire

  or

- one year after employment is terminated

whichever is later.

Employers must ensure that Section 1 is completed by the employee upon the date of hire (i.e. the first day of paid work). Section 2 requires employers to list the documents that were produced by the worker to verify his or her identity and employment eligibility. Employers may not demand more or different documents than an employee chooses to present, provided that the

documents presented are acceptable under the Form I-9 requirements. In addition, employers must review and accept documents that reasonably appear to be genuine and to relate to the person presenting them.

On August 27, 2009, USCIS amended Form I-9 to reflect a new revision date of Aug 7, 2009. The only acceptable versions of Form I-9 are the versions with the revision date of Aug. 7, 2009 or Feb. 2, 2009.

Immigration compliance

In 2006, the Georgia State Legislature enacted one of the most sweeping immigration measures in the United States, known as SB 529, the Georgia Security and Immigration Compliance Act. SB 529 covers a wide variety of topics, including:

- employment verification
- human trafficking
- public benefits
- identification
- tax withholdings
- state enforcement of federal immigration
- ethics for immigration assistance.

Key provisions

There are many important provisions of SB 529, but most notably the law:

- requires all public employers and all government contractors and subcontractors to register and participate in the federal employment eligibility verification program otherwise known as E-Verify
- establishes penalties for the offense of human trafficking
- authorizes trained state law enforcement officers to enforce federal immigration and custom laws while performing their authorized duties
- prohibits an employer from deducting compensation over $600 paid to an illegal immigrant as an allowable business expense
- requires employers to withhold a six percent tax on compensation paid to all non-resident workers who:
    - cannot provide a taxpayer ID number

  - provide an incorrect taxpayer ID number
  - provide a non-resident taxpayer ID number
- requires county, municipal, and regional jails to determine the legal status of prisoners who are charged with a felony or DUI and notify Immigration and Customs Enforcement if the individual is not legally in the United States
- establishes and enforces standards of ethics for immigration service providers
- requires verification of legal U.S. residence for public benefits where residence is a requirement and where the individual requesting the benefit is over 18 years old.

E-Verify

E-Verify is an Internet-based system operated by the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) that allows employers to verify the employment eligibility of their employees, regardless of citizenship. Based on the information provided by the employee on his or her Form I-9, E-Verify checks this information electronically against records contained in DHS and Social Security Administration (SSA) databases.

Application of SB 529 for contractors

Contractors or subcontractors are prohibited from entering into a contract with a public employer (that is, any department, agency, or instrumentality of a state or its political subdivision) for the physical performance of services in the State of Georgia unless the contractor or subcontractor registers and participates in E-Verify.

> **Note**
> SB 529 appears to apply to the physical performance of services in the State of Georgia on public contracts **even if** the employer is located outside Georgia.

If you contract with a public employer for the physical performance of services in Georgia, you are required to register and participate in E-Verify. Subcontractors working on a public contract must also register and participate in E-Verify.

On the other hand, if you enter into a contract with a private entity, you are not required to register and participate in E-Verify. However, you must continue to verify the employment eligibility of all newly hired employees by properly completing Form I-9.

Registration and participation in E-Verify is not required for contracts entered into prior to July 1, 2007. Further, employees hired prior to July 1, 2007 do not have to be verified through E-Verify.

Registration and participation in E-Verify became effective:

- on July 1, 2007 for public employers, contractors, and subcontractors with 500 or more employees
- on July 1, 2008 for public employers, contractors, and subcontractors with 100 to 499 employees
- on July 1, 2009 for all other public employers, contractors, and subcontractors.

Definitions and interpretations

As stated, the condition for which SB 529 requires participation in E-Verify is that the contract be "for the physical performance of services within the state." In this context, the phrase does not refer to services performed which are "physical." Rather, it is a reference to having services performed by someone who is physically present "within this state" and whether that person is lawfully so for that purpose.

The Attorney General interpretation of this regulation suggests that employers who are required to participate in E-Verify in Georgia will not be required to participate in other states, and, that in order to trigger participation in E-Verify, services must be performed by someone who is physically present "within this state." Further, SB 529 does not suggest that contractors and subcontractors participate in E-Verify for all newly hired employees in the United States who will perform work on behalf of Georgia.

Requirements for federal contractors

The E-Verify federal contractor rule requires the insertion of the Federal Acquisition Regulation (FAR) E-Verify clause into applicable federal contracts, thus requiring federal contractors to use E-Verify for their new hires and all employees (existing and new) assigned to a federal contract.

The E-Verify federal contractor rule requires federal contractors to enroll and participate in E-Verify only if they are awarded contracts or have existing indefinite-delivery/indefinite-quantity contracts that are bilaterally modified to contain the FAR E-Verify clause on or after September 8, 2009.

The E-Verify federal contractor rule affects the following employees:

- all newly-hired employees, following completion of the Employment Eligibility Verification Form I-9

  and

- all existing employees assigned to a federal contract.

Federal contractors also have the option of verifying their entire workforce. However, employees hired on or before November 6, 1986, and still in continuous employment, cannot be verified in E-Verify.

Exemptions

The E-Verify federal contractor rule exempts the following types of federal contracts:

- contracts that include only commercially available off-the-shelf (COTS) items and related services (or minor modifications to a COTS item)
- contracts valued at less than $100,000, the simplified acquisition threshold
- contracts less than 120 days
- contracts where all work is performed outside the United States.

Requirements regarding subcontractors

The E-Verify federal contractor rule requires certain federal prime contractors with the FAR E-Verify clause to require their subcontractors to use E-Verify when:

- the prime contract includes the FAR E-Verify clause
- the subcontract is for commercial or noncommercial services or construction
- the subcontract has a value of more than $3,000
- the subcontract includes work performed in the United States.

Subcontractors who are suppliers are not subject to the E-Verify federal contractor rule.

The prime contractor should provide general oversight to subcontractors to ensure they meet the E-Verify requirement. The prime contractor may be subject to fines and penalties if it knowingly continues to work with a subcontractor who is in violation of the E-Verify requirement. The prime contractor must, by whatever means the contractor considers appropriate, ensure that all covered subcontracts at every tier incorporate the FAR E-Verify clause.

If your company is not yet enrolled in E-Verify, you will have 30 days from the date the contract is awarded to enroll, and 90 days from the date you enroll with E-Verify, to initiate verification queries for newly hired employees. You will also have:

- 90 days from the date you enroll with E-Verify who will be working on the contract

or

- within 30 calendar days of the employee's assignment to a contract

to initiate verification queries for existing employees, whichever date is later.

If your company is already enrolled in E-Verify, but not designated as a federal contractor in E-Verify, you must:

- update your company profile in E-Verify and designate your company as a federal contractor within 30 calendar days of the contract award date that contains the FAR E-Verify clause or an existing contract that has been modified to include the FAR E-Verify clause

  and

- begin verifying all newly hired employees within 90 calendar days of designating your company as a federal contractor in E-Verify

  and

- begin verifying all existing employees assigned to the contract within 90 calendar days of designating your company as a federal contractor in E-Verify OR within 30 calendar days of the employee's assignment to a contract, whichever date is later.

When completing Form I-9, federal contractors participating in E-Verify must ensure that:

- employees provide a Social Security number on Form I-9

  and

- any List B document an employee presents must contain a photograph

  and

- if the employee presents Form I-551 (Permanent Resident Card) and I-766 (Employment Authorization Document) for his or her Form I-9, you must make a copy of his or her document, which is required for the Photo Matching Tool.

Nonimmigrant visas

Below is an overview of commonly used nonimmigrant visas.

B-1 – Business visitor

B-1 classification is designed for temporary business activities that promote international trade, commerce or investment. The B-1 visa allows an individual to come to the United

States for a short period of time for purposes of engaging in meetings and consultations with U.S. business associates; attending non-productive training for the benefit overseas company; attending professional or business conventions, conferences or meetings; or observing the conduct of business or other professional or vocational activity.

A B-1 visitor is not authorized to perform productive work in the United States. A B-1 visitor must maintain a foreign residence abroad to which the B-1 visitor intends to return at the end of the authorized period of stay. The B-1 visitor will generally remain on a foreign employer's home country's payroll and cannot receive compensation from a U.S. source, other than reimbursement for incidental expenses.

B-1 visitors are generally admitted for the period of time necessary to conduct the business. In theory, a B-1 visitor may be admitted up to a maximum of six months. However, in practice, USCIS officers typically admit business visitors for no more than 30-90 days. Individuals may apply to extend their period of stay up to six months. However, prolonged business visits may raise the presumption that the B-1 visitor is engaged in productive employment. A B-1 visitor may also change to another non-immigrant status. However, if an application for change of status is made within 30 days of entry, the USCIS may presume that the B entry was fraudulent and made with the intent to immigrate.

E-1 – Treaty trader

E-1 treaty trader classification allows the beneficiary to carry on substantial trade, including trade in services or technology, as long as the trade is principally between the United States and the treaty country. To qualify for E-1 status:

- the applicant must be a citizen of a treaty country
- the company for which the applicant is coming to the U.S. must have the nationality of the treaty country
- the international trade must be "substantial" in the sense that there is a sizable and continuing volume of trade
- the trade must be principally between the U.S. and the treaty country, which is defined to mean that more than 50 percent of the international trade involved must be between the U.S. and the country of the applicant's nationality
- the applicant must be employed in a supervisory or executive capacity, or possess highly specialized skills essential to the efficient operation of the firm (ordinary skilled or unskilled workers do not qualify)
- the applicant intends to depart the United States when the E-1 status terminates.

E-2 – Treaty investor

E-2 treaty investor classification allows the beneficiary to develop and direct the operations of a commercial enterprise in which he/she has invested or is in the process of investing a substantial amount of capital. To qualify for E-2 status, the investor must demonstrate:

- that the investor is a national of a treaty country
- that the investor has invested or is actively in the process of investing
- that the enterprise is currently running or will open its doors imminently
- that the investment is substantial
- that the investment is more than a marginal one solely for earning a living
- that the applicant will fill an executive/supervisory role or possesses skills essential to the company's operations.

F-1 – Students

F-1 classification allows an individual to come to the United States to pursue an academic program as a full-time student. F-1 students are issued Form I-20 by their sponsoring school and apply for their F-1 visas at a U.S. consulate abroad. F-1 students are allowed to remain in the United States for the time period required to finish their educational program.

F-1 students may be entitled to work authorization. Enrolled F-1 students, as well as recently graduated students, may be eligible to engage in "practical training" in the field in which they studied. There are two common types of practical training:

1. curricular practical training
2. optional practical training.

Curricular Practical Training (CPT) is issued to students currently enrolled on a full-time basis at an approved educational institution to obtain work experience in their field of study. This is defined as an alternative work/study, internship, cooperative education or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school. The student usually receives academic credit for this training. The university grants CPT and the student's Form I-20 is endorsed with the dates the student is eligible to work, as well as the number of hours per week. A student with CPT must present an original Form I-20 indicating CPT approval to an intended employer before employment may lawfully commence.

Optional Practical Training (OPT) is granted to students who wish to work in their field of study but are not going to work as part of their academic program. OPT is granted for

a maximum of 12 months throughout the student's academic career. For OPT eligibility, the student must apply with USCIS for an employment authorization document (EAD). The F-1 OPT employment may not commence until the F-1 student receives the EAD card from USCIS.

H-1B – Specialty occupations

H-1B classification is reserved for foreign workers who will be employed in a specialty occupation that requires attainment of a baccalaureate or higher degree or its equivalent in a specific field relevant to the occupation, and who is qualified to perform services in the specialty occupation because he or she has attained a baccalaureate or higher degree or its equivalent in the specialty occupation.

A foreign worker may hold H-1B status for a maximum period of six years. U.S. Citizenship and Immigration Services may approve H-1B status in three year increments or less. After the H-1B expires, the foreign worker must remain outside the U.S. for one year before another H-1B petition can be approved.

A foreign worker may obtain an extension beyond the maximum period of six years under the following circumstances:

- 365 days or more have passed since the filing of a labor certification application or an I-140 immigrant petition

  or

- 365 days or more have passed since the filing of an I-140 immigrant petition

  or

- the foreign worker is the beneficiary of an approved I-140 immigrant petition and there are no immigrant visa numbers available in his/her employment-based category due to the visa retrogression.

H-2A and H-2B – Agricultural and other seasonal/temporary workers

H-2A classification establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the United States to perform **agricultural labor or services** of a temporary or seasonal nature. The prospective employer must test the labor market by filing a temporary labor certification application with the U.S. Department of Labor certifying that there are no able, willing, qualified, and available U.S. workers, and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

H-2B classification applies to foreign workers who are coming temporarily to the United States to perform temporary **nonagricultural services or labor** on a one-time, seasonal,

peak load or intermittent basis. H-2B classification requires the prospective employer to test the labor market by filing a temporary labor certification application with the U.S. Department of Labor. The U.S. Department of Labor will either certify that there no able, willing, qualified, and available U.S. workers and that the foreign worker's employment will not adversely affect the wages and working conditions of similarly employed U.S. workers, or will issue a notice that such certification cannot be made prior to filing a petition with U.S. Citizenship and Immigration Services to confer H-2B status.

H-3 – Trainees

H-3 classification is reserved for foreign nationals entering the United States to receive training with a U.S. company. The eligibility requirements for H-3 visas are narrowly defined. For a foreign national to be classifiable as an H-3 trainee, the sponsoring U.S. entity must demonstrate that:

- the proposed training is not available in the foreign national's home country

  and

- the foreign national will not be placed in a position which is in the normal operation of the business and in which U.S. citizens and/or lawful permanent residents are regularly employed

  and

- the foreign national will not engage in productive employment unless such employment is incidental and necessary to the training

  and

- the training will benefit the foreign national in pursuing a career outside the United States.

The training program should include:

- the kind of training and supervision to be given
- the proportion of time that will be devoted to productive employment. Productive employment should be minimal because applicant should be receiving training and not performing productive work that displaces U.S. citizens or lawful permanent residents
- the number of classroom instruction hours
- the number of hours of on-the-job training (supervised and unsupervised)
- an explanation of how the training will prepare the foreign national for work that is not available or is new in the country where the foreign national will work

- an explanation why the foreign national cannot obtain the training in his/her country of origin and why the training must be provided in the United States
- an explanation why a training program is beneficial to the petitioning company providing the training
- the source of compensation received by the foreign national.

J-1 – Exchange visitor

J-1 classification is available to individuals participating in a recognized international exchange program. The Exchange Visitor Program is carried out under the provisions of the Mutual Educational and Cultural Exchange Act of 1961, as amended. The purpose of the Act is to increase mutual understanding between the United States and other countries by means of educational and cultural exchanges. There are a variety of educational and cultural exchange programs to facilitate J-1 sponsorship in different fields of endeavor.

The U.S. Department of State designates public and private entities to act as exchange sponsors. Designated sponsors facilitate the entry of foreign nationals into the United States as exchange visitors to complete the objectives of one of the following exchange visitor program categories:

- au pair
- camp counselor
- student, college/university
- student, secondary
- government visitor
- international visitor (reserved for U.S. Department of State use)
- alien physician
- professor
- research scholar
- short-term scholar
- specialist
- summer work/travel
- teacher
- trainee.

At the conclusion of their program J-1 exchange visitors are expected to return to their home countries to utilize the experience and skills they have acquired while in the United States.

Certain J-1 exchange visitors may be subject to a two-year foreign residency requirement at the end of their period of stay. The two year foreign residency requirement may apply to J-1 exchange visitors who participate in programs that were financed in whole or in part, directly or indirectly, by an agency of the U.S. Government or by the exchange visitor's government, or who are nationals or residents of a country which has been designated by the U.S. Department of State as requiring the skills of the exchange visitor. J-1 exchange visitors subject to the foreign residency requirement must return to their country of nationality or last residence after completing their program in the United States and must reside there physically for two years before they may become eligible to apply for an immigrant or temporary worker visa.

J-1 exchange visitors who are subject to the two-year foreign residency requirement must apply for a waiver of that requirement if they seek to remain in the United States beyond the end date of their programs or if they seek to submit an application to the U.S. Citizenship and Immigration Services for a change in visa status. A waiver may be requested based on:

- a claim of exceptional hardship to a U.S. citizen or legal permanent resident spouse or child of the J-1 exchange visitor
- a claim that the J-1 exchange visitor will be persecuted due to race, religion, or political opinions if he/she returns to his/her country of residence
- a request from an interested U.S. Government Agency
- a no objection statement from J-1 exchange visitor's government
- a request by a designated State Health Department or its equivalent.

L-1A and L-1B – Multinational managers/executives and professionals with specialized knowledge

L classification applies to intra-company transferees who, within the three preceding years, have been employed outside of the United States continuously for at least one year, and who will be employed by a branch, parent, affiliate, or subsidiary of that same employer in the United States in a managerial, executive or specialized knowledge capacity. The L-1 classification requires clear documentation of the qualifying relationship of ownership and control between the U.S. and foreign office. L-1 candidates abroad that wish to meet the one-year requirement need be aware that visits to the United States are subtracted from the one-year accumulation. If the candidate will require L-1 status to perform work requiring "specialized knowledge" of the company's advanced

processes and procedures, L-1B classification will attach. Managerial and executive candidates will be accorded L-1A classification.

Certain multinational companies receive L-1 processing under the "Blanket L" program. The Blanket L enables a petitioning employer to transfer managers, executives, and specialized-knowledge professionals to the U.S. on work assignments under a single, "blanket" petition. It eliminates the need to separately petition for each individual whom the company desires to bring to the U.S.

Initial L-1 visa status may generally be approved for up to three years and can be extended for up to a total of 7 years maximum stay for an L-1A (manager or executive) or 5 years for an L-1B (specialized knowledge). After the end of the maximum L-1 period of stay in the United States, the candidate must reside outside of the United States for a full year before eligibility for L -1 (or H-1B) status may resume.

O – Extraordinary ability

There are three classifications of "O" visas approved for individuals based on extraordinary ability. O-1 classification is reserved for aliens of extraordinary ability in the sciences, arts, education, business, or athletics, or who have a demonstrated record of extraordinary achievement in the motion picture or television industry. "Extraordinary ability" in the sciences, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who has risen to the very top of his or her field of endeavor. Extraordinary ability in the field of arts and extraordinary achievement with respect to motion picture and television productions share an identical standard, i.e., a high level of achievement in the field which is evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that the person is recognized as outstanding, leading, or well-known in his or her field of endeavor.

The O-2 nonimmigrant category extends to aliens coming to the United States solely to accompany or assist an O-1 performer or athlete.

The O-3 nonimmigrant classification includes spouse or children of an O-1 or O-2 nonimmigrant.

To qualify for O-1 classification, and therefore to support classification of O-2 and O-3 accompanying aliens, the O-1 alien must be coming to the United States to work in his or her area of extraordinary ability or achievement. The O-1 nonimmigrant may be admitted even if the work to be performed in the United States does not require a person of extraordinary ability or achievement. O-1 and O-2 petitions require written advisory opinions from a peer group, labor organization, or management organization.

P – Artists, athletes, and entertainers

There are four classifications of "P" visas which may be provided for artists, athletes and entertainers. P-1 classification is reserved for:

- an internationally recognized athlete performing at a specific athletic competition as an individual athlete or part of a group or team, at an internationally recognized level of performance

  or

- a member of an internationally recognized entertainment group who has had a sustained and substantial relationship with the group (in most cases, for one year or more) and provides functions that are integral to the group's United States performance.

P-2 classification is reserved for an artist or entertainer under a reciprocal exchange program between the United States and foreign organization(s) providing for temporary exchange of artists and entertainers (including groups).

P-3 is reserved for an artist or entertainer whose performance, teaching or coaching is integral to the performance of a group performing under a commercial or noncommercial program that is culturally unique.

P-4 classification is reserved for dependents of a P-1, P-2, or P-3 visa holders.

P visas are generally approved for a sufficient time period to complete the event or competition described in the petition, not to exceed one year.

TN – Treaty NAFTA

The North American Free Trade Agreement creates special economic and trade relationships between the United States, Canada and Mexico. The nonimmigrant NAFTA Professional (TN) visa allows citizens of Canada and Mexico, as NAFTA professionals, to work in the United States. Permanent residents, including Canadian permanent residents, are not eligible to apply TN classification.

Professionals of Canada or Mexico may work in the United States under the following conditions:

- applicant is a citizen of Canada or Mexico

  and

- profession is on the NAFTA list

  and

- position in the United States requires a NAFTA professional

and

- Mexican or Canadian applicant will work in a full-time or part-time job, for a U.S. employer (self employment is not permitted)

  and

- Mexican or Canadian applicant possesses the requisite qualifications for the position offered.

Visa waiver program

The visa waiver Program (VWP) enables nationals of certain countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa. VWP eligible travelers may apply for a visa, if they prefer to do so. Not all countries participate in the VWP, and not all travelers from VWP countries are eligible to use the program. VWP travelers are screened prior to admission into the United States, and are enrolled in the U.S. Department of Homeland Security's US-VISIT program.

Permanent labor certification

A permanent labor certification issued by the U.S. Department of Labor allows an employer to hire a foreign worker to work permanently in the United States. In most instances, before the U.S. employer can submit an immigration petition to U.S. Citizenship and Immigration Services, the employer must obtain an approved labor certification request from the U.S. Department of Labor. The U.S. Department of Labor must certify to U.S. Citizenship and Immigration Services that there are no able, willing, qualified and available U.S. workers to accept the job at the prevailing wage for that occupation in the area of intended employment and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

The qualifying criteria for permanent labor certification are as follows:

- applications filed on or after March 28, 2005 must file using the new PERM process and adhere to the new PERM regulations
- the employer must hire the foreign worker as a full-time employee
- there must be a bona fide job opening available to U.S. workers
- the job requirements must adhere to what is customarily required for the occupation in the United States and may not be tailored to the foreign worker's qualifications. In addition, the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements, unless adequately documented as arising from business necessity

- the employer must pay at least the prevailing wage for the occupation in the area of intended employment.

Employment-based permanent residence

In 1990, Congress created a priority system for granting permanent residence to aliens based on employment skills. Immigrant visas are available for foreign workers who qualify under the following five employment-based (EB) preference categories.

EB-1 eligibility

- **Extraordinary Ability Aliens**
  The employment-based first preference category is reserved for foreign nationals with extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. The foreign national must be one of that small percentage who have risen to the very top of the field of endeavor, to be granted this classification. A foreign national who receives a major internationally recognized award, such as a Nobel Prize, will qualify for EB-1 classification. Other awards may also qualify if the foreign national can document that the award is in the same class as a Nobel Prize. Since few workers receive this type of award, alternative evidence of EB-1 classification is permitted. The worker may submit "other comparable evidence" if the following criteria do not apply:

  - receipt of lesser nationally or internationally recognized prizes or awards for excellence
  - membership in associations in the field which demand outstanding achievement of their members
  - published material about the alien in professional or major trade publications or other major media
  - evidence that the alien has judged the work of others, either individually or on a panel
  - evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field
  - evidence of the alien's authorship of scholarly articles in professional or major trade publications or other major media
  - evidence that the alien's work has been displayed at artistic exhibitions or showcases

- performance of a leading or critical role in distinguished organizations
- evidence that the alien commands a high salary or other significantly high remuneration in relation to others in the field
- evidence of commercial successes in the performing arts.

- **Outstanding Professors and Researchers**
  Outstanding professors and researchers are recognized internationally for their outstanding academic achievements in a particular field. In addition, an outstanding professor or researcher must have at least three years experience in teaching or research in that academic area, and enter the U.S. in a tenured or tenure track teaching or comparable research position at a university or other institution of higher education. If the employer is a private company rather that a university or educational institution, the department, division, or institute of the private employer must employ at least three persons full-time in research activities and have achieved documented accomplishments in an academic field.

  Evidence that the professor or researcher is recognized as outstanding in the academic field must include documentation of at least two of the following:

  - receipt of major prizes or awards for outstanding achievement
  - membership in associations that require their members to demonstrate outstanding achievements
  - published material in professional publications written by others about the alien's work in the academic field
  - participation, either on a panel or individually, as a judge of the work of others in the same or allied academic field
  - original scientific or scholarly research contributions in the field
  - authorship of scholarly books or articles (in scholarly journals with international circulation) in the field.

- **Multinational Executives/Managers**
  Some executives and managers of foreign companies who are transferred to the United States may qualify for EB-1 classification. A multinational manager or executive is eligible for priority worker status if he or she has been employed outside the U.S. in the three years preceding the petition for at least one year by a firm or corporation and seeks to enter the United States to continue service to that firm or organization. The employment must have been outside the United States in a managerial or executive capacity and with the same employer, an affiliate, or a subsidiary of the employer.

The petitioner must be a U.S. employer, doing business for at least one year, that is an affiliate, a subsidiary, or the same employer as the firm, corporation or other legal entity that employed the foreign national abroad.

EB-2 eligibility

EB-2 classification includes aliens who are members of the professions holding advanced degrees or their equivalent and aliens who because of their exceptional ability in the sciences, arts, or business will substantially benefit the national economy, cultural, or educational interests or welfare of the United States."

A petition for a foreign professional holding an advanced degree may be filed when the job requires an advanced degree (beyond the baccalaureate) and the alien possesses such a degree or the equivalent. The petition must include documentation, such as an official academic record showing that the alien has a U.S. advanced degree or a foreign equivalent degree, **or** an official academic record showing that the alien has:

- a U.S. baccalaureate degree or a foreign equivalent degree

  and

- letters from current or former employers showing that the alien has at least 5 years of progressive post-baccalaureate experience in the specialty.

Qualified alien physicians who will be practicing medicine in an area of the United States certified by the Department of Health and Human Services as underserved may also qualify for this classification.

EB-3 eligibility

EB-3 classification is reserved for:

- foreign workers with at least two years of experience as skilled workers
- professionals with a baccalaureate degree
- other workers with less than two years experience, such as an unskilled worker who can perform labor for which qualified workers are not available in the United States
- skilled worker positions are not seasonal or temporary and require at least two years of experience or training. The training requirement may be met through relevant post-secondary education.
- professionals must hold a U.S. baccalaureate degree or foreign equivalent degree that is normally required for the profession. Education and experience may not be substituted for the degree.

- other workers who are in positions that require less than two years of higher education, training, or experience. However, due to the long backlog, a petitioner could expect to wait many years before being granted a visa under this category.

EB-4 eligibility

To qualify as an EB-4 special immigrant religious worker, you must be a member of a religious denomination that has a non-profit religious organization in the United States. You must have been a member of this religious denomination for at least two years before applying for admission to the United States. You must be entering the U.S. to work:

- as a minister or priest of the religious denomination

  or

- in a professional capacity in a religious vocation or occupation for the religious organization (a professional capacity means that a U.S. baccalaureate degree or foreign equivalent is required to do this job)

  or

- in a religious vocation or occupation for the religious organization or its nonprofit affiliate. (A religious vocation means a calling or devotion to religious life. Taking vows can prove that you have a calling to religious life. A religious occupation is an activity devoted to traditional religious functions.) Examples of religious occupations include (but are not limited to):

  - cantors
  - missionaries
  - religious instructors.

EB-5 eligibility

The employment-based fifth preference category is reserved for immigrants seeking to enter the United States to engage in a commercial enterprise that will benefit the U.S. economy and create at least ten full-time jobs. The basic amount required to invest is one million dollars, although that amount may be $500,000 if the investment is made in a targeted employment area. Of the approximately 10,000 numbers available for this preference each year, 5,000 visas are set aside for entrepreneurs who immigrate through a regional center pilot program discussed below.

Family-based permanent residence

If you want to become a lawful permanent resident based on the fact that you have a relative who is a citizen of the United States or is a lawful permanent resident, your relative in the U.S. will need to sponsor you and prove he/she has enough income or assets to support you, the intending

immigrant(s) when in the United States. Your relative sponsor and you, the intending immigrant, must successfully complete certain steps in the immigration process in order to come to the U.S. Here are the key steps:

- First, USCIS must approve an I-130 immigrant visa petition filed by your sponsoring relative for you.
- Next, most sponsors will need to demonstrate adequate income or assets to support the intending immigrant, and accept legal responsibility for financially supporting their family member, by completing and signing a document called an Affidavit of Support.
- Once this is complete, then the intending immigrant will apply for the immigrant visa as explained below.

The Immigration and Nationality Act allows for the immigration of foreigners to the United States based on relationship to a U.S. citizen or legal permanent resident. Family-based immigration falls under two basic categories:

- unlimited
- limited.

Unlimited family-based immigration

- **Immediate Relatives of U.S. Citizens (IR)**
  The spouse, widow(er) and unmarried children under 21 of a U.S. citizen, and the parent of a U.S. citizen who is 21 or older.
- **Returning Residents (SB)**
  Immigrants who lived in the United States previously as lawful permanent residents and are returning to live in the U.S. after a temporary visit of more than one year abroad.

Limited family-based immigration

- **Family First Preference (F1)**
  Unmarried sons and daughters of U.S. citizens, and their children, if any. (Maximum number of visas in this classification awarded each year: 23,400.)
- **Family Second Preference (F2)**
  Spouses, minor children, and unmarried sons and daughters (over age 20) of lawful permanent residents. (Maximum number of visas in this classification awarded each year: 114,200.) At least seventy-seven percent of all visas available for this category will go to the spouses and children; the remainder will be allocated to unmarried sons and daughters.

- **Family Third Preference (F3)**
  Married sons and daughters of U.S. citizens, and their spouses and children. (Maximum number of visas in this classification awarded each year: 23,400.)

- **Family Fourth Preference (F4)**
  Brothers and sisters of United States citizens, and their spouses and children, provided the U.S. citizens are at least 21 years of age. (Maximum number of visas in this classification awarded each year: 65,000.)

Chapter 5

Background checks

Screening candidates for employment by conducting background and reference checks is a valuable way for employers to discover relevant information about potential employees. The information discovered may indicate whether an applicant will be a good fit for a position. On the other hand, the information discovered may suggest that an applicant is not qualified. An important benefit associated with thoroughly checking into the applicant's background is that an employer may protect itself from potential liability associated with negligent hiring and negligent retention claims.

Often, as a part of the application process, an employer will want to gather information from a prospective employee's current or former employers. In an effort to encourage employers to provide more detailed and pertinent information, there is a Georgia law that protects employers from liability for providing information about current and former employees to a prospective employer of that employee. Georgia law presumes that an employer is acting honestly and fairly, unless the information was disclosed in violation of a nondisclosure agreement or the information was otherwise considered confidential by law.

There are many different steps an employer may take to check into an applicant's background. Depending on the nature of the position in question, employers may choose to use a few or all of the steps that follow for conducting appropriate background investigations.

Reference checks

Pre-hire checks

In most cases, it is advisable that employers check the personal and prior employment references listed by an applicant and document the information received, or, if not successful, the efforts made. While the law does not require a written authorization from the applicant, employers normally should obtain such a broad authorization before conducting these reference checks so that the applicant knows that the employer will be contacting his or her references. Additionally, employers might consider requesting a waiver from an applicant that releases former employers and the requesting employer from any claims relating to the reference check. With this type of waiver in place, a former employer may be willing to give more relevant information about their former employees. An employer also should make sure they have a fully completed application to use as a resource in the reference check, including past employment history, references, names of immediate supervisors, and educational background.

When contacting references, prospective employers should request basic information such as:

- dates of employment
- job duties
- performance assessments
- wage history
- discipline records
- tendency for violence
- circumstances surrounding discharge
- eligibility for rehire.

Although a former employer may not be willing to respond to all of these topics, a prospective employer may shield itself from negligent hiring and subsequent negligent retention claims simply by asking appropriate questions and making notes of the responses given. In addition to asking relevant questions and listening closely to the answers, a prospective employer should take careful notes of information given by a reference, as well as all unsuccessful attempts made to contact references.

Post-employment checks

When an employer is asked to provide information regarding a former employee, the employer should consider adopting a policy of declining to volunteer any subjective, speculative, and/or undocumented information about former employees. Under such a policy, employers should provide only the dates of employment and the positions held by the employee. Many employers provide only this limited information in connection with reference checks for fear of a later lawsuit by the former employee alleging claims of defamation, slander, breach of privacy and/or retaliation. As discussed above, Georgia law gives some protection to employers from liability. However, the protection afforded is not absolute.

Criminal record checks

An employer in Georgia may consider an applicant's criminal record in its hiring decision. Georgia law does not prohibit employers from taking adverse employment actions based on expunged arrests or charges. However, the EEOC has taken the position that considering arrests has an adverse or negative impact on minorities.

In Georgia, an employer may require that a new or current employee submit to a criminal records check. An employer seeking a records check on an employee must submit a records check

application to the Georgia Crime Information Center (GCIC). The GCIC will then notify the employer in writing of any criminal record finding or of the fact of no such finding. Employers should obtain an applicant's written consent before conducting a criminal background check.

If an employer makes an adverse employment decision based on information obtained from the GCIC, the employer must inform the employee of the decision and that the records came from the GCIC, specify the contents of the records, and explain the effect the records had on their personnel decision. Failure to do so will be considered a misdemeanor offense under Georgia law.

Some professions in Georgia are required to request criminal records checks. For example, nursing homes, day care centers and other businesses supervising children must request a criminal record check. Persons engaging in a private detective business, security business, the business of mortgage lending or brokerage are also required to undergo a criminal records check.

Driving record checks

Employers should review the driving record of applicants for positions that would require the use of a company vehicle. Driving record checks should be conducted before an applicant is hired and then periodically throughout employment. When checking the driving record of an applicant, employers should confirm that an applicant has a valid driver's license and review any driving violations, particularly past violations involving reckless driving and driving under the influence of alcohol. However, keep in mind that under the ADA alcohol-related convictions cannot be used to discriminate against an applicant perceived to be an alcoholic or with a record of alcoholism. As discussed below, if the employer uses a third-party company to obtain this information, the Fair Crediting Reporting Act (FCRA) may be implicated.

Credit checks

Credit checks may be performed for positions that involve financial responsibilities. However, the EEOC takes the position that credit checks may have an adverse impact on minorities. Thus, it is a good employment practice to limit the use of credit checks to positions for which there is a legitimate business necessity. For example, a credit check for a restaurant cook with no financial responsibilities would be inappropriate, while a credit check for a controller or accounts payable clerk might be more legitimate. Credit checks should be performed for all applicants for a particular position. Typically, credit reports can only be obtained through third-party entities that prepare such reports for a fee. As a result, the provisions of the FCRA usually apply to employers that obtain credit reports, and the employers are bound by its required disclosures and provisions.

Consumer reports

The Fair Credit Reporting Act (FCRA) includes significant compliance requirements for employers who use consumer reports in making employment-related hiring, promotion, and termination decisions. The term "consumer report" is defined very broadly by the FCRA as any written, oral, or other communication from a consumer reporting agency bearing upon the

consumer's credit worthiness, standing, credit capacity, character, reputation, personal characteristics, or mode of living. It includes records that are used in whole or in part to assess an individual's qualifications for employment, such as:

- motor vehicle
- criminal background
- bankruptcy
- medical history
- credit history.

These consumer reports must be generated by a consumer reporting agency for the FCRA to apply. Generally, the FCRA does not apply to an employer's ability to conduct its own reference checks by contacting former employers or otherwise checking public records or documents.

The following guidelines summarize some of the principal requirements imposed by the FCRA when an employer uses a consumer report in making employment decisions. Failure to follow the requirements of the FCRA could result in liability for civil fines or damages and even criminal prosecution.

Before obtaining a consumer report for the purpose of screening potential employees or in making promotion, demotion, or discharge decisions regarding existing employees based upon the contents of the consumer report, an employer must first:

- have an employment purpose for obtaining the consumer report (that is, the report is used for evaluating a consumer for employment, promotion, reassignment or retention)

  and

- give the affected individual **written notice** of the employer's intention to obtain a consumer report in a document that consists solely of this notice

  and

- get **written permission** from the affected individual to obtain a consumer report on that individual – Federal Trade Commission opinion letters indicate that an employer may combine the written notice and permission described in the above paragraphs on a single form, but nothing else may be included on this form (see sample notice below)

  and

- certify to the consumer reporting agency from which the employer obtained the consumer report that it has complied with all applicable provisions of the FCRA.

The following form is a sample authorization to obtain information under the FCRA from a consumer-reporting agency.

NOTICE

The company intends to obtain a consumer report within the meaning of the Fair Credit Reporting Act (FCRA) regarding you during the application process and/or during the course of your employment with the company.

AUTHORIZATION TO PROCURE CONSUMER REPORTS AND/OR OTHER BACKGROUND INFORMATION

I understand that the company or a third-party, consumer reporting agency acting on its behalf may conduct an investigation to obtain information about my background including, but not limited to: information about my personal character, previous employment, general reputation, educational background, credit history, driving record, and/or criminal history. I authorize all persons; corporations; credit agencies; educational institutions; law enforcement agencies; city, state, county, and federal courts; and military services to release any such information about my background. Moreover, I authorize any person or entity conducting the investigation or compiling and/or processing such information to furnish the company, and/or any third party acting on the company's behalf, with such information. I release anyone providing such background information and the company from any and all liability and damages whatsoever in connection with collecting, furnishing, obtaining, or using such information. I further understand that the company will provide me with written notice if any adverse employment action is to be taken based in whole or in part on information contained in a consumer report within the meaning of the FCRA.

_____ _____

WITNESS APPLICANT'S SIGNATURE

_____

APPLICANT'S PRINTED NAME

_____

DATE

Before taking any adverse action (that is, declining to hire, promote, or retain an employee), where that decision is based in whole or in party on information from a consumer report, the employer must first:

- provide a copy of the consumer report relied upon to the affected individual

  and

- provide a copy of the "Summary Of Your Rights Under The Fair Credit Reporting Act" to the affected individual – the summary of rights form may be obtained from the Federal Trade Commission's website at www.ftc.gov

and

- wait a "sufficient amount of time" to give an applicant or employee the opportunity to dispute the accuracy of the reported information – at least five business days.

After taking any adverse action (based in whole or in part on information from a consumer report), the employer must provide oral, written, or electronic notice to the affected individual of the following:

- the fact that the adverse action has been taken (that is, declined to hire, retain, or promote the individual)

  and

- the name, address, and phone number – the toll-free number, if there is one – of the consumer reporting agency that provided the consumer report

  and

- the fact that the consumer reporting agency that provided the consumer report cannot provide the individual with the specific reasons why the adverse action was taken because it played no part in the adverse action

  and

- the fact that the individual has the right to a free copy of the consumer report in question from the consumer reporting agency that provided the report if the request is made within 60 days from the date the action is taken

  and

- the fact that the individual has the right to dispute with the consumer reporting agency the accuracy or completeness of the report furnished.

It is a better practice to provide written notice of the preceding details so that there is documented evidence that the correct procedures have been followed.

The following form is a sample letter that should be provided to applicants and/or employees who experience an adverse employment action based at least in part on a consumer report under the FCRA.

[ON THE COMPANY'S LETTERHEAD]

{Date}

{Employee Name}
{Employee's Address}

Re: Notice of Adverse Employment Action

Dear {Employee Name}:

Based in whole or in part on information contained in the consumer report that the company obtained from {Name of Consumer Reporting Agency}, a copy of which the company previously provided you, the company has decided _____ at this time. *[Please note that the last sentence of this paragraph may change depending on the type, etc.)]*

The name, address, and phone number of the consumer reporting agency that provided the consumer report is as follows:

{Name, Address, and Toll-free Number of the Consumer Reporting Agency}

Please note that the consumer reporting agency that provided the consumer report was not involved in the decision to take an adverse employment action against you. As a result, the consumer reporting agency cannot provide you with the specific reasons for the adverse employment action at issue. However, you have the right to obtain from the consumer reporting agency identified previously a free copy of the consumer report in question if you request a copy of the report within 60 days following your receipt of this notice. Moreover, you have the right to dispute with the consumer reporting agency the accuracy or completeness of the information contained in the consumer report it provided to the company.

If you have any questions regarding your rights under the Fair Credit Reporting Act (FCRA), please do not hesitate to contact the Federal Trade Commission (FTC), the agency responsible for enforcing the FCRA at (202) 326-3761.

Sincerely,

{Company Representative}

Chapter 6

Employee policies and procedures manuals

Employee handbooks, or carefully drafted policies and procedures, can be an effective shield for employers. However, if improperly drafted, they can be used by employees against the company. The following chapter outlines a recommended process for drafting or revising an employer's handbook, or policies and procedures manual.

Employers should develop a "Policies and Procedures Manual" rather than a "Handbook." In keeping a "Policies and Procedure Manual" comprised of separate and distinct policies and procedures on a variety of workplace-related topics, the individual policies within the manual may be revised and updated as needed without revising the entire manual. Moreover, a compilation of policies and procedures may be less likely to be interpreted as a contract for employment.

Regardless of the format of the employer's policies, decisions should be made early in the process as to the content, form, and tone of the Policies and Procedures Manual. There are also certain necessary policies that should be included in any manual and some policies that should be avoided. This chapter will discuss issues facing employers with regard to other recommended policies which are often found in handbooks, as well as other optional policies which employers may choose to include in their Policies and Procedures Manual based upon the needs of the particular company. Finally, because policies in themselves are not effective without implementation, a plan for implementation is an important step in the creation of any manual.

Preliminary decisions

Before an employer begins to draft or revise an effective manual, the employer should make some preliminary decisions about its scope and nature.

Depth of manual and policies

One of the first decisions the employer will need to make is how many policies the manual will have and how detailed those policies will be. Some employers choose to create a manual that contains only the bare minimum of policies that are required by the law. Such manuals provide the employer with a modicum of protection in the event of a lawsuit, but are of limited use to the company's employees or managers on a day-to-day basis. On the other hand, some employers develop lengthy manuals which contain detailed policies on every subject which affects employees. These manuals provide

managers as well as employees with extensive guidance on company policies. However, the company may find it difficult to keep these detailed policies current, and disgruntled employees will find it easier to point out times when the company failed to follow some detail of its policies, arguing the employer breached a contract with the employee.

Most employers fall somewhere in the middle of these two extremes, issuing manuals which include policies on a number of personnel issues that are important to the employer (standards of conduct, at-will employment) and to employees (leave, vacation and benefits).

In deciding which type of manual is right for the company, the employer will need to consult with company management to determine what level of detail is appropriate. The employer may also want to consider how independent and/or trustworthy lower-level managers have proved to be in the past. Do they follow company policies or handle each situation as they think best at the time? Do they contact human resources when difficult issues arise, or do they make decisions on their own?

Laws to review in drafting/revising policies

The application of federal employment laws to an employer depends on the number of employees the employer has at any given time. For instance, the Family and Medical Leave Act only applies to employers who employ 50 or more employees, each working day during 20 or more weeks in the current or preceding calendar year. To determine which laws apply, it is important to consider the number of employees the company has (or is likely to have in the near future) within a particular state or locality. In addition, if the laws of the state in which the employer operates are more restrictive than the federal laws or address areas that are not covered under federal laws, the employer must comply with the state laws as well. For more information, see Chapter 2, **Compliance thresholds**.

If the employer's manual is to apply to multiple states, the employer will have to make some difficult decisions as to the extent to which the manual addresses and complies with the laws of the various states. There are three main approaches that employers operating in multiple states use:

1. if the employer operates in a large number of states, it is usually easiest and safest to create a manual with very general policies and frequent references to the fact that employees may be entitled to different or additional benefits (or subject to different eligibility requirements) under state law

2. if the employer operates in only a few states (especially where those states do not have many employment-related laws), it may be possible to draft policies which comply with the laws of all of these states

3. the employer may choose to address the issue of different states differently for the various policies. For instance, it may be easy to add certain classifications of employees (for example, sexual orientation, political affiliation) to the list of

protected classifications in the Equal Employment Opportunity Policy as required by the laws of one of the applicable states. However, it may be more difficult (if not impossible) to draft a Family and Medical Leave Policy that complies with federal law as well as the laws of several different states. In that case, the employer would have to either draft a general policy, and reference the fact that employees may be entitled to different benefits or restrictions under state law, or draft separate policies and insert them into the manuals for the respective states.

Things to consider

- Each company has a different corporate culture which should be reflected in the manual. Very formal companies may want to refer to "employees" and "the company" in their policies, while informal companies will probably use "you" and "we," as well as a more casual tone generally.

- The composition and educational level of the workforce will determine the complexity of the language and terms that are used in the manual.

- If the company is developing policies for the first time, it must decide how "tough" or "easy" it wants to be.

- Does the company want to do only the minimum the law requires or does it want to provide its employees with additional, more generous benefits, leave, pay, etc.?

- Will the manual cover the conduct and benefits of managers and executives, as well as employees?

- Will both unionized and non-unionized employees be subject to the manual?

- Which subsidiaries, affiliates, and divisions will the manual apply to? If the employer operates in different states or has different operations (for example a plant, a corporate office, and a retail branch) that have very different conditions of work, requirements, and benefits, it may make sense to develop separate manuals for the various locations and/or operations.

  Of course, separate manuals are more difficult for the company to administer (especially if it has a centralized Human Resources organization) and may create perceptions of inequity.

Necessary policies

Very few state or federal employment laws require employers to insert particular language in their employee manuals. However, recent court decisions have made it extremely advisable for employers to include certain policies and language in manuals which communicate information about the terms and conditions of employment to employees.

Introduction to the manual

At the beginning of the manual, most employers include an introductory statement that welcomes employees and explains the purpose and scope of the manual. It is important that this introduction contain a clear statement that the employee manual does **not create a contract** of employment between the employer and any employee, and that nothing in the employee handbook alters the at-will status of the company's employees. This disclaimer is important because courts in some states have held that a manual can alter the at-will status by creating a contract of employment. To avoid or minimize the likelihood of such a finding, the manual must contain a prominently placed, heavily emphasized disclaimer. The courts in some states (such as South Carolina) provide specific suggestions as to how to emphasize the disclaimer, for example, by writing it in all capitals, putting it in bold-faced and/or larger type, placing it on a separate page, or placing it in a box.

In Georgia, it is unlikely that a court would find that an employee manual constitutes a contract of employment – particularly with a conspicuous disclaimer. However, Georgia courts have found that employees may have contractual rights to benefits which are promised to employees in a manual. For this reason, it is also a good idea to include language in an employee manual which states that the manual does not create a contract for benefits, and that the company reserves the right to add, change, or delete employee benefits at any time. While this language doesn't fully immunize an employer from employee claims for contractual rights to such benefits, it should provide the employer with some protection were litigation to occur.

An introductory statement should also explain that the employee manual contains only basic guidelines for employee conduct and benefits and does not set forth the specific details of each such policy. The introduction will also usually state that the policies in the manual will be interpreted by the company in its sole discretion and that the company retains the right to apply these policies with some flexibility.

Finally, it is a good idea to include language in the introduction which states that this manual supersedes and replaces all prior written and unwritten policies of the company. This is important because some courts have held that where a company changes policies and fails to make it clear to employees that these policies have changed, the employer may be required to continue applying the previous policies to employees.

Equal employment opportunity policy

Another important element of any employee manual is a statement that the employer is committed to making all employment decisions without regard to any protected classification, such as:

- age
- race

- color
- religion
- sex
- national origin
- disability
- service in the uniformed services.

Additionally, some states have recently made it illegal to discriminate on the basis of sexual orientation. Although Georgia has not joined this group, if the employer is constructing a general policy that will apply to locations in such states, sexual orientation should also be expressly listed among factors not considered in employment decisions. It is important to make sure that all of the classes of employees that are protected under both federal and state employment statutes are listed in this policy.

Service in the uniformed services is a classification that is often omitted, and disability should not be referred to by the more dated term of handicap. In addition, many employers choose to include the language and other classifications protected by law at the end of the list of classifications. This will help protect the employer in the event that a classification is inadvertently omitted, the laws change before the manual can be amended, or the handbook is used in states that protect other classifications of employees.

Harassment policy

Many employers choose to combine their Equal Employment Opportunity Policy with a policy prohibiting harassment in the workplace. Supreme Court precedent has made it a virtual necessity for an employer to develop and distribute a strong and comprehensive harassment policy to its employees. Supreme Court rulings suggest that the prudent course for employers is to develop a harassment policy that:

- states the company will not tolerate harassment in the workplace by managers, employees, or non-employees
- gives examples of some types of prohibited conduct or statements (but does not limit the application of the policy only to these examples)
- outlines a procedure for reporting harassment
- promises that employees will not be retaliated against for raising claims of harassment
- warns that employees who are found to have engaged in unlawful harassment will be subject to disciplinary action, up to and including termination.

Common mistakes

One common mistake that many employers make is to draft a harassment policy that only prohibits sexual harassment. Such an approach is dangerous because courts have recognized harassment claims based upon race, disability, and age as well as sex. A comprehensive harassment policy that addresses all types of workplace harassment will provide an employer with better protection than a limited sexual harassment policy.

It can also be a mistake to promise in the policy that complaints of harassment or discrimination will be kept completely confidential. Total confidentiality may not be possible because the company may have to disclose the nature of the allegations (and even the identity of the alleged victim) to the accused or to witnesses in order to investigate those allegations fully. For this reason, the policy should only promise that complaints will be kept confidential "to the extent possible."

Finally, a harassment policy should give employees at least two different avenues of reporting complaints of harassment. A policy that requires employees to report all complaints of harassment or discrimination to their immediate supervisor could be problematic if the immediate supervisor is the individual who is engaging in the harassment or discrimination. A better approach would be to ask the employee to report such complaints to human resources, his or her supervisor, or to another member of the senior management team. Companies that have operations in several states may want to provide employees with a toll-free number they can call to report complaints of harassment or discrimination.

Employment at-will policy

Although a good employee manual will explain the at-will status of employment in its introduction, it is a good idea to include a separate employment at will policy as well. In addition to stressing that the handbook will not change employees' at-will status, this policy should also state that the employees' at-will status may not be modified by any oral or written representations other than a written contract of employment signed by the appropriate officer of the company and the employee.

Family and medical leave policy

The Family and Medical Leave Act (FMLA) is the only federal employment law that specifically requires employers to include a particular policy in its employee manual. The Department of Labor's regulations interpreting the FMLA state that an employer is not required to have an employee handbook, but if it does have such a handbook, the handbook must include a statement of the employer's policy on FMLA leave. Of course, this requirement only applies to employers who are subject to the FMLA.

To qualify as an employer for purposes of the FMLA, a company must have 50 or more employees each working day during 20 or more workweeks in the current or preceding calendar year.

While the FMLA does not outline the specific language that employers should use in their FMLA policy, some important elements of an effective FMLA policy are as follows:

- employee eligibility (whether the policy will apply to all employees or only those who meet the eligibility requirements of the FMLA)
- types of leave (including a general discussion of what constitutes a serious health condition under the FMLA)
- method of calculating the 12-month period (calendar year, date-to-date, rolling forward, rolling backward)
- use of paid leave (employer should state which types of paid leave (for example, vacation, sick leave) may be used for which types of FMLA leave (birth/adoption, serious health condition) and whether the use of such paid leave is optional or required)
- intermittent and reduced schedule leave
- notice and certification
- compensation and benefits
- job restoration after FMLA leave.

It is particularly important for the FMLA policy to specify the method for calculating the 12-month period in which the 12 weeks of leave may be taken. If the employer fails to specify which method is to be used, an employee may select the method that is most beneficial to him or her.

Employer notice obligations within employee manuals

Effective January 16, 2009, new regulations clarify and strengthen employer notice requirements in order to better inform employees regarding their FMLA rights and obligations. In particular, employers that use policy and procedure manuals must include information from a notice prepared by the Department of Labor (DOL) within those manuals. If an employer does not use a policy and procedure manual, that employer may distribute the DOL notice to new employees upon hiring them. The DOL notice may be found at:

- www.dol.gov/esa/whd/fmla/finalrule/FMLAposter.pdf.

Employers should also take note that on October 28, 2009, President Obama signed the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010 into law. The Act builds upon the NDAA for FY 2008 which amended the Family Medical Leave Act (FMLA) by granting up to 12 weeks of exigency leave for employees with urgent needs related to the call to active service of a reservist

or National Guard family member. The NDAA for FY 2010 modifies this provision by extending the exigency leave to family members of servicemen and women already on active duty as well.

The NDAA for FY 2010 also expands the NDAA for FY 2008 with regard to eligibility for caregiver leave. The NDAA for FY 2008 granted up to 26 weeks of leave to an employee to care for a family member injured while serving on active military duty. The NDAA for FY 2010 includes leave for employees to care for family members who are currently veterans undergoing medical treatment, recuperation, or therapy for serious injury or illness that occurred any time during the five years preceding the date of treatment.

All provisions of the NDAA for FY 2010 were considered effective upon their enactment on October 28, 2009.

For more information, see Chapter 23, **Family and medical leave**.

Standards of conduct policy

No law requires that an employee manual contain a list of prohibited types of employee conduct, but this is one of the main reasons many employers develop employee manuals in the first place. A typical Standards of Conduct Policy should list the common types of misconduct which will result in discipline, but it should also stress that this list is not all-inclusive. The policy should also state that misconduct will result in discipline, up to and including termination.

Acknowledgment form

One of the most important parts of an employee manual is an Acknowledgment Form. This form is usually included at the end of the handbook and is designed to be read by employees, signed, and returned to the company to be retained in the employee's personnel file. A good Acknowledgment Form will contain the same disclaimers found in the introduction about how the handbook does not create an employment contract or any other type of contract. The Acknowledgment Form should also reiterate that the policies may change from time to time and will be interpreted by the company in its sole discretion.

Some employers have decided to implement a mandatory-arbitration process which requires employees to resolve all employment-related disputes with the company through arbitration, rather than a lawsuit. While there are many pros and cons to implementing such an approach, it is important to realize that a statement embedded in an Acknowledgment Form which states that the employee is also agreeing to arbitrate employment-related claims may not be sufficient to bind the employee. Many courts have indicated that mandatory arbitration agreements must be clear and will not be effective if they are simply included in a general Acknowledgment Form.

Recommended policies

Attendance and punctuality

Most employers take one of two approaches to attendance and tardiness in their employee manual:

- they may spell out a very formal policy of how many days (or portions of days) may be missed during a particular time period

  or

- they may set forth only a very general policy which states that attendance and punctuality are important and tardiness and absenteeism may lead to discipline, up to and including discharge.

The more general policy carries with it a risk that different managers may interpret this standard differently or on an ad-hoc basis, leading to differential (and possibly discriminatory) treatment of employees.

Most attendance and punctuality policies contain a statement that employees are expected to be present and on-time. Such policies should generally define excused and unexcused absences – stressing that failure to give proper notice of an absence may result in an absence being considered unexcused. Guidelines regarding the amount of notice an employee must give for the absence to be excused are also typical. Finally, many attendance and punctuality policies include a statement that an employee will be considered to have resigned if he or she fails to show up for work for two or three consecutive days, unless the absence was excused and the employee gave proper notice.

As a final warning, employers must be careful that their attendance and punctuality policies do not violate state or federal laws which permit employees to take leave for various purposes. For instance, the policy should probably include in the list of types of absences that are considered excused, any absence required or permitted under applicable leave laws. In addition, an attendance and punctuality policy should not state that an employee will be disciplined for simply excessive absences, but instead should state that the employee may be disciplined for excessive, unexcused absences.

Employee classification policy

If references are made in various policies to benefits, vacation or leave given to different classifications of employees, those classifications of employees need to be defined at the beginning of the manual. Employees are often classified by whether they are:

- exempt or non-exempt

- full-time or part-time (should specify different classes of part-time employees, if applicable)

- temporary/probationary/regular (avoid "permanent" because the phrase implies that these employees are not employees-at-will).

Many employers choose to insert a provision which states that none of these classifications change the at-will employment status of the company's employees.

Drug and alcohol policy

While workplace drug and alcohol use are often included on the list of prohibited types of employee conduct, many employers prefer to have a separate policy on substance abuse. This is particularly important if the company intends to comply with a state, drug-free workplace statute. Some states, including Georgia, will give an employer a significant discount on its workers' compensation insurance if the employer implements a drug free workplace program. These programs generally govern the procedures an employer may use to test an employee for use of illegal substances, and may also specify what types of testing are required, permitted, or prohibited and what language must be included in a policy statement on substance abuse.

If the company wants to implement a substance use/abuse policy, it must be careful to comply with any state or local statutes regarding such testing. Generally, however, a substance abuse policy should specify what types of substance abuse or use is prohibited (for example, illegal drugs, alcohol use on premises, abuse of prescription drugs). In addition, the policy should set forth any standards for testing, such as:

- when the company will test for drugs (applicant testing, random testing, for-cause testing, post-rehabilitation testing)
- whether a confirmation test will be conducted
- consequences of a positive test or refusal to be tested
- confidentiality
- any opportunity to explain or contest results.

Employee benefit plans

One common mistake that employers make in drafting a policy regarding employee benefit plans is to include too much information about the nature of benefits and eligibility for benefits. The important thing to remember in drafting such policies is that the employee manual should be drafted such that it does not (and will not in the future) conflict with the company's benefit plan documents or the summary plan descriptions. The nature of the benefits and the eligibility requirements may change and if there is a detailed description of these matters in the employee manual, the company should be careful to change the descriptions, as well as the plan documents and the summary plan descriptions. It is a better idea to simply list the different types of employee benefit plans that the company currently offers to employees, and refer employees to the plan documents for more information. In addition, a general Employee Benefit Plans Policy

should contain a statement that the company reserves the right to modify, add to, or eliminate these benefits at any time.

Jury duty and subpoenaed witness duty

An employee's right to leave work for jury duty and/or subpoenaed witness duty is governed solely by state law. However, most states prohibit an employer from disciplining an employee for fulfilling these civic duties. In Georgia, it is unlawful for any employer or agent of the employer to discharge, discipline, or penalize an employee because the employee is absent from work for the purpose of attending a judicial proceeding in response to a subpoena, summons for jury duty, or other court order or process that requires the attendance of the employee at the judicial proceeding. An employer who violates this law is liable for damages incurred by the employee. Georgia law requires that employers pay the employee their normal salary while the employee is absent for jury duty. The employer may deduct any jury pay from the regular salary in making these payments. A good policy will explain the employer's policy with regard to payment during jury duty and/or witness duty service, and should explain how much advance notice the employee must give before taking leave for these reasons.

Military leave

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) and various state laws govern the amount and nature of leave an employee is entitled to for serving in the military. A company's Military Leave Policy should explain what types of military leave are permitted and should explain what an employee must do to exercise his or her reemployment rights under the statute. In addition, the policy should state whether the employer will continue to pay an employee during the military leave.

In Georgia, an employee who is absent for military service in the U.S. armed forces or Georgia's organized militia must be reinstated if:

- they receive a certificate of completion of military services from the appropriate military officer

  and

- they are still qualified to perform the duties of the position

  and

- they apply for reemployment within 90 days after being relieved from such service.

In Georgia, an employee who either participates in assemblies or annual training of the state militia or attends service schools conducted by the U.S. armed forces for up to six months in any four-year period must be reinstated if:

- they are qualified for the position

and

- they apply for reemployment within ten days after completion of service.

Likewise, a Georgia employee who is discharged or suspended by his employer because of either membership in the state militia or the U.S. reserves or active service in the Georgia National Guard must be reinstated if:

- they are qualified for the position

  and

- they apply for reemployment within ten days after the discharge or suspension or the completion of the service, whichever is later.

Employers should be aware that military leave was greatly expanded under the recent changes to the FMLA that became effective January 16, 2009. For more information, see Chapter 23, **Family and medical leave**.

Overtime policy

Employers should include a policy regarding overtime work and pay in their employee manuals. An overtime policy can explain that employees will only be paid time and a half for hours that they work over 40 in a workweek – reiterating that paid time off for vacation, sick leave, holidays, etc. does not count towards the forty hours. An important element of any overtime policy is a mandate that non-exempt employees must obtain permission from their supervisor before working overtime, and that they cannot start work early, work through lunch, or work late without similar permission. The policy may also state that from time to time, employees will be required to work overtime, and repeated refusals to work such overtime may result in discipline. In drafting an overtime policy, it is important to check the wage and hour laws of the states in which the employees will be working. Georgia follows federal law and requires employees be paid time and a half for all hours worked over 40 in a workweek. However, some states require overtime for hours worked over eight per day or require additional pay for holidays – especially in certain industries.

Sick leave policy

Each company's sick leave policy may vary, and must be crafted to meet the needs of the company and the nature of its workforce. However, there are a few basic guidelines that apply to all such policies:

- First, the policy must explicitly state how much leave is given to each classification of employees, and how the leave will be managed.

- The policy should also make it clear whether the leave will be paid or unpaid and it should outline any notice requirements for employees.

- Finally, the sick leave policy needs to be checked to make sure that it does not violate the Americans with Disabilities Act (ADA) or the FMLA. For instance, the sick leave policy should not state that employees will automatically be terminated if they exceed the permissible number of sick days, because both the ADA and the FMLA may require an employer to give an employee additional unpaid time off to recover from a disability or a serious health condition.

Vacation policy

As with sick leave policies, vacation policies differ widely from employer to employer. The key thing to remember in drafting a vacation policy is that if employees accrue vacation on a monthly or yearly basis, the accrual process needs to be clearly explained. In particular, employers often do not adequately explain how accrual will work during the first year (or partial year) of employment. Will employees be given a lump amount or accrue on a prorated or monthly basis? Many employers also make the mistake of trying to draft a complicated formula for accrual when it simply may be easier to include a chart or table with the length of service and amount of vacation listed (especially where the accrual rate changes at certain threshold levels, such as after five or ten years). Other issues a company should consider in drafting a vacation policy are whether employees will be required to wait for a period of time before accruing vacation, whether vacation may be carried over from year to year (and if so, whether there is a maximum), and whether employees will be paid for accrued but unused vacation time upon their resignation or termination.

Voting leave policy

In Georgia, upon reasonable notice to the employer, the employee is permitted to take any necessary time from their employment to vote in any municipal, county, state, or federal political party primary or election for which such employee is qualified and registered to vote, provided that the time off shall not exceed two hours. If the hours of work begin at least two hours after the opening of the polls or end at least two hours prior to the closing of the polls, then the time off for voting shall not be available. Usually, the company is permitted to decide when during the day the employee may be absent to vote.

Workers' compensation policy

Some employers make the mistake of drafting detailed workers' compensation policies which describe all of the various types of benefits an employee can receive under the company's workers' compensation insurance policy and how an employee must process claims. It is usually a better idea for a workers' compensation policy to simply advise employees to follow the company's safety procedures and immediately report any illnesses or injuries which occur at work or during working hours. For more information, see Chapter 28, **Workers' Compensation**.

Optional policies

The following policies are ones which employers may choose to include in their manuals. Employers should check applicable employment laws to be sure the policies comply with any Georgia or federal requirements in these areas.

- bonuses
- break room
- bulletin board
- compensation
- procedures
- confidential and proprietary information
- conflict of interest
- discipline procedures
- dress code
- educational leave and reimbursement
- electronic communications
- employment of relatives
- expense reimbursement
- funeral/bereavement leave
- grievance/problem-solving procedures
- holidays
- inclement weather
- medical examinations
- orientation/training
- performance evaluations
- personal leave
- privacy in the workplace

- promotions and transfers
- raises/salary increases
- smoking
- solicitations
- termination
- use of company equipment and supplies
- workplace violence.

Implementing the employee manual

It is not enough for an employer to simply develop a comprehensive employee manual – the manual must also be effectively distributed to employees and consistently enforced. To be sure that company managers will be willing and able to enforce the policies contained in the manual, it is a good idea to have a few key managers at each level review a draft of the manual before it is finalized. These managers may be able to tell the employer whether the manual accurately reflects current practices, whether it sets realistic standards, and what employee reaction will be to changes.

Binding the manual

Once the text of the manual has been finalized, the employer needs to decide on the binding. There are two principal ways to bind the manual – as a single booklet or in a folder or binder with removable pages. A single booklet is usually cheaper to produce and easier to distribute. The single booklet approach also makes it easy to tell which policies were in force at a particular time (as long as the manual is clearly marked with an effective date). A policies and procedures manual that is contained in a binder with removable pages will be more expensive, but it will be easier to update. A company that chooses to issue a handbook and replace particular pages/policies from time to time may find it more difficult to keep track of which versions of policies were in effect on a particular date (such as when an employee went out on leave or when a policy infraction occurred that later became the focus of a lawsuit). If such a method is used, each page of each policy should be labeled with the effective date of that policy.

Presenting a new manual

When the employer is ready to present the manual to employees, it should be rolled out with some degree of fanfare to ensure that all employees are aware of the new policies. Often, the President/CEO of the company will issue a formal announcement and/or draft a welcome letter to be included with the manual. If the manual represents significant changes from the company's previous policies, training sessions should be held for managers who will have to implement and enforce the policies. The Human Resources

Department should also be prepared to receive a large number of questions from employees and managers during the initial weeks and months the new manual is in effect.

Acknowledgment forms

The most important part of the implementation process is having employees sign the Acknowledgment Forms found at the end of the manual and return them to the company for filing. As explained above, the manual will not provide the employer with much protection in the event of a lawsuit or other dispute if the company cannot demonstrate that the employee received and read it. The Human Resources Department may want to keep a list of all employees and check each employee's name off as it receives a signed Acknowledgment Form from that employee. Managers will also need to be educated in the importance of such forms, and the processing of such forms may need to be added to the new-hire process. The signed Acknowledgment Forms should be kept in the employees' individual personnel files.

Review and revise

Finally, the implementation of an employee manual is not complete until the company schedules a final review before it is distributed to the employees. In addition, periodic reviews should be conducted every year or two in order to ensure that the manual reflects any changes in the law and reflects the company's current practices. Each time the manual or particular policies are updated, the Human Resources Department should keep several copies of the old manual or policies on file. These may be needed to manage an employee with disciplinary problems under a prior version of a policy or if a lawsuit is later filed concerning events which occurred under a previous version of the manual.

Chapter 7

Employee personnel files

Most of the information collected about employees should be kept in a confidential manner. Personnel files should be kept in a locked cabinet, and employers should designate only a few individuals to have access to the files. In addition, the Americans with Disabilities Act (ADA) requires medical information to be kept separately from other personnel records.

There are no Georgia or federal laws outlining what specific information must be included in a personnel file. The contents of personnel files are likely to vary widely depending on the industry or business involved. Personnel files will probably include the following basic information:

- employment application
- performance evaluation
- attendance records
- disciplinary records
- insurance election forms
- employer handbook acknowledgement forms
- necessary tax forms, such as IRS W-4s
- payroll information.

Medical information of any kind should be kept out of an employee's personnel file. This includes requests for leaves of absence based on underlying medical conditions and notes from physicians listing work restrictions based on health concerns. If a doctor's note excusing an employee's absence contains medical information, it should be kept in a separate file to preserve its confidentiality. A simple notation in the personnel file that a written note was provided to excuse the absence is sufficient. In most cases, workers' compensation claim forms should not be kept in personnel files because of the confidential medical information they often contain. Benefit claim forms for insurance purposes may also inadvertently disclose medical information and should be separated from personnel files in order to maintain confidentiality.

Employee access

Public employers

Unlike private sector employees, state and federal employees have access to their employment records. Employees of federal agencies can, on request, obtain information about themselves contained in any system of records maintained by a federal agency. State employees can request that persons having custody of public records make these records available, at reasonable times, for inspection. Some information or records, however, are exempt according to state statute.

Private employers

Georgia does not have a statute which allows private employers' employees access to their personnel files. Therefore, there is no general right for a private sector employee to review or copy his personnel file without the consent of his employer. However, despite the limited access requirements faced by Georgia employers, many employers choose to allow some degree of access to employee personnel files in order to promote good employee relations.

Medical records

Employees do have the right to obtain certain medical information. Under the Occupational Safety and Health Act (OSH Act), employers are required to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under the OSH Act. These regulations provide employees and their representatives with an opportunity to observe the monitoring and measuring of toxic materials and to have access to certain medical records. For more information see Chapter 25, **Workplace safety and health.**

Confidentiality

The Americans with Disabilities Act (ADA) requires that public and private employers maintain strict confidentiality procedures regarding medical information. Even if information does not directly identify an individual, his or her identity may be discernible based on absence records or other information. Once confidential medical information is discernible, it may be subject to broad dissemination. This is especially true with regard to the most sensitive medical information, such as mental health, HIV, or other serious illness. Because the potential for harm to the employee and to the Company is so high, employers should carefully monitor access to confidential medical information and should establish procedures to ensure that this type of information is disseminated only as necessary.

Written policy regarding personnel files

Employers can avoid problems and ensure that supervisors and human resources personnel are consistent when it comes to maintaining the files and monitoring employee access to these files by instituting and following a written policy regarding personnel files. The policy should state the circumstances under which employees will be allowed to review their personnel file and should provide for some appropriate form of supervision for these situations. This will ensure that the integrity of the personnel records is maintained.

Personnel files should also be periodically reviewed and updated with new information. As demonstrated above, every record relating to a particular employee does not belong in that employee's personnel file. Some records, such as those reflecting confidential medical information, must be kept separately.

Proper documentation is an invaluable tool in defending a company's decisions relating to a particular employee. However, poor documentation can be more detrimental to an employer than none at all. Therefore, employers should ensure that all documentation relating to an employee is accurate, concise, and factual, and employers should keep in mind that any documents created may later be discoverable in future litigation.

Chapter 8

Restrictive covenants, non-compete agreements, and trade secrets

Sometimes an employer's greatest legal concerns do not arise until after an employee has left the company. Unfortunately, it may be too late at that point for the employer to adequately protect its interests.

In the absence of a restrictive covenant in an employment agreement, a company's former employees are generally free to immediately go to work for a competitor, to solicit their former employer's customers and employees, and to disclose confidential information that does not rise to the level of a trade secret. This relative freedom can result in great harm to the previous employer, particularly in instances where the former employee had particularly strong relationships with customers, vendors, or other employees, or where the former employee had access to significant and potentially damaging business information. In short, unless a company requires that its employees execute legally enforceable restrictive covenants (often referred to generically as "non-compete agreements"), there may be no way to prevent former employees from taking the training and knowledge you provided them and using it for the benefit of a direct competitor.

Employers looking to protect their interests face an even more difficult task in a state like Georgia, where the courts are among the strictest in the country when it comes to enforcing restrictive covenants against a former employee. This strict judicial scrutiny means that a Georgia employer must engage in a careful and thoughtful analysis when drafting a restrictive covenant, rather than simply relying on a generic form. This chapter provides a basic look at the types of contractual restrictions that can be placed on a Georgia employee as well as the possibility of using the Georgia Trade Secrets Act to restrict post-employment activity in instances where there may not be a valid restrictive covenant.

Restrictive covenants

In many ways, restrictive covenants are subject to the same basic requirements of other contracts in that they must be written, must be supported by consideration, and must include sufficient certainty with respect to the terms of the agreement. In Georgia, however, restrictive covenants in the employer-employee context are subject to much more scrutiny than an ordinary contract.

This scrutiny results from provisions in both the Official Code of Georgia and the Georgia Constitution, the latter of which provides that all contracts and agreements which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly, shall be illegal and void. As a result, Georgia courts have consistently found that restrictive covenants that are not narrowly tailored to an employer's legitimate, protectable interests are an illegal restraint of trade and cannot be enforced.

Therefore, when drafting a restrictive covenant, it is important for an employer to consider exactly what interests it wishes to protect and how narrowly it can tailor a restrictive covenant to accomplish its goals.

Types of restrictive covenants

Although they are commonly lumped together and referred to as "non-competes," there are actually several different types of restrictive covenants that an employer can use when attempting to protect its interests. The appropriate type of covenant depends on the type of protection the employer needs. Generally speaking, restrictive covenants fall into one of the following categories.

Non-competition

In its purest form, a covenant not to compete prohibits a former employee from engaging in any business or activity that is competitive with his or her former employer. This prohibition exists regardless of whether the new business or activity actually does any harm to the business of the former employer. Because it is the broadest and most restrictive type of covenant, it is subject to the highest judicial scrutiny and is the type of covenant that is most frequently found unenforceable by Georgia courts. To be enforceable, a non-competition covenant must be reasonably limited with respect to time, geography, and the scope of activities permitted to the former employee.

Non-solicitation of customers

These covenants do not specifically prohibit the ability of a former employee to engage in competition. Rather, they prohibit the employee's solicitation of customers (and sometimes vendors, suppliers or similar entities) who have established business relationships with the former employer. It is advisable that non-solicitation covenants should be reasonably limited in time. In recent years, Georgia courts have upheld covenants without a durational and/or geographical restriction where such covenants were limited to those customers with whom the former employee had "material contact." However, in the absence of such language, a non-solicitation covenant should contain a reasonable geographic and temporal scope.

Non-recruitment of employees

These covenants are similar to those regarding the non-solicitation of customers, but instead prohibit the former employee from soliciting or recruiting employees

of his or her former employer. Non-recruitment covenants must contain reasonable time limitations. It is unclear in Georgia whether such covenants must be limited to those workers with whom the former employee had "material contact" or can extend to all employees of the former employer. It is also unclear in Georgia the circumstances in which a non-recruitment covenant requires a reasonable geographic scope.

Non-disclosure of confidential information

Non-disclosure covenants limit the former employee's ability to disclose information he or she may have about the former employer's customers, suppliers, pricing or other business information. As with the other covenants discussed above, a non-disclosure covenant must be limited in time under Georgia law. They do not, however, require any geographic limitation or "material contact" provision. It is important to note that, although many non-disclosure covenants include the term "trade secret," Georgia law already prohibits the disclosure of trade secrets by statute (see page 84, **Trade secrets**). In reality, very few types of information actually rise to the level of a trade secret under the law, and a non-disclosure covenant therefore protects the distribution of valuable confidential information even if it does not legally constitute a trade secret.

Factors governing enforceability

In addition to the Constitutional prohibition on contracts in restraint of trade discussed above, the primary reason that restrictive covenants are difficult to enforce in Georgia is that its courts will under no circumstances modify or "blue pencil" an overbroad covenant to make it enforceable. As a result, a non-competition covenant that is reasonable with respect to its duration and geographic scope may be struck down in its entirety if the scope of activities it prohibits is overly broad. Furthermore, an invalid non-competition or non-solicitation covenant will result in the court striking both provisions, even if one would be perfectly enforceable if standing alone. In contrast, an invalid non-recruitment or non-disclosure covenant does not effect the validity of other covenants.

When examining the enforceability of restrictive covenants, Georgia courts generally consider three things:

1. the length of time the restriction remains in effect

   and

2. the geographical area in which the restriction applies

   and

3. the scope of activities that are prohibited.

1. Time

The time that a restrictive covenant remains in effect is the least controversial and easiest to predict of the three factors governing the enforceability of a restrictive covenant in Georgia. As discussed above, time limits are required on all four types of restrictive covenants, with the possible exception of a non-solicitation covenant provided the restriction is limited to those customers with whom the employee has material contact. Time limits of one or two years will be enforced in most circumstances. Put simply, any non-competition, non-solicitation or non-recruitment covenant with a term longer than two years is a risky proposition for the employer. Time limits on the disclosure of confidential information can generally be longer. Finally, Georgia employers should be wary of "tolling provisions" that state that a time limit begins to run only when the former employee is in violation of the covenant. Such provisions have been held invalid, although similar provisions that become effective only upon the filing of a lawsuit to challenge the covenant have been upheld.

2. Geography

The requirement that a restrictive covenant contain a reasonable geographic limitation is often the most problematic element for the employer seeking protection. Although a geographic scope is not necessarily required for non-recruitment and non-disclosure covenants, it is mandatory in any non-competition covenant and in any non-solicitation covenant that does not contain the "material contact" limitation described earlier in this chapter.

Unfortunately for Georgia employers, drafting an enforceable geographic restriction is becoming more and more difficult as technology has freed many white-collar workers from working at a fixed location. The cardinal rule remains that the scope of the defined territory must bear some reasonable relation to the area in which the employer does business and, in most cases, be co-extensive with the area in which the employee has actually worked.

> **Example**
> If an employee works as a salesperson and is assigned to a territory that consists of Cobb, Dekalb, Fulton and Gwinnett Counties, a non-competition covenant that prohibits him or her from competing anywhere in Georgia would be overbroad and struck down by a court. One would assume, however, that a covenant that prohibited competition in those same four counties would be enforceable. Assuming that the hypothetical employee continued to work in those same four counties, the covenant most likely would be enforceable. If, however, the employee had been reassigned and his or her territory consisted of Cobb, Fulton, and Forsyth Counties at the time of his termination, the covenant would likely be struck down.

Furthermore, employers cannot rely on language that defines the geographic scope as the particular territory that the employee worked in at the time of his or her termination. Given the state of the law as it currently exists in Georgia, the only real solution for an employer whose employees work in different territories at different times during their employment is to execute a new agreement or covenant each time a territory changes. (Fortunately in this respect, continued employment at-will is sufficient consideration to support a restrictive covenant in Georgia.) Employers who use restrictions based on a radius of a certain number of miles (as opposed to counties) face similar issues in that, if the radius exceeds the area in which the employee actually worked, it may be struck down as overly broad. Finally, geographic terms that are difficult to define or which change regularly (like "the Atlanta metropolitan area") are also difficult to enforce. In short, there is no magic geographical restriction that is necessarily enforceable in a non-competition covenant under Georgia law and, therefore, geographic scope must be based on the individual facts and circumstances of every situation.

Employers attempting to enforce non-solicitation covenants that apply to all customers face similar obstacles in that such covenants must have a reasonable geographic limitation based on the actual activities of the employee. As with a time limitation, recent Georgia decisions have recognized an exception to this rule when non-solicitation covenants are limited to those customers with whom the employee had material contact by virtue of his or her employment with the previous company. As discussed above, in these instances, no geographic restriction is necessary.

3. Scope of activities

Although there are many gray areas with respect to the scope of activities that may be prohibited by a non-competition or non-solicitation covenant in Georgia, it is clear that a non-competition clause that prohibits the employee from working for a competitor "in any capacity" is invalid. In general, the activities that a non-competition covenant seeks to prohibit should be of the same nature as (although not necessarily identical to) those that the employee performed for his previous employer. In addition, covenants that specifically list or describe the prohibited activities are most likely to be enforced. Such a covenant can be rendered invalid, however, by the mere inclusion of phrases such as "or otherwise" or "in any other capacity." Furthermore, the nature of the business interest that the employer seeks to protect should be clearly explained in the agreement.

The scope of activities prohibited by a non-solicitation covenant should also be clear. Georgia decisions suggest that such covenants can limit the solicitation of both existing and prospective customers of the previous employer, assuming there is at least some kind of connection between the previous employer and prospective customer. Although the case law is less clear, it appears that non-solicitation covenants can only prohibit the actual, affirmative solicitation of

prohibited customers and cannot restrict the former employee's ability to accept unsolicited business from those customers.

Available remedies

Injunctive relief (a court order requiring that a party comply with the covenant) is almost always sought in restrictive covenant cases and is often the only issue that ends up being decided. Both the employer seeking to enforce a restrictive covenant and the employee (or subsequent employer) seeking to invalidate the covenant have the option of filing for a temporary restraining order, preliminary injunctive relief, and/or declaratory judgment declaring and explaining the rights of the parties under the covenant at issue. Damages are also available and can include both lost profits and incidental damages flowing from any breach of the covenant. As in other contract actions, punitive damages are not available.

Trade secrets

Employers who do not secure any restrictive covenants are not necessarily without recourse in the event that a former employee discloses or uses certain proprietary information. Georgia, like the vast majority of states, has adopted a version of the Uniform Trade Secrets Act and protects information that amounts to a trade secret even in the absence of any written agreement. Whether or not information qualifies as a trade secret under the Georgia Trade Secrets Act (GTSA) depends on several factors, which are discussed below. It should be noted, however, that trade secrets are defined much more narrowly than confidential information that can be protected by a non-disclosure covenant of the type discussed in the section above. Thus, the prudent employer should not necessarily rely solely on the GTSA to protect its confidential or proprietary information. On the other hand, if employer information does amount to a trade secret, it can be protected indefinitely, unlike confidential information covenants that can only be enforced for a reasonable period of time.

What is a trade secret

The GTSA specifically lists the following types of information that can amount to trade secrets:

- technical or non-technical data
- formula
- patterns
- compilations
- programs
- devices
- methods

- techniques
- drawings
- processes
- financial data
- financial plans
- product plans
- lists of actual or potential customers or suppliers.

Under the GTSA, information amounts to a trade secret if:

- the information is not commonly known by or available to the public

  and

- the information has actual or potential economic value to its possessor because others who can obtain economic value by using or disclosing it generally do not know it and cannot readily ascertain it by proper means

  and

- the possessor has made reasonable efforts to keep the information secret.

The requirements of each of the three prongs of the statutory definition are discussed below.

1. Information not commonly known or available to the public

Although it is difficult to imagine how information could meet the requirements under prongs two and three of the GTSA test without also satisfying the first prong, this threshold requirement does come into play on occasion. For example, many trade secret cases involve a company's use of commonly known and publicly available components that still amounted to a trade secret because the company's method or sequence of integrating those components was not commonly known or available to the public. One Georgia court has specifically held that the mere fact that a function can be reproduced with a combination of commercially available components and reverse engineering does not necessarily preclude the function or system from being a trade secret.

2. Economic value

As discussed above, this prong requires that the information have actual or potential economic value because others who can obtain economic value by using

or disclosing it generally do not know of the information and cannot reasonably ascertain it by proper means. There is no bright line rule as to how much economic value the information must have and a court's inquiry is generally directed to whether the information is generally known and can be reasonably ascertained by proper means. Georgia courts have held improper means to include things like theft, bribery, misrepresentation, breach of a confidential duty, and espionage. Reverse engineering is generally not considered improper.

3. Reasonable efforts to maintain secrecy

The final prong establishing that information is a trade secret under the GTSA is the effort made by the possessor of the information to maintain its secrecy. As one would expect, this determination is fact intensive and hinges on the individual facts and circumstances of every case. It should be noted, however, that Georgia courts have held that in instances where customer lists were not widely disseminated and employees were required to execute non-disclosure agreements, the information was held to be a trade secret. In contrast, some courts have held that the mere requirement that a non-disclosure agreement be signed does not necessarily constitute reasonable efforts to maintain secrecy. Despite this uncertainty, it is clear that the language of a non-disclosure covenant can play a vital role in the determination of whether something amounts to a trade secret. Likewise, evidence that access to trade secrets was restricted, that trade secrets were shared with employees only where necessary, and that such employees were informed that the information was a trade secret may also be relevant to show reasonable efforts to maintain secrecy.

Misappropriation of trade secrets

In addition to defining the meaning of a trade secret, the GTSA also defines misappropriation as:

- acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means

  or

- disclosure or use of a trade secret without express or implied consent by a person who:

  - used improper means to acquire knowledge of the trade secret

    or

  - at the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:

    - derived from or through a person who had utilized improper means to acquire it

or

- acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use

  or

- derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use

  or

- before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Available relief

The GTSA provides a variety of relief in the event that a trade secret is misappropriated. Specifically, Georgia courts can issue orders prohibiting actual or even threatened misappropriation. An injunction of this nature may even prohibit a former employee from working for a competitor or in a specific division or department of a competitor for a period of time. Injunctions may also condition future use of a trade secret on the payment of a royalty. Furthermore, the GTSA provides for the recovery of damages in addition to or in lieu of injunctive relief. Damages can include both the actual loss suffered by the holder of the trade secret as a result of the misappropriation as well as the unjust enrichment enjoyed by the party that misappropriated the trade secret. Exemplary damages and attorneys' fees are also available under the GTSA in instances where the misappropriation is "willful and malicious."

Actions for the misappropriation of a trade secret under the GTSA must be brought within five years from the date when the misappropriation was discovered or should have been discovered by the exercise of reasonable diligence.

Chapter 9

Wages and hours

The Fair Labor Standards Act (FLSA) was originally enacted in 1938 to ensure employees a "fair wage for a fair day's work," and it has been amended several times since then. The FLSA establishes standards for:

- a minimum wage rate
- maximum number of hours
- overtime pay
- child labor
- record keeping.

While the FLSA requires employers to pay a minimum wage and overtime to many employees, it also contains numerous exemptions to these requirements. These subjects, among others, are addressed in this chapter.

Most states have enacted their own overtime laws with provisions which sometimes differ from those of the FLSA. However, wages and hours in Georgia are primarily governed by federal law. Applicable Georgia laws are also discussed in this chapter.

Who is covered

Enterprise coverage

The FLSA applies to enterprises, or a company as a whole, with related operations performed for a common business purpose, including all operations regardless of whether performed at the same location. For example, all departments of a store or plant and all stores and plants within a company are included in the enterprise, while independent contractors and certain independent retail and service establishments are not included within the enterprise. A business that is a covered enterprise is subject to the FLSA with respect to all of its employees.

To qualify as a covered enterprise, a company must have:

- two or more employees who are engaged in commerce, engaged in production of goods for commerce, or are handling, selling, or otherwise working on goods or materials that have already been moved in or produced for commerce

  and

- an annual gross sales volume of at least $500,000.

The FLSA applies to hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies regardless of their sales volumes. Each of these enterprises is addressed below.

Hospitals and nursing homes

Hospitals and institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises are covered by the FLSA.

Public agencies

Public employers are covered by the FLSA. Special provisions apply to certain public employees, including higher overtime eligibility levels and longer work periods in which to calculate overtime for law enforcement and fire protection employees. Elected officials and their personal staff members and appointees, as well as members of the legislative branch, are excluded from the FLSA's coverage of public agencies.

Educational institutions

Preschools (including child care facilities), elementary schools, secondary schools, institutions of higher education, and schools for gifted or handicapped children are covered by the FLSA.

Manufacturing companies

The vast majority of manufacturing companies that are engaged in the production of goods for commerce are covered by the FLSA.

Transportation companies

Transportation companies are covered by the FLSA. However, certain employees such as interstate truck drivers, and the helpers and mechanics working on those trucks, are exempt from the overtime requirements of the FLSA.

Public utilities

Public utilities are covered by the FLSA.

Retail and service establishments

Retail and service establishments whose annual revenues are at least $500,000 are covered by the FLSA. The term "retail and service establishment" has a special meaning under the FLSA: "an establishment 75 percent of whose annual dollar volume of goods or services (or a combination of both) is not for resale and is recognized as retail sales or services in the particular industry."

These establishments include:

- retail stores
- restaurants
- hotels
- theaters
- cemeteries.

Numerous businesses are excluded from the above definition of retailers because the concept of retailing is not generally applicable to them. Such businesses include:

- accounting firms
- financial institutions
- brokerage houses
- doctors' offices
- laundries
- law firms
- book publishers.

Employees of retail and service establishments paid on commission are not subject to the FLSA's overtime requirements. In order to be considered such an employee, the employee must receive at least one and one half the current minimum wage and more than 50 percent of his or her earnings must come from commissions.

Individual employee coverage

Even if an organization is not a covered enterprise as outlined above, its individual employees may still be covered by the FLSA. An individual is covered if he or she is engaged in interstate commerce, produces goods for interstate commerce, or performs activities closely related and directly essential to the production of goods for commerce.

The FLSA also covers certain domestic service workers depending on the amount of cash wages they receive from one employer in a calendar year, or if they work a total of more than eight hours a week for one or more employers. Examples of service workers are:

- day workers
- housekeepers
- chauffeurs
- cooks
- full-time babysitters.

Postings for enterprises subject to the FLSA

Employers covered by the FLSA are required to display an official poster outlining FLSA provisions. This poster is available at no cost from local offices of the Wage and Hour Division, including Georgia's offices in Atlanta and Savannah. (Contact information for these offices is provided at the end of this chapter.) The poster is also available through the DOL by calling 1-866-4USWage (1-866-487-9243) and it is available electronically for downloading and printing at:

- www.dol.gov/esa/whd/regs/compliance/posters/flsa.htm.

Exemptions from minimum wage or overtime requirements

Employees subject to the FLSA must be paid overtime compensation for all hours worked over 40 per week and must be paid, at a minimum, the hourly wage set by federal law. The Department of Labor estimates that approximately 86 percent of the workforce are covered by federal wage and hour law. The FLSA exempts some employees from its overtime pay and minimum wage provisions (total exemptions), and it also exempts certain employees from the overtime pay provisions alone (partial exemptions). Due to the general shift from manufacturing to services and focus on technology, the employees exempted from FLSA provisions have changed somewhat since the inception of the FLSA. Indeed, traditional "white collar" jobs once classified as exempt from overtime provisions are now often covered by the FLSA based on the duties performed. Most of the FLSA's exemptions relate to specific jobs or industries.

Note: The duties, not the title, determine whether an employee is exempt from the FLSA.

White-collar exemptions

There are five principal white-collar exemptions to the FLSA.

1. executive
2. administrative

3. professional
4. computer employee
5. outside sales.

Salary basis

For the executive, administrative, or professional exemption to apply, the employee must be paid on a salary basis. An employee is paid on a salary basis if, for each week the employee works, he or she receives a predetermined salary (exclusive of board, lodging, or other facilities) that is not subject to reduction based upon the quality or quantity of work performed.

Effect of deductions on salary basis

Week-long absences

Exempt employees need not be paid for any week in which they perform no work, regardless of the reason for the absence.

Partial day absences

Employers may not deduct from exempt employees' pay for partial day absences except for intermittent or reduced-schedule FMLA leave or partial absences during the initial or final week of employment.

Absences of less than a week

- **Absences caused by the employer**
  An employer may not deduct from exempt employees' pay for absences of less than a week that are caused by the employer (for example, lack of work), except for unpaid disciplinary suspensions.

- **Absences taken for reduced schedule or intermittent leave under the FMLA**
  An employer may deduct a proportionate amount from the pay of an exempt employee who takes intermittent or reduced schedule leave under the FMLA. The deduction may be made for full or partial days missed.

- **Absences in the initial or final week of employment**
  Because an employer need only pay for the time an exempt employee actually worked during the first and last week of employment, an employer **may** deduct for full or partial days of absence in those weeks.

- **Absences of less than a week caused by the employee**
  An employer may not deduct from the pay of exempt

employees for absences of less than a week that are caused by the employee, except for the following:

- absences due to personal reasons other than sickness or accident
- absences due to sickness or disability
- absences due to jury duty, witness duty, or military leave.

Unpaid disciplinary suspensions
An employer may suspend an exempt employee without pay for one or more full days as discipline for an infraction of workplace conduct rules if the following conditions are met: the suspension is in good faith, a written policy provides for such suspensions, and the workplace conduct rule involves serious misconduct (such as harassment, workplace violence, drug or alcohol violations, or violations of state or federal laws), but not performance or attendance problems.

Deductions as penalties for violations of safety rules of major significance
An employer **may** deduct any amount from an exempt employee's pay (including an amount that would be equivalent to a partial day of pay) as a penalty imposed in good faith for a violation of a safety rule of major significance (defined as a rule regarding the prevention of serious danger in the workplace or to other employees).

Effect of improper deductions from salary

If an employer makes improper deductions from its employees' salaries, it may lose the exemption if the facts show it did not intend to pay those employees on a salary basis. An actual practice of making improper deductions shows that the employer has violated the salary basis test.

An isolated or inadvertent partial-day deduction generally can be made up without losing the exemption. However, such a dock due to lack of work jeopardizes the exemption (for example, an employee sent home early and not paid for the full day). The exemption can also be lost if there is a corporate policy permitting partial day docks or requiring partial day absences be "made up."

The DOL's regulations permit a safe harbor on the salary basis test. Under the safe harbor, an employer will not be considered to have violated

the salary basis test if it has a policy against improper docking, communicates that policy, and reimburses any employees found to have suffered an improper deduction.

Before an exempt employee's status is jeopardized, the employee must be subject to impermissible docks or partial week suspensions "as a practical matter." In other words, the mere possibility of an impermissible pay reduction is not enough. The non-compliant policy must clearly be applied to exempt employees, or several actual improper deductions or suspensions must have been imposed against exempt employees, for exempt status to be jeopardized.

Executive employee exemption

The executive exemption applies to an employee who is paid over $455 per week on a salary basis who meets the following criteria:

- **Primary duty**
  Manages the enterprise in which he or she is employed or of a customarily recognized department or subdivision.

  and

- **Supervision**
  Customarily and regularly directs the work of two or more employees.

  and

- **Authority**
  Has the authority to hire or fire other employees or his or her suggestions and recommendations as to hiring, firing, promotion or other change of status are given particular weight.

The executive exemption also includes any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which he or she is employed and who is actively engaged in its management.

Administrative employee exemption

The administrative exemption applies to an employee who is paid at least $455 per week on a salary basis who meets the following criteria:

- **Primary duty**
  Performs office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, or performs functions in the administration of a school system or educational establishment or institution, or of a department or subdivision

of such facility, in work directly related to the academic instruction or training carried on there.

and

- **Discretion**
  Customarily and regularly exercises discretion and independent judgment with respect to matters of significance.

Note
The duties, not the title, determine if an employee is exempt.

Examples of administrators include:

- financial services employees
- employees who lead a team of other employees assigned to complete major projects
- executive assistants or administrative assistants to a business owner or senior executive
- human resources managers
- purchasing agents.

Professional employee exemption

The professional exemption, which includes both "learned professionals" and "creative professionals," applies to an employee who is paid $455 per week on a "salary basis" or a "fee basis" who meets the following criteria.

Learned professionals

- **Primary duty**
  Performs work:
  - requiring advanced knowledge

    and
  - in a field of science or learning

    and
  - customarily acquired by a prolonged course of specialized intellectual instruction.

- **Discretion**
  Consistently exercises discretion and judgment in performance.

- **Intellectual**
  Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

  Note
  Teachers, lawyers, and physicians are excepted from the salary requirement of the learned professional exemption and have their own duty requirements for this exemption.

Examples of learned professionals include:

- registered or certified medical technologists
- registered nurses
- dental hygienists
- physician assistants
- accountants
- chefs
- certified athletic trainers
- funeral directors or embalmers.

Salary requirements do not apply to:

- teachers
- attorneys
- doctors.

Creative professionals

Primary duty
Performs work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical, or physical work.

Creative professionals perform work in creative fields including music, writing, acting, and the graphic arts.

Computer employee exemption

The computer employee exemption applies to an employee who is compensated on a salary or fee basis at a rate of at least $455 per week or who is compensated on an hourly basis at a rate of not less than $27.63 per hour (or approximately $57,460 per year), who is employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker and whose primary duties consist of one or more of the following:

- the application of systems analysis techniques and procedures including consulting with users to determine hardware and software specifications

  or

- designing computer-based systems based on and related to user specification

  or

- creating or modifying programs based on or related to systems design specifications

  or

- creating or modifying computer programs relating to machine operating systems.

Outside sales employee exemption

Outside sales employees are exempt if they are customarily and regularly engaged away from the employer's place of business or away from an in-home office in making sales or obtaining orders for services or the use of facilities. Outside sales must be the employee's primary duty. There is no salary requirement for this exemption.

Highly compensated employees

Under the exemption for highly compensated employees, an employee with total annual compensation of at least $100,000 is considered exempt if:

- the employee is paid on a salary basis or fee basis at a rate of at least $455 per week

  and

- the employee's total annual compensation is at least $100,000 (including both salary and commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned in a 52-week period)

and

- the employee's primary duty includes performing office or non-manual work

and

- the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.

Other exemptions

Following are some categories of employees that are either totally exempt (exempt from minimum wage and overtime requirements), or partially exempt (exempt from overtime requirements only) from the FLSA.

Although many states do not allow the following exemptions (and state law must be followed where it is more favorable to the employee), Georgia law allows these exemptions.

Total exemptions (minimum wage and overtime)

In addition to the exemptions listed above, the following workers are exempt from the minimum wage and overtime provisions of the FLSA:

- employees of recreational and amusement establishments and organized camps
- local retail and service establishments
- employees of certain small local newspapers (under 4,000 subscribers) and switchboard operators of small telephone companies
- seamen employed on foreign vessels
- employees engaged in fishing operations
- employees engaged in newspaper delivery
- farm workers employed on small farms (those that used less than 500 "man days" of farm labor in any calendar quarter of the preceding calendar year)
- casual babysitters and persons employed as companions to the elderly or infirm.

Partial exemptions (overtime)

The following employees are exempt from the FLSA overtime provisions only:

- certain commissioned employees of retail or service establishments
- auto, truck, trailer, farm implement, boat, or aircraft salespersons employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers
- auto, truck, or farm implement parts-clerks and mechanics employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers
- railroad and air carrier employees, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans
- announcers, news editors and chief engineers of certain non-metropolitan broadcasting stations (non-metropolitan is defined as a town of 100,000 or less not part of a standard metropolitan statistical area of 100,000 or a town with a population of 25,000 or less which is part of such an area but at least 40 air miles from the center of the major city)
- domestic service workers who reside in their employers' residences
- motion picture theater employees
- farm workers.

Payment of wages

Payment of wages is generally governed under state law.

Who is covered

Georgia law defines an employer as any person, firm, corporation, partnership, stock association, agent, manager, representative, or foreman, or other person having control or custody of any place of employment or of any employees, except agricultural and domestic labor and those employers having less than eight employees.

Method of payment

Employers may pay employees on a piece-rate basis, as long as they receive at least the equivalent of the required minimum hourly wage rate. Employers of tipped employees (those who customarily and regularly receive more than $20 a month in tips) may consider such tips as part of their wages, provided that employers meet certain conditions.

Time of payment

Georgia law provides that all employers (except within farming, sawmill, and turpentine industries) employing skilled or unskilled workers must make wage payments on dates chosen by the employer, provided that each month is divided into at least two equal pay periods.

Compensable working time

In general, the FLSA considers time spent performing activities that are primarily for the employer's benefit as compensable "hours worked", while time spent primarily for the employee's benefit is not. Below is an explanation of how this rule is applied to several specific situations.

Rest periods

Rest periods are common and are considered to be primarily for the employer's benefit. Therefore, short periods of 20 minutes or less for breaks, such as for coffee and snacks, are compensable hours worked.

Meal periods

The general rule is that a meal period of 30 minutes or more need not be compensated as work time.

If an employee does not punch in and out for an unpaid meal period during the work shift, the employer must ensure that the employee actually is relieved of duties for the entire meal period. Supervisors must be sure that employees actually take their scheduled meal periods. Where they do not, the time cards must be marked accordingly. Meal periods not spent predominantly for the benefit of the employer are not compensable, while meal periods for the employer's benefit are compensable. For example, if an office employee who is required to eat at his desk and answer telephone calls or a factory worker who is required to be at his machine is working while eating, such time is compensable.

If a meal period is interrupted by more than an insignificant amount of time (two or three minutes), then the employee must be paid for the lunch period as hours worked or receive a second lunch period. Repeated interruption of meal periods on a continuing basis may lead to a finding that the employee is not entirely relieved of duties and hence the meal periods are compensable hours worked. Therefore, there is a risk in allowing (as opposed to requiring) employees to eat at their work place because the question arises as to whether they had an uninterrupted meal period.

Waiting time while on duty

When employees are idle during their regular workday because of interruptions beyond their control, the time spent waiting is counted as working time if it is unpredictable, short in duration, and controlled by the employer such that employees are unable to use

that time for their own purposes. Below are a few examples of compensable waiting times:

- a factory worker who, while waiting for the machine she operates to be repaired, talks with her co-workers
- a clerk who, while waiting on an assignment or for a large copy job to be completed, reads a book or works a crossword puzzle
- a repairman who, while waiting on his customer to get the premises ready, talks on the phone with a friend.

24-hour duty

Employees on duty 24 or more hours or who reside on the employer's premises may agree in writing to have uninterrupted sleep time of up to eight hours per night deducted from hours worked. No reduction is permitted unless at least five hours of sleep are taken. Up to three hours of meal times also may be deducted. Persons who reside on the employer's premises also may voluntarily sign agreements setting forth their work and non-work time on a fair and reasonable basis.

On-call time

Whether on-call time is compensable depends on the extent to which the employee's personal time is restricted. Carrying a beeper does not constitute hours worked, provided the employee is relatively free to come and go as he or she pleases and the employee is given sufficient time to report (generally 20 to 30 minutes, depending on geographic population density) so that the employee can be free to use time to engage in personal activities while on call. The employee can be required to refrain from drinking alcoholic beverages during this period. Some restrictions may translate on-call time into hourly work, such as requiring an employee to stay at work or placing an employee constantly on-call or frequently interrupting the on-call period.

Travel time

All in one day

- Normal commuting to and from work in the particular geographic area is not compensable hours worked.
- Travel time to a distant out of town location is hours worked for drivers and passengers (all forms of travel).
- Travel between work locations and between a reporting work location and another place of assignment is considered hours worked.

Out of town overnight

- Travel during normal work hours is hours worked.
- Travel outside normal work hours as a passenger does not constitute hours worked.
- Travel time as a driver, other than normal commuting, is hours worked.
- If the employee is allowed to use public transportation for the trip but instead uses an automobile for personal reasons, the company may count hours worked as either:
    - the time spent driving to the destination

      or

    - the time that would have been considered hours worked had the employee used public transportation.

Commuting in company vehicle

The use of an employer's vehicle for travel by an employee commuting to and from work and incidental activities, such as getting a car washed or its oil changed, shall not be considered part of an employee's principal activities (and therefore such time spent doing the activities is not compensable) if:

- the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment

  and

- the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

Meetings, lectures and courses

Attendance at meetings, lectures, and training programs or courses is considered compensable hours worked **unless all four of the following are met**:

1. time is outside employee's normal working hours

   and

2. the course subject is not directly related to employee's regular job (such as learning the requirements of a new or higher-rated job)

   and

3. attendance is truly voluntary (except for state mandated training)

   and

4. no productive work is performed.

Time spent outside of normal work time in state or licensing agency mandated training such as to meet continuing education requirements is not hours worked.

Uniform changing

Time spent in uniform changing activities must be counted as hours worked if the employee must change at work and the employee cannot perform his or her job without the uniform.

Medical attention

Time spent by employees in waiting for and receiving medical attention is compensable if the medical attention is received during normal work hours and:

- the medical attention is received at the employer's facility or on plant premises

  or

- the employer directs the medical attention to be obtained elsewhere.

Physical examinations

Time spent receiving a physical examination that is required for continued employment is compensable. Time spent on tests (such as drug screens) by applicants seeking employment is not compensable.

Civic and charitable work

Time spent by employees working for public or charitable purposes at the employer's request, under its direction or control, or while the employee is required to be on the premises is compensable hours worked. For example, an employee directed by the employer to attend a charitable function must be paid for that time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not compensable.

Additional compensatory time issues for public employees

Volunteers

Public employees are able to engage in voluntary sporadic or occasional work for their employer in a different capacity without those hours being combined for overtime purposes. An example of a voluntary sporadic assignment would be a school clerk collecting tickets at a high school football game.

Compensatory time off

In general, federal, state, and local government employers, with the agreement of their employees, can give compensatory (or "comp") time off (at time and one-half) rather than pay cash overtime. In other words, if an employee worked 60 hours in a week, he could get 30 hours of comp time off instead of 20 hours of overtime pay.

If the work done by an employee for which comp time may be provided includes work in a public safety activity, emergency response activity, or seasonal activity, the employee can accrue up to 480 hours of comp time (320 hours of actual overtime worked). "Public safety activities" generally refer to law enforcement officers and firefighters. "Emergency response activities" generally refer to the dispatch of emergency vehicles, rescue work, and ambulance services. "Seasonal activities" typically include work during periods of increased demand which are regular and recurring in nature. There is a 240-hour cap on comp time (160 hours of actual overtime worked) for all other types of work.

Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work and must be under an agreement or understanding between the employer and employee prior to beginning the overtime. There is no specific time limit as to when a public employee may elect to use comp time earned. However, the public employer must permit the employee to use such time within a reasonable period after the employee requests time off, unless such use will unduly disrupt the government's operations (which generally depends on the government's workload and specific circumstances of each case). When an employee's employment is terminated, he or she must be paid for all remaining comp time at his or her current rate of pay.

Recordkeeping requirements

Information that must be maintained

Employers are required to maintain payroll records showing the following information:

For all employees:

- employee's name and company identification number
- home address
- birth date (if under 19)
- sex and occupation
- time of day and day of week that employee's work week begins

- total wages paid per pay period
- date paid and pay period covered by payment.

For employees subject to minimum wage and overtime provisions of the FLSA:

- regular hourly rate of pay in effect for time period covered by the records
- hours worked per day and per week (must furnish this information to employees with every payment of wages)
- total daily or weekly earnings exclusive of overtime pay
- total premium pay for overtime hours
- total additions or deductions from pay including purchase orders or wage assessments (payroll deduction information must be furnished to employees with every payment of wages).

For exempt employees:

- basis on which wages are paid in sufficient detail to permit calculation for each pay period of total compensation, including fringe benefits.

  Note
  A copy of the paycheck is **not** sufficient to meet these requirements.

Record retention (under the FLSA)

- Payroll records (such as ledgers and payroll registers), employment agreements, and sales and purchase records must be kept for three years. The FLSA does not require any particular form in which the records must be kept.
- Supplementary basic records (such as time cards, work sheets, wage rates, and billing records) must be kept for two years.
- State and federal tax withholding forms, such as W-2's, must be retained four years from the due date of the tax, or the date the tax is paid, whichever is later.

Georgia recordkeeping requirements

Under Georgia law, employers are required to maintain the following records for at least one year after the date of the record:

- employee's name
- employee's address

- employee's occupation
- daily and weekly hours worked by each employee
- wages paid during each pay period to each employee.

Note
Employers must comply with the longer record retention requirements of the FLSA for employees covered by that statute.

Penalties

The principal risk to an employer in failing to maintain adequate or accurate employment records is that the employer will be held responsible for the information contained within such records. For instance, employee testimony as to hours worked generally will be believed in the absence of accurate records of such work. Courts and government agencies maintain that the employer can hardly complain about this consequence, since it could have been easily avoided by accurate recordkeeping.

Recording hours worked

Hours worked are all hours an employee is engaged to work, engaged to wait, or actually at work, whether or not authorized. Therefore, if an employee starts work early or works beyond the end of his or her shift, such work must be compensated, whether or not it was authorized or even necessary. Employees, however, may be disciplined for unauthorized or unnecessary work.

Employers may keep track of employees' time in any method they choose. Employers, for example, may use a time clock, have a timekeeper keep track of employees' work hours, or tell their workers to write their own time on the records. Generally, any timekeeping plan is acceptable as long as it is complete and accurate.

Time clocks

Time clocks are not required but can be used to record hours worked. If time clocks are used, rounding practices may be used. If the rounding method is followed, employers must ensure that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. Employers should round employee time to the nearest increment (5 minutes, 10 minutes, not to exceed 15 minutes).

Minimum wages

Effective July 24, 2009, the federal minimum wage is $7.25 per hour. The Georgia minimum wage is $5.15, but employers covered by the FLSA must pay the higher rate. Under the FLSA, employees who receive tips may be credited up to 40 percent of the statutory minimum wage per hour for tips received. The employer must be able to demonstrate the employee receives at least the minimum wage for each hour of work when tips and direct wages are combined. In

Georgia, employees compensated wholly or partially by tips are not covered by the minimum wage law.

Youth opportunity wage

Employers can hire individuals under age 20 and pay them at a rate of $4.25 per hour for the first 90 days of employment. After the initial 90-day period, the employee's hourly rate must be increased to at least the current minimum wage. Employers cannot take any actions against current employees, including a reduction of their hours or wages, in order to take advantage of the youth opportunity wage.

Payment below minimum wage with DOL certificate

The FLSA also permits the employment of certain individuals at wage rates below the statutory minimum wage, so long as employers obtain certificates issued by the Department of Labor, including:

- student learners (vocational education students)
- full-time students in retail or service establishments, agriculture, or institutions of higher education
- individuals whose earning or productive capacities for the work to be performed are impaired by physical or mental disabilities, including those related to age or injury.

Georgia minimum wage laws

An employer which is subject to the FLSA is not subject to Georgia's minimum wage law, so long as the FLSA provides for a higher or equal minimum wage than state law. Where applicable, minimum wages must be paid to employees under Georgia law except to those who:

- work for an employer with sales of $40,000 or less per year
- work for an employer with five employees or fewer
- are domestic employees
- work for a farm owner, sharecropper, or land renter
- are paid wholly or partially in tips
- are high school or college students
- are newspaper carriers

- are employed by a nonprofit child-caring institution or long-term care facility serving children or mentally disabled adults if the employee resides in such institution, receives board and lodging without cost, and is paid in cash at least $10,000 per year.

Overtime compensation

Number of hours

The FLSA does not limit either the number of hours in a day or the number of days in a week that an employer may require an employee to work, as long as the employee is at least 16 years old. Georgia law also limits minors under the age of 16 from working more than four hours on any day when school is in session, more than eight hours on any other day, and more than 40 hours in any one week. Under Georgia law, however, there are several provisions that set a maximum number of hours that can be worked for certain types of workers.

Factory workers

Factory workers in cotton or wooling manufacturing establishments (except engineers, firefighters, watchmen, mechanics, teamsters, yard employees, clerical force, and clean-up and machinery repair help) are limited to working 10 hours per day or 60 hours per week, unless hours are necessary to make up lost time (not to exceed ten days) caused by accidents or other unavoidable circumstances.

Railroad employees

Railroad employees engaged in train operations cannot work more than 13 hours in any 24 hours, except when such train is detained from reaching its destination on scheduled time, and such employees must receive at least ten hours rest unless the train is late according to the schedule.

Rate of overtime pay

The FLSA requires payment of an overtime premium for all hours worked over 40 in a workweek, except where the employee is exempt from the FLSA's overtime requirements.

Hours that are paid but not worked do not count as hours worked under the FLSA. Examples include:

- holidays
- vacations
- sick days

- absences due to:
    - voting
    - jury service
    - reporting to a draft board
    - attending a family member's funeral
    - inability to reach work due to inclement weather.

Overtime pay rate is one and one-half times the employee's regular rate of pay. All compensation must be included in computing an employee's regular rate unless specifically excluded by the FLSA. An employee's regular rate is calculated by dividing the employee's total weekly compensation by the total hours worked during the workweek. For instance, if an employee works 40 hours in one workweek and receives $440 (which includes regular hourly pay at 10 dollars per hour for four 8-hour weekdays, plus weekend differential), his regular rate is 11 dollars.

The FLSA includes the following payments in regular rate computation:

- on-call pay
- shift differential
- weekend differential
- longevity pay
- commission payments
- payments for "sold back" benefits (such as vacation or sick pay if the sale is during employment rather than a terminal benefit)
- safety, incentive, productivity, attendance, and merit bonuses.

The FLSA excludes the following payments from the regular rate computation:

- discretionary bonuses
- prizes
- gifts
- expense reimbursements
- radio and television talent fees which satisfy government regulations

- benefit plan contributions (generally do not include cafeteria plans with a cash option)
- some stock options, including those exercised by non-exempt employees
- premium payments for overtime work.

Exception for hospital and nursing home employees

If a hospital, nursing home, or other health care provider has in-patients, then it may use a special option to calculate overtime. Instead of the 40 hour per week standard, eligible institutions with in-patient care for residents can elect to pay overtime based upon the "8 and 80" rule. Under this rule, if employees agree, they are eligible for overtime compensation if they work more than eight hours in a workday or in excess of 80 hours in a two-week work period.

Example
If a hospital employee works 24 hours (8 hours per day for 3 days) one week and 48 hours (8 hours per day for 6 days) the next week, he or she is not owed overtime compensation. This is because the total hours for the 2-week period is only 72 hours, and the employee never worked more than 8 hours in one day.

Unauthorized overtime

Employers often want to enforce a "no overtime without prior authorization policy" to control costs. However, such a policy will not prevent employees from being entitled to overtime compensation. In such cases, employees should be told that working unauthorized overtime will lead to discipline (but not non-payment). If employees continue to perform unauthorized work, they should be paid for it and disciplined appropriately (up to and including termination).

Special plans

There are a number of special circumstances under which the FLSA overtime provisions and regular rate of pay differ from the situations explained above. A few examples of special plans for overtime compensation are discussed below.

Two rates in one work week

Employees working two jobs at two different rates for their employer during the same work week can be paid overtime earnings when the total hours worked exceeds the applicable overtime level according to one of two available approaches.

Approach #1 – weighted average approach

Under this approach, the employee's total earnings for the two separate jobs is divided by the total number of hours worked. That figure is the weighted average regular rate.

Example
If an employee works 40 hours a week at a job paying $10 an hour and works ten hours at another job paying $6 an hour, the weighted average rate would be $460 divided by 50 hours or an hourly rate of $9.20.

Approach #2 – rate of overtime job approach

An employee and his or her employer can agree prior to performance of the work that the employee will be paid overtime compensation based upon the rate of the job being performed during the overtime hours. This agreement should be in writing.

Fixed salary for fluctuating hours

An employee may be employed on a salary basis but work hours that fluctuate from week to week. According to an agreement, the employee may be paid a fixed salary for each week he or she works, no matter how few or many hours. When the employee works overtime, his or her overtime compensation is determined by dividing his or her salary by the total number of hours worked. This figure is multiplied by ½ times the number of overtime hours worked. The ½ figure is used because the salary is intended to provide the employee straight-time compensation for all hours worked, including overtime hours, so the employee only needs to receive the additional half-time for the overtime hours.

Example
A non-exempt employee whose weekly salary is $400 works 50 hours in one week. Her salary of $400 is divided by the hours she worked, 50, yielding a rate of $8 per hour. She is entitled to $40 overtime compensation (half the hourly rate times the number of overtime hours worked – $4 x 10).

Belo contracts

A "Belo" contract is a very specialized guaranteed pay plan derived from a Supreme Court decision by the same name. Such a plan only applies where an employee's hours of work regularly fluctuate above and below 40 hours per week for reasons beyond the employer's control. An example of such an employee is a service technician who handles customer emergency equipment breakdowns. The guarantee may involve a straight-time and overtime component for work weeks up to a certain number of hours (50 for example) and a time and one-half payment for hours worked over that limit. The regular rate used in such plans must be a bona fide rate and operative in determining compensation. Due to the complexity of these contracts, an attorney specializing in this area should be consulted before implementing one.

Joint employment

With many companies combining operations and centralizing staff functions and with prevalent mergers and acquisitions, joint employment issues are becoming more common under the FLSA. An employee working for two or more organizations at the same time (joint employers) is entitled to overtime after 40 hours of total work and cannot legally be required to work more than 40 hours of straight time for joint employers.

Specifically, the wage and hour regulations provide that where the employee performs work that simultaneously benefits two or more employers, or works for two or more employers at different times during the work week, a joint employment relationship generally will be considered to exist, and all employers are responsible, individually and jointly, for compliance with the overtime provisions of the FLSA. The following situations represent joint employment relationships:

- where there is an arrangement between employers to share the employee's services (in other words, the employee performs jobs for each employer – or is an "interchanged" employee)
- where one employer is acting directly or indirectly in the interest of the other employer (or employers) on behalf of the employee
- where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, due to of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Meal/rest periods

Many states have laws requiring meal and/or rest periods, yet neither of these periods is required under the FLSA. As addressed above, the FLSA's only connection to this subject is the provision that for off-duty meal periods not to constitute hours worked, they should be at least 30 minutes long.

Georgia requires time off, or a day of rest, each week. Georgia defines Saturday and Sunday as days of rest. Under Georgia law, if a business operates on either "day of rest" (Saturday or Sunday), an employee whose day of worship falls on that day must be provided reasonable accommodation to receive the benefit of this day of rest. This "day of rest" law does not apply to:

- casual transactions that are not business transactions
- agricultural operations

- healing arts
- nonprofit charitable or religious organizations
- governmental agencies.

Georgia also allows, but does not require, employers to provide female employees with reasonable, unpaid break time to express breast milk for an infant child. This break time is not required if it would unduly disrupt the employer's operations.

Enforcement

The child labor, minimum wage, and overtime provisions of the FLSA are enforced by the Wage and Hour Division of the U.S. Department of Labor. Government investigators have authority to inspect and copy an employer's records, to interview employees, and to otherwise make determinations of FLSA violations. Based on the results of such DOL audits, the Secretary of Labor, an individual employee, or a group of employees may sue an employer to collect past due minimum wages or overtime compensation.

Statute of limitations

The statute of limitations to collect past-due wages is two years for ordinary violations and three years for willful violations.

Civil remedies

Liquidated (pre-determined) damages in an amount equal to back wages found due are available as a remedy, plus attorneys' fees and costs. An injunction is also possible in court cases brought under the act by the Secretary of Labor. Attorneys' fees can be recovered in successful private actions. Civil fines of up to $1,000 can be assessed by the DOL for each repeated or willful violation.

Criminal penalties

Willful FLSA violations (those violations in which a court finds an employer knew or should have known that pay practices were in violation of the FLSA) can result in criminal prosecution. First offenders are subject to a fine not to exceed $10,000. Second offenders are subject to a fine and maximum prison term of six months.

The FLSA is very complex and involves numerous detailed regulations. In addition, DOL investigators are quite experienced. Moreover, in the last few years, litigation for failure to pay overtime compensation has increased dramatically, with companies collectively paying out more than one billion dollars annually to resolve these claims, often brought as collective actions, which involve claims by numerous employees as a result of a single improper pay practice. It is extremely important that employers consult an attorney at the earliest stage of any potential lawsuit or DOL audit involving wage and hour laws. Keep in mind that the information contained in this chapter only addresses a portion of the relevant laws and regulations related to wage and hour laws.

Equal pay

The Equal Pay provisions of the FLSA provide that persons performing jobs requiring equal skill, effort, and responsibilities at the same establishment may not be paid different wage rates based upon their sex. (Georgia has a similar law prohibiting discriminatory wage practices based on sex.) Differences may be based upon seniority and bona fide merit systems. This statute is enforced by the Equal Employment Opportunity Commission (EEOC). Recently the EEOC has increased enforcement of this Act to bring wages of women more in line with those of men.

The Equal Pay Act has the same statute of limitations – two years for ordinary violations and three years for willful violations – as the FLSA. Liquidated (pre-determined) damages are also available to claimants where the employer is unable to prove its actions were taken in good faith.

The Lilly Ledbetter Fair Pay Act of 2009 (Ledbetter Act) further expands protection to employees with pay claims. Unlike the Equal Pay Act, the Ledbetter Act covers more than just gender discrimination – it also protects against discrimination in pay based on race, color, religion, national origin, age, and disability.

The Ledbetter Act further provides that an unlawful employment practice occurs "**each time** wages, benefits, or other compensation is paid, resulting in whole or in part from a [discriminatory] decision or other practice." So, if an employee believes that she was denied a promotion as the result of a discriminatory practice, each paycheck she receives after that decision will now trigger the start of a new 180-day period within which she may file a claim of discrimination. If an unlawful employment practice has occurred, the employee may be entitled to recover back pay for up to the two-year period before the charge was filed.

The Ledbetter Act is deemed to have become effective on May 28, 2007, and applies retroactively to all pending claims of discrimination after that date.

Wage deductions

Union dues

Under Georgia law, union dues, fees, and assessments may be made and deducted from paychecks with individual authorization of an employee.

Restrictions on garnishments

Wage garnishment occurs when an employer withholds a portion of an employee's earnings for the payment of a debt as the result of a court order or other equitable procedure. Employers are prohibited from discharging an employee because his or her earnings have been subject to garnishment for any one debt. However, an employee is not protected from discharge if the employee's earnings have been subject to garnishment for a second or subsequent debt.

Under both federal and Georgia law, the maximum amount of an individual's disposable earnings (earnings after statutory withholding) that can be subjected to garnishment is the lesser of:

- 25 percent of disposable earnings for that week

  or

- 30 times the federal minimum hourly wage (currently $7.25 as of July 24, 2009 x 30 = $217.50) in effect at the time the earnings are payable.

The intent of these restrictions is to save a certain amount of the earnings for the wage earner. The above restrictions do not apply to any debt due for a state or federal tax, child support or alimony, or any order of a bankruptcy court under Chapter 13 of the Bankruptcy Act. Up to 50% of a worker's disposable earnings may be garnished for child support or alimony if the worker is supporting another spouse or child, or up to 60% if the worker is not.

Under Georgia law, funds or benefits from pension or retirement programs or individual retirement accounts are exempt from garnishment until paid or transferred to the beneficiary, unless for alimony or child support. Assessments are permitted only for child support.

For multiple garnishments, state laws may differ as to which orders take priority, although orders for child support generally take first priority.

Internal audits

Given the potential liability to employers and the level of back pay that can be awarded in a wage and hour investigation or lawsuit, internal audits are advisable. These audits should focus on:

- exempt status (particularly in light of the recent changes to white-collar exemptions)
- proper recording of hours worked
- correct calculation of overtime compensation
- equal pay (particularly in light of the recently enacted Lily Ledbetter Fair Pay Act).

The assistance of an outside attorney specializing in this field is advisable in such audits to allow the employer to eliminate compliance issues before becoming the subject of an investigation. However, these audits become valueless if any compliance issues discovered during the audit are not promptly resolved.

Government contractors – special wage and hour laws

In addition to the FLSA, other federal wage and hour laws may apply to employers who do business with the federal government, as set forth briefly below.

Walsh-Healey Public Contract Act

This Act sets basic labor standards for employers with federal government contracts to manufacture or supply articles with a value of over $10,000. Under this law, government contractors are required to pay prevailing wage rates in addition to conforming to the requirements of the FLSA. The amount recoverable for violations of this Act includes the difference between the wages paid and the prevailing wage or benefit rate and liquidated (pre-determined) damages to claimants. There is also the possibility of exclusion from government work.

Davis-Bacon Act

This Act covers mechanics and laborers engaged in federal public buildings and work projects with a value of $2,000 or more. Under this law, government contractors are required to pay prevailing wage rates in addition to conforming to the requirements of the FLSA. Disqualification from government work is a possible sanction in addition to back wages for underpayments.

Service Contract Act

This Act covers employers with federal government service contracts worth $2,500 or more. Its provisions and enforcement are similar to the Walsh-Healey and Davis-Bacon Acts.

Summary

Wage and hour enforcement activity has increased dramatically in the past five years. In addition to increased administrative enforcement, there have also been an increasing number of private lawsuits brought by individuals and groups of individuals. In the lawsuits, liquidated damages (double back pay) are often sought and the three-year statute of limitations for willful violations invoked. Thus, compliance with federal wage and hour laws is essential and self-audits should be conducted at regular intervals.

Where to go for more information

- **United States Department of Labor Wage and Hour division**
  Internet: www.dol.gov/esa/whd

  Phone: 1-866-4-USWAGE
  (1-866-487-9243)

- **Georgia Department of Labor Wage and Hour Division**
  Internet: www.dol.state.ga.us

  Atlanta District Office
  61 Forsyth Street, SW
  Room 7M10
  Atlanta, GA 30303
  Phone: 404-893-4600

  Savannah Area Office
  Juliette Gordon Low Federal Bldg. Complex
  124 Barnard Street, Suite B-210
  Savannah, GA 31401-3648
  Phone: 912-652-422

Chapter 10

Child labor

Georgia and federal law regulate the employment of minors under age 18 by restricting the occupations in which they can work and the number of hours that they can work in a given day. If federal and state laws ever come into conflict, the employer must obey the stricter regulation of the two. Georgia law is generally less restrictive than federal law in the area of child labor, so an employer will generally be guided by the federal statutes. Exceptions to this rule are noted below.

Job/task restrictions

Child labor laws are structured such that the younger the child, the greater the restrictions on the types of jobs and tasks the child is allowed to perform.

Under 14 years of age

Under the age of 14, a child may work:

- delivering newspapers
- performing in radio, television, movie, or theatrical productions
- working in businesses owned by their parents (except for manufacturing, mining, and certain hazardous jobs)
- babysitting
- performing minor chores around a private home
- performing certain types of agricultural work on a farm owned or operated by their parents.

14 and 15 years of age

At the ages of 14 and 15, a child may also work in:

- an office
- a grocery store
- a retail store

- a restaurant
- a movie theater
- a baseball park
- an amusement park
- a gas service station.

At ages 14 to 15, a child may not work in:

- communications or public utilities jobs
- construction or repair jobs
- driving a motor vehicle or helping a driver
- manufacturing or mining occupations
- operating power driven machinery or hoisting apparatus, other than typical office machines
- processing occupations
- public messenger jobs
- transporting of persons or property
- workrooms where products are manufactured, mined, or processed
- warehousing and storage.

In addition to the above jobs, Georgia law also prohibits children under 16 from working with/in:

- food processing
- railroads
- unguarded gears
- vessels or boats
- dangerous gases or acids
- freezers and meat coolers
- loading and unloading trucks, railroad cars, conveyors, etc.

- scaffolding or construction
- mills, factories, laundries, manufacturers, or workshops.

16 years of age

Once a child turns 16 he may work most jobs that have not been declared hazardous by the Secretary of Labor. Currently, the list of hazardous occupations includes:

- driving a motor vehicle and being an outside helper on a motor vehicle
- coal mining
- logging and sawmilling
- operating power-driven woodworking machines
- jobs with exposure to radioactive substances
- operating power-driven hoisting apparatus
- operating power-driven metal-forming, punching, and shearing machines
- mining, other than coal mining
- meat packing or processing (including the use of power-driven meat slicing machines)
- operating power-driven bakery machines
- operating power-driven paper-product machines
- manufacturing brick, tile, and related products
- operating power-driven circular saws, band saws, and guillotine shears
- wrecking, demolition, and ship breaking operations
- roofing operations and all work on or about a roof
- excavation operations.

18 years of age

Once a child turns 18, the child labor laws no longer apply and the individual is subject only to general statutes that restrict the wages and hours of adult workers.

Hour restrictions

Similar to the types of jobs a child is permitted to work, the hours a child can work are restricted as well.

14 and 15 years of age

When a child is between 14 or 15 years old, the hours worked are restricted to:

- non-school hours
- 3 hours in a school day
- 18 hours in a school week
- 8 hours on a non-school day
- 40 hours on a non-school week
- all hours must be between seven a.m. and seven p.m. (except from June 1 through Labor Day, when evening hours are extended to 9 p.m.).

16 years of age

There are no hour restrictions once a child turns 16.

Employment certificate

Before any minor under the age of 18 may be employed in Georgia, the employer must first obtain an employment certificate approved by an issuing officer at the Georgia school where the child attends or the School Superintendent of the County where the child lives. This certificate must be kept on file and be accessible at the place of employment, such that it may be reviewed or provided to any school attendance officer or to any representative of the Department of Labor. An employment certificate is not needed if the child is performing community service or similar non-compensated work.

Serving alcoholic beverages

Under Georgia law, any child under the age of 18 may not: dispense, serve, sell or take orders for alcoholic beverages. An exception to this applies where alcohol is sold for consumption solely off of the premises. Note that various municipal laws may be more restrictive.

Minors in entertainment

Under Georgia law, to be employed as a performer in radio, television, motion pictures, or theatrical productions a minor must first obtain a State Certificate of Consent, issued from the

Georgia Child Labor Section of the Georgia Department of Labor. This Certificate must be obtained before the child starts work.

Meal periods and breaks

Neither Georgia nor federal law requires meal periods or breaks for minors.

Minimum age and overtime

Employers must generally comply with all state and federal laws regarding minimum wage and paying overtime wages at a rate of one and half times for all hours worked over 40.

Penalties

Violations of child labor laws can carry criminal and civil penalties. Employers are subject to a civil money penalty of up to $11,000 per worker for each violation of the child labor provisions of the Fair Labor Standards Act (FLSA). When a civil money penalty is assessed, employers have the right to file an exception to the determination within 15 days of receipt of the notice of such penalty. When an exception is filed, it is referred to an Administrative Law Judge for a hearing and determination as to whether the penalty is appropriate. Either party may appeal the decision of the Administrative Law Judge to the Secretary of Labor. If an exception is not timely filed, the penalty becomes final.

The Act also provides for a criminal fine of up to $10,000 upon conviction for a willful violation. For a second conviction for a willful violation, the Act provides for a fine of not more than $10,000 and imprisonment for up to six months, or both. The Secretary may also bring suit to obtain injunctions to restrain persons from violating the Act.

Where to go for more information

- www.dol.gov/dol/topic/youthlabor
- www.dol.state.ga.us/em/child_labor.htm

Chapter 11

Temporary and leased employees

There has been dramatic growth in recent years in the use of temporary and leased employees. Those workers, sometimes referred to as "contingent employees," are often employed by an employment services company or temporary employment firm, and are supplied to another employer for whom the workers provide their services. The increasing numbers of contingent employees raises many important legal issues. Often, the essential question is whether employers must, under federal and state labor and employment laws, treat contingent employees in their workplaces as though they were regular employees.

Definitions

Contingent employment

The term "contingent employment" is a catch-all term generally used to refer to all types of employment in which the employee is not a traditional or regular employee. Contingent workers are generally divided into the following three classifications:

- temporary employees

  or

- leased employees

  or

- independent contractors.

Differences between temporary employees, leased employees and independent contractors can be difficult to recognize under different circumstances. Further complicating matters, the terms are sometimes used interchangeably. Moreover, insurance companies also provide their own definitions of leased and temporary employees. In most cases, the question regarding temporary and leased employees becomes: "Who employs this individual?" The answer is often that both the company that supplies the employee and the company that uses the employee's services will be considered employers.

Employee and employer classifications

For purposes of this chapter and unless other terms are required by the particular law under discussion, the following terms will be used to identify the various parties in the temporary employee relationship:

- the entity that supplies employees to the workforce will be called the "supplier employer"
- the business for whom the work is performed will be the "customer employer"
- the worker will be referred to as a "temporary employee" or "leased employee." These workers do **not** include "independent contractor." For more information about the treatment of independent contractors, see Chapter 13, **Independent Contractors**.

Employee

Employees are part-time or full-time employees on the payroll of an employer whose services are needed for an indefinite period of time and/or whose services are not limited to any particular project.

For the purposes of Georgia's Workers Compensation Act, "employee" means "every person in the service of another under any contract of hire or apprenticeship, written or implied, except a person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer."

Employer

Generally, an "employer" is defined as having the right to direct the employee's time, manner, methods, and means of the execution of the work.

Independent contractor

In contrast to the definition of employee, an independent contractor is a self-employed individual who performs work for another, generally under a written contract. These workers are typically used for project work that requires specific, in-depth knowledge or expertise. They are not employees of the employer. Accordingly, the employer has no absolute "right to control" the time, manner, method or means in which the task or function is accomplished.

Employee vs. independent contractor

In order to determine whether an individual is an "employee," or an "independent contractor" the following factors are frequently considered by the courts:

- the nature of the business
- the duration of employment

- the right to control the conduct of the work
- the right of termination
- the method of payment
- the correlation between the work and the customary business of the employer
- the belief of the parties regarding the employer-employee relationship
- the freedom to select and hire helpers
- the furnishings of tools and equipment
- where the work is performed
- self scheduling of working hours
- the freedom to offer services to other entities.

Leased employees

Leased employees are employees of a leasing agency who are hired out to an employer on a temporary basis to supplement the employer's workforce, generally in connection with peak workload periods, employee absences, specific work projects or work that is expected to last for a limited duration.

The Internal Revenue Code (IRC) defines a "leased employee" as any person who is not an employee of the recipient who provides services to the recipient if:

- such services are provided pursuant to an agreement between the recipient and any other person

  and

- such person has performed such services for the recipient on a substantially full-time basis for a period of at least one year

  and

- such services are performed under primary direction or control by the recipient.

In connection with a proposed model employee leasing regulation, the National Association of Professional Employer Organizations (NAPEO) and the National Association of Temporary Services (NATS) have been involved in the formulation of definitions for the terms in the following section.

Client company

A client company is an individual or entity which has contracted with an employee leasing company to supply the client company with temporary employees and related services.

Employee leasing company

A company which, in a majority of its contractual relationships, for a fee places the employees of a client company onto its payroll and leases said employees to the client company on an ongoing basis, as agreed to by the client and employee leasing company.

Employment responsibilities are shared by the employee leasing company and the client company.

The direction and control of workers provided by the employee leasing company is shared by the employee leasing company and the client company, provided that the employee leasing company:

- reserves, and is extended by the client by written contract, a joint or shared right of direction and control over leased employees assigned to the client's locations

  and

- retains shared authority with the client company concerning hiring, firing, disciplining, and reassigning the leased employees

  and

- notifies leased employees, formerly employed by the client company, in writing, or with an employee manual or handbook, of the change in employment relationship, as well as the employee leasing company's terms and conditions of employment

  and

- retains a shared right of direction and control over management of safety, risk, and hazard control at the work site or sites affecting the leased employees, including:

  - responsibility for performing safety inspections of client equipment and premises

    and

  - responsibility for the promulgation and administration of employment and safety policies

    and

- responsibility for the management of workers' compensation claims, claims filings, and related procedures.

Typically, employee leasing does not include other independent contractor services, such as security services, job shop companies, strike-breaker replacements, or any other service which does not perform the functions defined above.

Temporary employees

Temporary employees are part-time or full-time, on-the-payroll employees whose work is limited to a particular project or period of time. Temporary employees are on the payroll, but generally do not perform work for a sufficient period to be eligible for a company's employee benefits.

Workers' compensation

Under Georgia's Workers' Compensation Act general immunity from liability that protects employers as to workplace injuries and illnesses generally also applies with regard to temporary employees working for customer employers. See Chapter 28, **Workers' compensation.**

Workers' compensation covers every person in the service of any employer subject to the law unless that person's employment is "not in the usual course of the trade, business, occupation, or profession of the employer."

Courts have found that even with temporary employment, if the work is of the type usually performed for the employer, then the customer employer must carry workers' compensation for those temporary employees.

Georgia law liberally defines covered employees so as to meet the goal of providing compensation for those who are injured in the workplace. Most temporary employees should be covered by workers' compensation.

Joint or dual employment

Georgia law recognizes that an employee may have two employers at the same time, and that both may be liable for workers' compensation premiums.

With out a contractual provision, whenever any employee whose injury is compensable under Georgia's workers' compensation laws is, at the time of the injury, in the joint service of two or more employers, the employers shall be liable for the payment of the compensation in proportion to their wage liability to the injured employee. However, Georgia law does not prevent any contractual arrangement between the two employers for a different distribution of the ultimate burden of compensation. For this reason, the contract between the supplier and customer employer should expressly allocate this responsibility.

Independent contractors

Employers are not required to maintain workers' compensation for independent contractors.

Subcontractors

With regard to subcontracted employees, the principal, intermediate contractor or subcontractor may be liable for a temporary employee's workers' compensation coverage. In other words, an injured worker may bypass his or her immediate employer to seek workers' compensation benefits from any intermediate or principal employer. In the temporary employment situation, if the supplier employer does not maintain workers' compensation insurance, the injured temporary employee could potentially collect workers' compensation benefits from the customer employer that contracted with the supplier employer.

One way for a customer employer to protect themselves from claims of this nature is to require that the supplier employer provide proof of having workers' compensation insurance for its temporary employees. Typically, this may be accomplished with a certificate of insurance. In addition, a supplier employer may also contact the Georgia State Board of Workers' Compensation in an effort to determine whether a supplier employer has workers' compensation insurance.

Leased employees

In Georgia, unless otherwise agreed in writing, customer employers enjoy workers' compensation immunity from suit when utilizing supplier employers, provided that workers' compensation benefits are provided to a leased employee by its supplier employer.

Safety and health

The federal Occupational Safety and Health Act (OSH Act) applies to employers engaged in interstate commerce who employ even a single employee. See Chapter 25, **Workplace Safety and Health**. The law requires employers to:

- make sure that the workplace is safe for employees

  and

- maintain records of illnesses and injuries of employees under its supervision

  and

- notify employees of hazardous substances in the workplace.

Recording injuries (OSHA 300 Log)

Under the OSH Act, a customer employer is required to record injuries to employees on its OSHA 300 Log. OSHA's regulations specifically state that a customer employer must also record injuries to temporary employees at their facility on its OSHA 300 Log if the customer employer supervises those employees on a day-to-day basis. Similarly, if a supplier's employee becomes injured at the facility, the customer employer is required to record that injury on the log if the customer employer supervises the supplier's employee on a day-to-day basis. If the supplier employer supervises the supplier's employee at the customer employer's workplace, then the supplier employer (not the customer employer) must record the injury on the log. So, the customer employer need only determine whether it supervises a worker on a day-to-day basis to decide whether to include that worker's injury on its OSHA 300 Log.

In a situation where a violation is found and an employee has been exposed to a hazard, the Occupational Safety and Health Administration (OSHA) may issue citations to the appropriate employer. In the case of temporary employees, OSHA may issue a citation to the supplier employer, the customer employer, or both, depending on who it finds to be the temporary employee's employer. If OSHA determines that the customer employer did not employ the individual who was harmed on the customer employer's worksite, then OSHA will consider the situation to be one where there are multiple employers at one worksite, and it will evaluate whether the customer employer may still be subject to citation as a creating, exposing, correcting or controlling employer. Each of these various types of employers has certain obligations under the OSH Act.

- **Creating employer**
  A **creating** employer is one which created a hazardous condition that violates an OSHA standard. Creating employers may be cited even if the only employees exposed are those of other employers (for example, leased employees).

- **Exposing employer**
  An **exposing** employer is one whose own employees are exposed to the hazard – regardless of who created the hazard. An exposing employer is subject to citation if:

  - it knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition

    and

  - it failed to take steps consistent with its authority to protect its employees.

- **Controlling employer**
  A **controlling** employer is one which has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them (either by contract or in practice). A controlling employer must

exercise reasonable care to prevent and detect violations on the site. In determining whether reasonable care was exercised, OSHA will look at:

- the scale of the project
- the nature and pace of the work
- how much the controlling employer knows about the safety history and practices of the employer it controls
- controlling employer's knowledge of the other's prior non-compliance and the other's safety and health efforts.

Wages and hours

Under the federal Fair Labor Standards Act (FLSA), employers are required to comply with specified minimum wage, overtime, equal pay, child labor, and recordkeeping requirements with respect to employees who are covered under the law. See Chapter 9, **Wages and hours**. Often, supplier and customer employers are regarded as joint employers who are jointly liable for complying with FLSA's requirements with respect to temporary employees.

Such joint responsibility derives from the FLSA's broad definition of employer as any person acting directly or indirectly in the interest of an employer in relation to an employee. In similar broad terms, FLSA defines "to employ" as to suffer or permit to work.

Therefore, customer and supplier employers generally become jointly responsible for satisfying all FLSA requirements including minimum wage, record keeping, and (if the temporary employee works more than 40 hours in a week for the customer employer) overtime obligations.

Finally, while temporary employees are covered by the FLSA, the exemptions applicable to certain regular employees also apply to temporary employees. For example, temporary executive, administrative, and professional employees are exempt from the FLSA's requirements. In addition, workers in certain agricultural and service industries may not be protected by the law under certain circumstances.

Other employment laws

Title VII and other anti-discrimination laws

Courts have broadly interpreted the coverage of anti-discrimination laws, such as Title VII and the ADEA, focusing primarily on control over the opportunity for and conditions of employment as indicative of employer status. Based on these broad interpretations, courts are willing to hold customer employers liable for their discriminatory acts towards temporary employees. In determining whether a customer employer in a particular case can be subject to liability for acts that discriminate against temporary employees, courts often consider the degree of the customer employer's supervision of the temporary employee's daily activities. See Chapter 17, **Discrimination in employment**.

In a variety of cases, courts and agencies have found that customer employers are subject to liability. Courts have indicated that a customer employer can, under circumstances where it shares supervision and control with the supplier employer, be jointly liable in connection with the unlawful actions of the supplier even if the customer employer disagreed with or had no knowledge of those actions.

Americans with Disabilities Act

While many of the considerations above apply equally with respect to the Americans with Disabilities Act (ADA), there are additional considerations under the ADA. See Chapter 19, **Disabilities and reasonable accommodation.**

Specifically, the duty to reasonably accommodate qualified individuals with a disability affects both supplier and customer employers. Supplier employers make reasonable accommodations to qualified temporary employees with disabilities so as to enable such persons to perform the essential functions of their assignments with customer employers.

> **Example**
> Federal guidelines provide that a supplier employer may be required to provide its temporary employee who has the condition of dwarfism with a step stool to enable the person to perform essential functions. The guidelines, however, do not require the supplier to make physical changes to the customer employer's premises.

The ADA does not specifically discuss a customer employer's obligations to reasonably accommodate a temporary employee. EEOC guidelines do, however, apply the joint employer doctrine in the temporary employee context. In this context, a supplier employer and its customer employer are both obligated to provide a reasonable accommodation that the temporary employee needs on the job. The conservative approach for a customer employer is, therefore, to offer a reasonable accommodation to a qualified temporary employee with a disability who needs an accommodation and who, with accommodation, could perform the essential functions of the job.

Family and Medical Leave Act

Under the federal Family and Medical Leave Act (FMLA), separate companies or businesses may, under some circumstances, be treated as joint employers. See Chapter 23, **Family and medical leave**. Where the customer employer has sufficient control over the work or working conditions of the temporary employee, a joint employment relationship exists and both the supplier and the customer must count the temporary employee to determine whether each respective employer has sufficient employees to be governed by the FMLA. This is determined by taking into account:

- the nature and degree of control
- degree of supervision

- power to determine pay rates and involvement in payroll functions
- the direct or indirect right to modify the employment conditions of the workers.

Recent 2008 amendments to the FMLA regulations were made to address Professional Employer Organizations (PEO) arrangements. The new regulations clarify that PEO's that contract with customer employers merely to perform administrative functions, including payroll, benefits, regulatory paperwork, and updating employment policies, are not joint employers with their customer employers. Consequently, the customer employer is solely responsible for complying with the FMLA with respect to such workers. The U.S. Department of Labor (DOL) maintains, however, that where a PEO has the right to hire, fire, assign, or direct and control the temporary employees, or benefits from the work that the temporary employees perform, such a PEO can be considered a joint employer with the customer employer.

According to the DOL, an employer's responsibilities to a temporary employee under the FMLA differ depending on whether the employer is the primary employer or the secondary employer. To determine which employer is primary and which is secondary, the DOL will consider who has the responsibility for:

- hiring and terminating the employee
- assigning/placing the employee
- paying the employee and providing employment benefits.

Generally, because temporary employees are normally the employees of the supplier employer, the supplier employer will be the primary employer, and the customer employer will be the secondary employer.

The primary employer is the only employer responsible for giving required notices to its employees, providing leave, maintenance of health benefits, and job restoration. As secondary employers, customer employers must not interfere with a temporary employee's attempt to exercise an FMLA right or otherwise engage in conduct within the prohibited acts provision of the regulations.

In addition, the final FMLA regulations make it clear that the customer employer has a responsibility to rehire a temporary employee returning from FMLA leave provided by the supplier employer, assuming there is still temporary work available with the customer employer and the customer employer is still doing business with the supplier employer.

Wrongful discharge

In most non-union settings, an employer, pursuant to the at-will nature of employment in Georgia, can terminate the employment of an employee for any reason or no reason, at any time, without notice, as long as the reason does not violate employee protections under state or federal law. However, both supplier and customer employers can be

subject to wrongful discharge lawsuits if, in discharging an employee, they breach a written employment agreement, violate federal or state statutes, or retaliate against an employee for exercising a right protected by law.

Unions and labor relations

Under the National Labor Relations Act (NLRA), employers must respect employees' statutory rights to engage in protected activities and to collectively bargain. In a variety of ways, customer employers also must treat temporary employees as though they were their own employees under the NLRA.

On rare occasions, the National Labor Relations Board (the NLRB) has found that a customer employer is in fact the "sole employer" of temporary employees assigned to it and solely liable for its violations under the NLRA.

More commonly, the NLRB has found "joint employer" status between a customer employer and a supplier employer. Where two or more employers exert significant control over the same employees–where from the evidence it can be shown that they share or codetermine those matters governing essential terms and conditions of employment – they constitute "joint employers" within the meaning of the NLRA.

Factors considered in determining whether the customer employer enjoys sufficient "control" to be a joint employer include its involvement in:

- hiring and firing
- promotions and demotions
- establishing wages and working conditions
- daily supervision
- discipline
- direction of the employees.

Each joint employer can be found liable for unfair labor practices committed not only by itself but also for any committed by the other employer, if the non-acting joint employer knew or should have known that the other employer acted unlawfully and acquiesced in that action. Additionally, if there is a recognized or certified union, each joint employer has a duty to bargain under the NLRA.

Income withholding, FICA and FUTA taxes

Employers, of course, are responsible for paying their employees' wages and employment taxes, as well as the employer's portion of Social Security (FICA) taxes and federal and state

unemployment (FUTA and SUTA) taxes. In fact, Internal Revenue Code defines "employer" as the person who pays wages.

Because supplier employers usually control the payment of wages to temporary employees, the IRS regards them, and not customer employers, as the principal employer for tax purposes. However, the IRS and the courts have held that if a supplier employer defaults on its tax obligations to the government, the customer employer may be liable for taxes corresponding to temporary employees in its workforce.

Health and pension benefits

Although no employer is legally required to provide benefit plans to its employees, the Employment Retirement Income Security Act of 1974 (ERISA) governs employee benefit plans if they exist. If a qualified benefit plan provides benefits to all employees, temporary employees could be eligible to participate in the plan if their relationship with the customer employer satisfies the common law test for an employer-employee relationship. This is true even if the agreement between the employee and employer provides that no employer-employee relationship is intended or created.

I-9 immigration requirements

Under the Immigration Reform and Control Act (IRCA), an employer must complete an I-9 form for each employee attesting that it has verified the employee's right to work. In this context, temporary employees are considered employees of the employer who pays their wages, and the supplier employer is required to complete I-9 forms for the temporary employees. Nevertheless, a customer employer may not use the temporary employees to knowingly obtain the services of unauthorized aliens. Therefore, if a customer employer has reason to believe that one of its temporary employees is working illegally in the United States, it should notify the supplier employer immediately. Employers must be careful, however, not to make assumptions about an individual's citizen/alien status based upon that individual's physical appearance, name or accent.

Even though the supplier employer is typically responsible for completing the temporary employee's I-9 form, a customer employer should ensure that its contracts with the supplier employer clarify that the supplier employer has the responsibility for completing the I-9 forms; that the supplier employer has in fact completed the I-9 forms; that the supplier employer is not providing workers to customer employer who are not authorized to work in the United States; and that the supplier employer will indemnify the customer employer for any penalties assessed with regard to the hiring of unauthorized workers or I-9 paperwork violations. See Chapter 4, **Immigration**.

Summary

As reflected above, there are many open questions about the situations in which a customer employer must regard temporary employees as its employees under various labor and employment laws. While in some cases, customer employers may be pleased to be regarded as

an "employer" of the temporary employees, such as in the workers' compensation setting, where employer status shields a party from tort liability for injuries arising out of and in the course of employment, in the majority of cases, customer employers may, understandably, desire to have no employment relationship with their temporary employees because of the potential liability that arises with such a relationship. Often, the answer as to whether a customer employer can actually be regarded as a temporary employee's employer rests only with a very fact-specific inquiry of the circumstances of each individual case.

Chapter 12

Performance evaluations

Performance evaluations are useful for both the employer and the employee. They help the employer make informed decisions regarding important employment matters such as compensation, transfers, promotions, and terminations. While they keep the employee informed regarding his or her performance, including where he or she can improve, performance evaluations are also important, however, in avoiding and defending against litigation. A performance evaluation that creates a record of an employee's performance can help to build an excellent defense to an employment discrimination lawsuit.

The employment evaluation process can sometimes be an uncomfortable experience for the evaluator and employee. However, when evaluations are done in a candid, consistent and open manner, they can benefit both parties. Though there is no requirement under Georgia or federal law for employment evaluations, evaluations are an important component of the employer/ employee relationship, and should be treated accordingly.

Supervisor instruction and training

Since supervisors and managers generally administer performance evaluations, it is essential that they receive the appropriate training and instruction. Even with an established performance evaluation procedure in place, a manager who ineffectively or erroneously performs the evaluation can render it useless or harmful to the employer and employee.

It is important that supervisors and managers are informed about the importance of an employment evaluation. There are several mistakes that managers typically make that can ruin the value of a performance evaluation. For instance, evaluators sometimes rate an employee's performance as good or excellent without really considering the employee's performance. Similarly, evaluators sometimes use the same language on each employee's evaluation, suggesting that little time or effort was devoted to their completion. Some evaluators try to use the performance evaluation as a motivational tool or morale booster by giving the employee undeservedly high marks, which leads the employee to believe that his or her employment is secure. Thoughtlessly evaluating the employee, using form language in the evaluation, or giving the employee undeservedly high marks defeats both the evaluative and litigation-defense purpose of employment evaluations. For example, if an employer asserts that an employee was fired because of his lackluster performance (rather than his race), then any documents evidencing those performance issues would greatly assist in the defense of any future discrimination lawsuit.

In addition to written instructions, the employer should provide training for managers and supervisors who will administer performance evaluations. The training should cover the evaluation procedure in detail, including:

- how to determine appropriate criteria on which to base evaluations
- how to evaluate employees in an unbiased, meaningful manner
- how to relay positive attitudes, constructive criticism, and problem areas to employees.

The training should also address some common mistakes made during the process such as the use of vague adjectives to inadequately describe performance or giving undeserved praise or avoiding criticism in order to boost employee morale. It is important that the supervisor or manager know that the employer will not tolerate any bias or stereotyping in the evaluation process.

The company should give written instructions regarding performance evaluations to supervisors and managers who evaluate employees. The instructions should:

- outline the purpose and importance of performance evaluations, including the potential ramifications of a poorly administered evaluation
- emphasize the importance of honesty, fairness, and consistency within the evaluation procedure
- include information on how to deal with potential problems in an evaluation, such as incomplete information regarding the employee or factual disputes
- require that the supervisor review the job description of the employee prior to the performance evaluation.

Each supervisor or manager who receives a copy of the written instructions should sign an acknowledgement that they have reviewed the performance evaluation instructions, and that they agree to follow the instructions. The acknowledgement should also indicate that the supervisor/manager will be held responsible for his or her evaluations.

Scope and tone of evaluation

Performance evaluations should be job specific. A stock evaluation form, while consistent, may be insufficient to address the performance of a particular employee. The evaluation should be based on the tasks described in the job description of the employee (see page 8, **Job descriptions**), as well as job-related skills that bear on the employee's performance. Examples of generally appropriate areas of evaluation include commitment, judgment, initiative, leadership, professionalism and knowledge of the job.

Keep in mind that the traditional adjectives used in evaluation forms such as "satisfactory" or "poor" are sometimes inappropriate. If the company uses a standard evaluation form for all or

most of its employees, evaluators should indicate which categories are "Not Applicable" to a given employee.

Evaluations should be based on job performance, **not** personality traits. For an evaluation to appropriately help an employee develop, the evaluation cannot be received as an attack on the employee's personality. Personal attacks on an employee during an evaluation can create a number of potential liabilities for the employer, including discrimination claims if the criticism is arguably based on a stereotype. Therefore, evaluations should be based strictly on job performance.

It is also important that the evaluation cover all aspects of the employee's job. An evaluation that does not cover all key functions of a job can make defending the corporation in a subsequent suit difficult. If the employee is fired because of his or her poor performance in an area that is not covered by the performance evaluation, then the employer will have no record of the employee's poor performance. Even if the employer can show that the employee did a poor job in a specific area without the performance evaluation, it is hard to show that the poor performance was a truly important part of the employee's job if it is not included in his or her performance evaluation.

Objective review of completed performance evaluations

To ensure against bias or stereotyping by an evaluator, the company should create a system that monitors the evaluation process. Human Resources should review all performance evaluations before they are presented to the employee. The evaluation should also be reviewed and approved by one of the evaluator's superiors, preferably one who is familiar with the person being evaluated or the job duties of that employee. Additional levels of review decrease the likelihood of bias and reinforce the reliability of the evaluation.

Once an evaluation monitoring system is in place, the system itself should occasionally be tested by the employer to ensure that it is effectively creating a consistent and fair evaluation procedure for all employees.

Keys to a meaningful evaluation

- **Be honest**
  A review should be honest and candid. Resist the temptation to avoid the areas of the employee's performance that need improvement. While it is appropriate to point out the achievements and strengths of an employee, the evaluation must also cover his or her deficiencies. Provided that the statements made are true, a harsh evaluation cannot be used against the employer in a lawsuit. Remember that the performance evaluation procedure is designed to help the employee know how he or she is doing in a job, as well as to serve as a tool for the employer in defense of litigation. If the performance

evaluation does not deliver a straightforward, candid picture of the employee's performance, then neither of those goals are achieved.

- **Avoid excessively favorable reviews**
  Evaluators are sometimes motivated to give excessively favorable reviews of employees. Some supervisors hope to avoid confrontation or an uncomfortable evaluation meeting with the employee. Other supervisors believe that an overly positive performance review is a good motivational tool to boost the morale of an employee.

  The employer should include controls in the employee review process to guard against overly favorable reviews. For instance, the design of the performance evaluation form, if done carefully, can be effective in preventing excessively favorable reviews. For example, an effective evaluation form should provide ample opportunity for evaluations to identify specific examples of employee performance rather than allowing them to check "satisfactory" or "unsatisfactory." In addition, evaluation forms should require evaluators to identify areas for improvement or constructive criticism. Also, requiring a group of managers or supervisors to evaluate their subordinates collectively can expose evaluators who might otherwise give overly favorable reviews. Finally, occasional refresher training of supervisors and managers regarding employment evaluations can be effective in preventing inflated reviews.

  The employer should set expectations for the scale of evaluation ratings and communicate those expectations to the managers and supervisors. There must be room on the scale to distinguish exceptional employees and poor employees. Some companies accomplish this goal by rating satisfactory employees in the middle of the grading scale and reserving the highest grades for those who truly stand out from their peers.

- **Skip the quota approach**
  Rigid mathematical quotas or bell curves requiring a certain percentage of employees in each evaluation category are not advised. Groups will likely have different numbers of outstanding, average or poor employees, and mathematical quotas create an unequal evaluation system from group to group. Notice that setting a quota or curve is different from setting an expected evaluation range and communicating that range to supervisors and managers. While supervisors and managers need to be informed of the standards and expectations of the procedure, they should not be forced to make artificial categorizations based on mathematical formulas.

- **Keep evaluations uniform**
  It is important that the rating scale of the performance evaluation be explained to supervisors and managers. The words "Poor" or "Satisfactory" may mean different things to different evaluators. Be sure that all evaluators have a consistent understanding of the forms, standards and terms that are used in the evaluations.

- **Address strengths and weaknesses**
  Even when evaluating an employee with poor performance, evaluators should note any strengths that employee may have. It is also advisable to offer some type of constructive

criticism with each evaluation. A discharged employee who brings a discrimination suit may allege that he or she was held to a different standard than other employees. Showing that other coworkers receive criticism in their evaluation can help diffuse such an allegation. Including criticism in performance evaluations also helps to establish a pattern for good employees whose performance deteriorates later on. If the employee is discharged because of poor performance, it can help to show that this problem existed in the past as well, though not acutely enough to warrant discharge.

Evaluation documentation and retention

It is important that performance evaluations be carefully documented. An evaluation is of little use if there is no documented record of it. A consistent system of documentation should be a fundamental step in any performance evaluation procedure.

If performance evaluations are used to make compensation decisions, consider retaining evaluations supporting those compensation decisions indefinitely. A law was passed in early 2009 that now makes it easier for current and former employees to challenge pay decisions made in the distant past – even those that occurred ten or twenty years ago. Having performance evaluations handy will help to build a defense to any future lawsuit by showing that the compensation decision was based on performance rather than any bias or stereotype.

Employee acknowledgment

The employee should sign an acknowledgement that he or she has read the evaluation. This prevents the employee from claiming ignorance as to the criteria or results of the evaluation. It also provides proof of fairness, and can potentially alert the employer to additional problems with the employee.

The employee should also be given the opportunity to write a response to his or her review. This improves communication between the employer and employee, and creates a record of the employee's assent to the evaluation. Should the employee refuse to sign his or her evaluation, the manager should note such refusal on the form itself to provide a record that the employee was given a chance to review the evaluation.

The employee should also have the opportunity to agree or disagree with the job criteria for which he or she is evaluated. If the employee agrees with the duties being described, then there can be no dispute regarding the scope of the evaluation. If the employee disagrees with the evaluation, then the employer has the opportunity to change the criteria of the evaluation or reintroduce the employee to the duties of his or her job.

To the extent that performance evaluations are used as an opportunity to motivate an employee to reach some stated goal, acknowledgement of that goal should also be made on the evaluation. If, for example, the supervisor and employee agree that the employee has frequently been late for work, and agree that the employee must work harder to be on time, then the goal of better punctuality should be noted on the evaluation.

When not to evaluate

Though performance evaluations can be helpful in improving employee performance and defending against litigation, they should not be used at all if certain elements of the procedure are missing. Remember, although an employee evaluation is a confidential document, a poorly drafted evaluation can be used by the employee against the employer should the employee file a lawsuit. The following are examples of crucial omissions from the evaluation procedure that render the evaluation useless or even harmful to the employer:

- inconsistent performance reviews among employees
- poorly defined or non-job related performance criteria
- non-documented performance evaluations
- unclear delineations of employee deficiencies
- failure by the employer to follow up or enforce performance goals set in an evaluation.

Chapter 13

Independent contractors

There are advantages and disadvantages to employers using independent contractors. As employers are required to pay certain benefits and taxes on behalf of their employees, the financial benefits of having a large independent contractor work force may be significant. However, it can also be extremely burdensome for employers to keep on top of exactly what qualifies someone as an independent contractor, and the penalties for misclassification can be costly.

For employees, the company must withhold federal income taxes, as well as state and local taxes. The company must also withhold taxes under the Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax (FUTA) in accordance with the Internal Revenue Code (IRC). Employees participate in employee benefit plans, while independent contractors do not. As benefit plans often account for a large percentage of payrolls, this is a potential area of savings for employers who choose to use independent contractors. A host of other laws regulate employment practices, including the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA), and various employment discrimination laws. These laws typically do not apply to independent contractors.

There is a definite trend for courts and federal and state agencies to classify independent contractors as employees. In these situations, employers become exposed to unanticipated liabilities and penalties. Especially for those employers who use large numbers of independent contractors, it has become increasingly important for employers to consider the potential ramifications of classifying employees as independent contractors.

Federal tax laws

Employees' wages are subject to federal withholdings and deductions for taxes. Social Security and Medicare are withheld for employees only – not independent contractors. Accordingly, the Internal Revenue Service (IRS) has a strong interest in whether employees are legitimately characterized as independent contractors.

IRS's right to control test

The IRS uses the common law Right to Control test in determining whether an individual is correctly classified as an independent contractor versus an employee. In this regard,

the IRS examines a number of factors organized into three groups: behavioral control, financial control, and the type of relationship between the parties.

The IRS works through these factors before concluding whether the business has "the right to direct and control the means and details of the work." Employers should similarly work through the same exercise before attempting to claim that an individual is an independent contractor versus an employee. The employer should keep in mind that the importance of each factor will vary depending on the type of work being done and the circumstances of the particular case. In close cases, an employer may want to consider consulting a tax professional or requesting an IRS determination of the worker's status. Bearing this in mind, the following are the factors considered by the IRS in the Right to Control test.

Behavioral control

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of:

- **Instructions the business gives the worker.** An employee is generally subject to the business's instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work:
    - when and where to do the work
    - what tools or equipment to use
    - what workers to hire or to assist with the work
    - where to purchase supplies and services
    - what work must be performed by a specified individual
    - what order or sequence to follow.

  The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

- **Training the business gives the worker.** An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

Financial control

Facts that show whether the business has a right to control the business aspects of the worker's job include:

- **The extent to which the worker has unreimbursed business expenses.** Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services they perform for their business.

- **The extent of the worker's investment.** An employee usually has no investment in the work other than his or her own time. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.

- **The extent to which the worker makes services available to the relevant market.** An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.

- **How the business pays the worker.** An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.

- **The extent to which the worker can realize a profit or loss.** Since an employer usually provides employees a workplace, tools, materials, equipment, and supplies needed for the work, and generally pays the costs of doing business, employees do not have an opportunity to make a profit or loss. An independent contractor can make a profit or loss.

Type of relationship

Facts that show the parties' type of relationship include:

- **Written contracts describing the relationship the parties intended to create.** This is probably the least important of the criteria, since what really matters is the nature of the underlying work relationship, not what the parties choose to call it. While a contract may state that the worker is an employee or an independent contractor, this is not alone sufficient to determine the worker's status. However, in close cases, the written contract can make a difference.

- **Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.** The power to grant benefits carries with it the power to take them away, which is a power generally exercised by employers over employees. A true independent contractor will finance his or her own benefits out of the overall profits of the enterprise.

- **The permanency of the relationship.** If the company engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.

- **The extent to which services performed by the worker are a key aspect of the regular business of the company.** If a worker provides services that are a key aspect of the company's regular business activity, it is more likely that the company will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

Safe haven provisions

Congress has enacted a "safe haven" rule that can minimize some employers' uncertainty when it comes to proper treatment of workers as employees or independent contractors for purposes of employment taxes. This rule provides that an employer cannot be penalized for its characterization of particular workers as independent contractors if three requirements are met:

- First, an employer must have had a reasonable basis for treating the workers as independent contractors. To establish a reasonable basis, an employer can show that:

  - the employer reasonably relied on a court case about Federal taxes or a ruling issued to the employer by the IRS

    or

  - the employer was audited by the IRS at a time when the employer treated similar workers as independent contractors and the IRS did not reclassify those workers as employees

    or

  - the employer treated the workers as independent contractors because the employer knew that was how a significant segment of its industry treated similar workers

or

- the employer relied on some other reasonable basis, such as the informed advice of a business lawyer or accountant.

- Second, an employer must have treated the workers, and any similar workers, as independent contractors for federal tax filing purposes (taking into consideration the functions performed and the relationship between the taxpayer and the workers).

- Finally, the employer must have filed all required federal tax returns consistent with the employer's treatment of each worker as not being employees (Forms 1099-MISC).

Statutory employees

If workers are independent contractors under common law rules, such workers may nevertheless be treated as employees by statute for certain employment tax purposes if they fall within any one of the following four categories:

- a driver who distributes beverages (other than milk) or meat, vegetable, fruit, or bakery products – or who picks up and delivers laundry or dry cleaning, if the driver is the employer's agent or is paid on commission

- a full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contracts, or both, for one life insurance company

- an individual who works at home on materials or goods that the employer supplies and that must be returned to the employer or to a person the employer names, if the employer also furnishes specifications for the work to be done

- a full-time traveling or city salesperson who works on the employer's behalf and turns in orders to the employer from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. The goods sold must be merchandise for resale or supplies for use in the buyer's business operation. The work performed for the employer must be the salesperson's principal business activity.

If workers fall into one of the above categories, they must also meet the following three conditions to be statutory employees:

1. the service contract states or implies that substantially all the services are to be performed personally by them

2. they do not have a substantial investment in the equipment and property used to perform the services (other than an investment in transportation facilities)

3. the services are performed on a continuing basis for the same payer.

Statutory nonemployees

The tax code exempts certain occupations from FICA, FUTA and employee tax withholding requirements, regardless of any contract involved or the labels attached to the parties. For an occupation to fall within the category of statutory nonemployee, the worker must be a direct seller (including newspaper carriers and distributors), licensed real estate agent, or a companion sitter who meets certain IRC requirements. Direct sellers and licensed real estate agents are treated as self-employed for all federal tax purposes, including income and employment taxes, if:

- substantially all payments for their services as direct sellers or real estate agents are directly related to sales or other output, rather than to the number of hours worked

  and

- their services are performed under a written contract providing that they will not be treated as employees for federal tax purposes.

Direct sellers

Direct sellers include persons falling within any of the following three groups:

1. persons engaged in selling (or soliciting the sale of) consumer products in the home or place of business other than in a permanent retail establishment

2. persons engaged in selling (or soliciting the sale of) consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis prescribed by regulations, for resale in the home or at a place of business other than in a permanent retail establishment

3. persons engaged in the trade or business of delivering or distributing newspapers or shopping news (including any services directly related to such delivery or distribution).

Direct selling includes activities of individuals who attempt to increase direct sales activities of their direct sellers and who earn income based on the productivity of their direct sellers. Such activities include:

- providing motivation and encouragement
- imparting skills, knowledge, or experience
- recruiting.

Licensed real estate agents

This category includes individuals engaged in appraisal activities for real estate sales if they earn income based on sales or other output.

Companion sitters

Companion sitters are individuals who furnish personal attendance, companionship, or household care services to children or to individuals who are elderly or disabled. Companion sitters who are not employees of a companion sitting placement service are generally treated as self-employed for all federal tax purposes.

Note: A person engaged in the trade or business of putting the sitters in touch with individuals who wish to employ them (that is, a companion sitting placement service) will not be treated as the employer of a sitter if that person or placement service does not receive or pay the salary or wages of the sitters and is compensated by the sitters or the persons who employ them on a fee basis.

Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) regulates wage and overtime requirements for employees. The FLSA defines employee very broadly as "any individual employed by an employer." Given this vague definition, state and federal courts have typically applied the Economic Realities Test in determining a worker's status under the FLSA.

Economic realities test

The Economic Realities Test generally revolves around the amount of monetary risk the worker has in the job (in other words, if the worker can finish the job with a monetary loss, then he or she will typically be considered an independent contractor). Although the Economic Realities Test focuses on the worker's monetary risk, the courts also look to whether the employee has the right to control how the work is performed. Both economic reality and the right to control are relevant (see page 145, **IRS's right to control test**). In applying the economic realities test, the courts look to the following factors:

- nature and degree of employer's control as to the manner in which the work is to be performed
- employer's payment of wages
- employer's right to hire, discharge, and discipline
- worker's opportunity for profit or loss
- worker's investment in equipment or materials required for task, or his employment of workers

- degree of permanency and duration of worker/employer relationship
- skill level required for work
- the extent to which the work is an integral part of the employer's business.

Some courts refer to this test as the "Hybrid Test" (particularly in the employment discrimination context), while others continue to call it the Economic Realities Test. As part of the Economic Realities Test, the courts look to the circumstances of the whole activity and not any one of the aforementioned factors.

ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) was enacted to safeguard employee benefit plans, such as pension plans, profit-sharing plans, and health insurance plans. The classification of a worker as an independent contractor or employee determines that individual's coverage under ERISA. If the worker is an employee, he or she is protected by ERISA, but if the employee is an independent contractor, ERISA does not apply.

Common law agency test

Independent contractors are not permitted to participate in an employer's ERISA-covered employee benefit plan, but employees are. ERISA uses the common law agency approach to determine whether an individual is an employee. In 1992, the Supreme Court set forth standards to be used to determine whether a person is an employee for purposes of ERISA. The Supreme Court held that the underlying consideration when determining the type of relationship that exists in the ERISA context is the right to control the manner and means by which the work is accomplished. The Supreme Court then set forth the following additional factors to be evaluated in applying the common-law test in the ERISA context (with no one factor being determinative):

- skill required
- source of the instrumentalities and tools used to perform the tasks
- location of the work
- duration of the relationship between the parties
- whether the employer has the right to assign additional projects to the worker
- the extent of the worker's discretion over when and how long to work
- method of payment
- the worker's role in hiring and paying assistants
- whether the work is part of the regular business of the employer

- whether the employer is in business
- the provision of employee benefits to the worker
- the tax treatment of the worker.

Employment discrimination laws

Federal anti-discrimination laws, such as the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and Title VII of the Civil Rights Act of 1964 (Title VII), only apply to employees. Typically, courts apply a Hybrid Test to determine when a worker is an "employee."

Hybrid test

The Hybrid Test is a combination of the factual Economic Realities Test and the basic common law agency Right to Control Test. Under this test, courts focus on the right to control, but also take economic realities into consideration, as needed, and look at the following factors:

- the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision
- the skill required in the particular occupation
- whether the employer or the individual in question furnishes the equipment used and the place of work
- the length of time during which the individual has worked
- the method of payment, whether by time or by the job
- the manner in which the work relationship is terminated (for example, by one or both parties, with or without notice and explanation)
- whether annual leave is afforded
- whether the work is an integral part of the business of the employer
- whether the worker accumulates retirement benefits
- whether the employer pays social security taxes
- the intention of the parties.

Section 1981 claim

Employers should be aware that although independent contractors are not covered under the anti-discrimination laws set forth above, they are protected under Section 1981 of the

Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991. As originally enacted, Section 1981 provided that, "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens…." In 1991, Congress amended the Act by adding language which made it clear that it encompasses broader race discrimination and harassment claims as well.

This prohibition on racial discrimination applies to all types of employment-related decisions, including hiring, pay, promotions, demotions, discipline, and termination. Employers should be aware that they will not necessarily prevail on race discrimination or harassment cases just because they can successfully argue that the worker at issue was an independent contractor.

Unfair labor practices

The National Labor Relations Act (NLRA) protects workers against unfair labor practices and allows them to organize or support labor organizations without fear of recrimination by the employer. The NLRA specifically excludes from its definition "any individual having the status of independent contractor." The National Labor Relations Board (NLRB) applies the common law agency test to analyze the master-servant relationship, and determine whether an individual is an employee and subject to the NLRA. Although there is no shorthand formula associated with the test, the NLRB looks to the following factors when determining whether a servant is an employee or independent contractor:

- the extent of control which, by the agreement, the master may exercise over the detail of the work
- whether the worker is engaged in a distinct occupation or business
- kind of occupation and whether it is typically done under the direction of the employer
- skill required in the particular occupation
- whether the employer supplies the facilities, tools, materials, or supplies for the worker
- length of time for which the worker is hired
- method of payment, whether by time or by the job
- whether the work is a part of the employer's regular business
- whether the parties believe they are creating a master-servant relationship, which is defined by the employer's right to control the individual
- whether the principal is or is not in business.

The NLRB also notes that the above factors should not be applied uniformly. Instead, the Board gave the following explanation as to how they should be applied:

> The total factual context of any relationship must be reviewed in light of relevant common law principles. No one factor is decisive. The same set of factors that are relevant in one case may be unpersuasive when balanced against a different set of opposing factors in another case. In other words, it is very difficult to rely on the weight given to a certain factor in one case.

Therefore, this list of factors is not exclusive or exhaustive, and the Board's application of the factors depends on the specific facts of each case.

Recently, the NLRB and the courts have moved away from their focus on the employer's right to control the means and manners by which the worker performs services and instead applied certain entrepreneurial factors based on the worker's ability to generate a profit or loss.

Workers' compensation

Classification of a worker as an employee or an independent contractor is important under the Georgia Workers' Compensation Act (GWCA). Employees who are injured on the job must pursue their remedies through the GWCA rather than sue their employer. Independent contractors, on the other hand, are not employees under the GWCA and are ineligible for workers' compensation benefits if they are injured while performing work for the company which hired them. The distinction between an employee and an independent contractor depends on a case-by-case inquiry rather than the actual language of the arrangement. Therefore, an employer cannot avoid its responsibilities under the workers' compensation laws simply by designating a worker as an independent contractor. The Act defines an independent contractor as a person who:

- is a party to a contract, written or implied, which intends to create an independent contractor relationship

  and

- has the right to exercise control over the time, manner, and method of the work to be performed

  and

- is paid on a set price per job or a per unit basis, rather than on a salary or hourly basis.

Applying this test, all three factors must be met in order for a worker to qualify as an independent contractor. Otherwise, a worker shall be considered an employee and thus entitled to workers' compensation benefits.

However, even if an individual is deemed an independent contractor, the individual does have an avenue of recovery available if he is injured on the job. Unlike an employee, he or she is able to sue the employer for injuries based on negligence. The law classifies the independent contractor as a business invitee to whom the company has a reasonable duty of care to warn of any dangerous conditions on the premises.

Unemployment compensation

Georgia employers are not obligated to pay unemployment taxes for independent contractors, and independent contractors may not receive unemployment benefits if their services are terminated. However, an independent contractor may not waive, release, or commute his/her rights to benefits or any other rights under the employment security laws. The individual is considered an employee for purposes of the employment security laws if:

- there is direction and control by the prime contractor, and not merely a requirement that the end result be reached within a reasonable time

  or

- if the individual's work is done solely with the prime contractor.

Summary

The choice between using an employee or an independent contractor is one that should be made only after careful consideration. Special attention should be given to the classification of these workers, since improper classification can lead to significant tax and non-tax penalties, liability for injury, and other costly liabilities for the employer.

Chapter 14

Privacy and monitoring

Key cards, private e-mail accounts, audio and video surveillance, password-protected computer workstations – they all make the workplace more efficient and safe, and they also have changed the landscape of employee privacy dramatically within a generation. Monitoring technology allows employers to guard against a range of employee misconduct, from unproductive uses of the Internet to fraud and other sources of significant liability for both the employee and the employer. Management is no longer limited to direct observation governed by human limitations – technological advancements have allowed companies to "supervise" their employees on a much wider scale. Employers can now use technology to monitor employees and make sure that productivity stays high, while employer fraud, theft, and other misconduct stays low. Yet, employers must also be mindful of applicable local, state, and federal laws that may protect employees.

As employers increase their ability to monitor and record their employees' workplace conduct, so does the risk that employees will complain. Some employees have even sued their employers, claiming violations of their "right to privacy." Federal law and the laws of most states (including Georgia) do recognize some employee privacy interests. Therefore, an employer must consider employee privacy interests when it monitors employee conduct.

Employers should be aware of all applicable federal and Georgia laws (and understand that the law of privacy is constantly changing) when formulating policies to monitor employee conduct. An employer should also be mindful of the effect of monitoring policies on employee morale. A monitoring policy that is legal, but that employees view as unfair and unnecessary, may ultimately hurt productivity. An employee who thinks that his employer has unfairly invaded his privacy is more likely to seek a lawyer, pursue litigation, or campaign for more protective laws.

Wiretapping

Congress passed the Electronic Communications Privacy Act of 1986 (ECPA) in reaction to increasing concern that new threats to civil liberties were being made possible by emerging technology. The ECPA essentially modified some of the provisions of the federal Wiretap Act and added a new section, the Stored Communications Act. The ECPA is the principal federal law governing the interception of oral, wire, and electronic communications and the retrieval of stored electronic communications.

Title I of the ECPA includes amendments to the Wiretap Act and governs the interception, access, use, and disclosure of electronic communications. Title II of the ECPA is known as the Stored Communications Act (SCA) and governs the privacy of e-mails that are in storage.

The ECPA amendments are not very clear, and courts have been critical of the ECPA's statutory language. The SCA forbids unauthorized "access" to an "electronic communication while it is in electronic storage." Courts have grappled with the interaction between these two provisions, as well as the respective legal boundaries of each Act.

A private right of action under the Wiretap Act allows recovery of actual and punitive damages, plus attorneys' fees and costs. The Wiretap Act also provides for statutory damages, which usually are awarded in daily increments, computed at $100 dollars a day, and capped at $10,000. Damages are awarded on a daily basis even though many different types of violations may happen within the course of the same day.

Georgia has its own wiretap statute, which is similar to the federal Wiretap Act and does not impose any additional restrictions on workplace monitoring. Georgia's wiretap statute makes it unlawful for "any person intentionally and secretly to intercept … the contents of a message sent by telephone." Like the federal Wiretap Act, however, the Georgia statute contains an important exception: where one of the parties to the communication has given prior consent to the interception. Georgia courts have held that an employer does not violate the statute when it advises employees that its telephones are for business use only and that use of the telephones will be monitored. Similarly, determining what numbers were dialed from a particular telephone is not prohibited.

By using a monitoring policy, employers can avoid violation of Georgia's wiretap statute. Indeed, the statute prohibits only interceptions of conversations done "secretly" and explicitly states that third parties may intercept telephone calls and electronic communications if one party to the communication consents.

Without express or implied consent, employers that wish to monitor calls for the purpose of "business service improvement," or quality assurance by using telephone service observing equipment, must apply for and obtain a license from the Georgia Public Service Commission (GPSC). Such employers must demonstrate a clear, apparent, and logically reasonable need for the use of the monitoring equipment in connection with a legitimate business activity of the user and that such equipment will be operated by persons of good moral character. The "Telephone Service Observing Equipment" license granted by the GPSC imposes several conditions upon grantees. For example, employers using the GPSC's license to monitor phones must prominently display on each phone that the instrument is subject to monitoring.

The Wiretap Act

The Wiretap Act forbids the unauthorized interception, use and disclosure of any oral, wire or electronic communication.

Oral communications

An oral communication is anything "uttered by a person exhibiting an expectation that such communication is not subject to interception under such circumstances justifying such expectation." Therefore, if the parties communicate and behave in such a way that suggests that they intend their conversation to be private, it constitutes a protected "oral communication." Conversations among employees, even in a public work space, can sometimes be protected "oral communications" if spoken in private beyond the hearing range of others.

Wire communications

This category includes communications transmitted on any system that can function in interstate commerce, which covers telephone communication and possibly fax communication.

Electronic communications

Electronic communications include many of the communications that are widely used in today's workplace, such as cellular telephones, e-mail, voice-mail, pagers, and messages transmitted over the Internet.

Interception

Interception under the Wiretap Act is "acquisition of the content of any wire, electronic, or oral communications through the use of any electronic, mechanical, or other device." Courts have interpreted interception in a variety of ways. One court held that a defendant intercepted a communication when she retrieved and forwarded to her own personal mailbox a voice-mail message from the recipient's mailbox before it had been received by the recipient. In another case, a court held that viewing an e-mail message on the plaintiff's computer screen did not constitute "interception."

Exceptions

The Wiretap Act's general prohibition on interception has three major exceptions:

1. **The service-provider exception**
   This exception enables owners of a communications system (such as a server) to routinely review communications in order to manage and safeguard the system's information.

2. **The business use exception**
   This exception pertains to interceptions made in the normal course of the electronic communication provider's business. In order for this exception to apply, the intercepting equipment must be "furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of business" and the interception must be used by the provider "in

the ordinary course of its business." Therefore, where employees use the telephone to conduct their business and the employer routinely uses monitoring equipment such as a telephone extension to check quality and customer service, the monitoring will probably fall within the business use exception.

3. **The consent exception**
   If one party to the communication consents to being monitored, there can be no "interception" of the communication. The employer need not obtain express consent to avoid violation of the FCRA. By implementing a policy permitting employer monitoring of e-mail, voice-mail, and telephone calls and requiring employees to acknowledge their understanding of that policy, consent will be implied. However, if an employee only consents to monitoring of his or her business-related calls, he or she will not be deemed to have consented to the monitoring of personal calls. An employee who uses a line that he or she knows to be monitored for business purposes may be found to have consented to the monitoring. Written consent by an employee is the strongest defense against an ECPA claim.

Personal phone calls

Courts are less inclined to allow interception of employee communications where employers are attempting to monitor the content of personal phone calls. In monitoring communications, an employer should stop the interception as soon as it realizes the communication is of a personal nature. Note that this does not limit an employer's right to discipline an employee for excessive personal phone calls while at work.

Stored Communications Act

The SCA prohibits unauthorized access, interception, and disclosure of information stored in electronic form. Stored communications can take many forms, but they most commonly include computer files and e-mail messages that have been archived.

Exceptions

Employers rarely face challenges under the SCA as the Act contains an exemption for conduct authorized by the person or entity providing a wire or electronic communications service. This allows employers that provide electronic communication services to access messages once they are stored in their computer or telephone systems, without notifying employees of the access.

It is also important to note that exclusively internal e-mail systems provided by employers might be outside the scope of the SCA, because such a service would not technically be provided to the public.

Terrorism-related monitoring

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 impacts workplace privacy significantly. This Act, which is mainly designed to combat terrorism, gives agencies of the government more extensive search powers, allowing them to conduct surveillance both traditionally and electronically to track and apprehend terrorists.

The Patriot Act has eased some of the restrictions under the ECPA on the government's ability to access electronic information and surveillance, making it easier for the government to obtain "wire communication" evidence such as voice-mail, e-mail, and other electronic communications captured and stored by employers. Certain provisions of the Act (the so-called "sneak and peek" provisions) allow the government to conduct surveillance while delaying notice. As long as the government can demonstrate reasonable cause for investigating without giving notification (basically, that notifying the target would negatively impact the investigation), the Act allows the government to delay notification. The government can monitor someone's office, computer, or e-mail without notifying the individual until after the monitoring has been done. Further, instead of having to obtain a wiretap order, the government can access the content of stored voice-mail messages using only a search warrant. The government may also use a search warrant to obtain the contents of unopened e-mail that have been stored for 180 days or less. Employers now face the reality that their communications systems are completely open to the government and therefore have a critical interest in making sure that no illegal communication or information is being transmitted or stored on their information systems.

Other sources of privacy rights

Employers should also monitor new regulations that impact federal privacy rights, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which restricts access to personal health information.

In addition, in the case of large multinational companies, other countries may have restrictions on access to personal information that can further complicate privacy compliance. For example, the European Union's data privacy directive requires companies to abide by its protocols for the protection of its member state citizens' and residents' personal information.

Employee issues

This common law theory shields employees from certain deliberate invasions of employees' workplace privacy. Generally, employers may be liable when:

- the manner of intrusion would be highly offensive to a reasonable person

  and

- the employee had a reasonable expectation of privacy.

In an employment situation, intrusion upon seclusion, or prying or intrusion into a person's private concerns that would be offensive or objectionable to a reasonable person, can occur in situations such as:

- alcohol and drug testing
- gathering medical and other personal information
- conducting surveillance
- unauthorized eavesdropping or wiretapping
- obtaining certain confidential information to determine eligibility for employment.

However, reasonable investigation or surveillance in connection with a lawsuit, or surveillance in a restroom to protect against crime, does not give rise to an intrusion claim. In addition, using a speakerphone to monitor employees' calls at work is not an unlawful intrusion if employees are told that telephones are for business use only and will be monitored. In Georgia, highly personal questions or demands by a person in authority may also amount to an unlawful intrusion.

Public disclosure of private facts about an employee

Employees are also protected from public disclosures about their private lives. The relevant factors for employer liability are similar to those of intrusion upon an employee's private affairs:

- the disclosure must be public
- it must be highly offensive to a reasonable person
- the subject matter must not be of legitimate concern to the public.

Unlawful public disclosure in the employment context typically arises when an employer discloses information from a background investigation into an applicant or employee, or when it discloses personal information about an employee's or applicant's health or personal information that goes beyond the range of individuals who need to know the information. Notably, the truth of the information disclosed is **not** a defense (in contrast to defamation claims, discussed below).

There is no cause of action or right to sue for public disclosure where the employee also informs others of the embarrassing facts, or where the employer discloses facts that are a matter of public record, such as criminal records.

Publicity that places the employee in a false light in the public eye

Employers can be held liable under these similar common law theories for making false or misleading public statements about their employees. To be liable, the employer must disclose false or misleading information that is highly offensive or insulting and act in intentional or in reckless disregard for the truth.

Traditionally, lawsuits alleging false light and defamation against employers arise most often in the context of employee references. Employers should take great care in providing references by making sure that all employee references come from a central source and are truthful and accurate. Generally, mere personal opinions will most likely not give rise to liability.

A false light or defamation lawsuit may also be prompted by false, misleading, or derogatory e-mails about an employee. Employers are well advised to discourage any communication (electronic or otherwise) that contains potentially false or derogatory comments about an employee, regardless of who is sending or receiving the communication.

Appropriation of the employee's name or likeness for the employer's advantage

An employer may also face liability by appropriating an employee's name or likeness to the employer's advantage, such as when an employer uses an employee's name or likeness to advertise the employer's business or product. However, this is rare in the employment context. Nevertheless, employers should remain aware of the potential for such liability.

Privacy rights created by contract

Employee manuals, collective bargaining agreements, and employment agreements can be the source of privacy rights. Employers should make clear that such agreements are not intended to create rights.

Issues related to other types of monitoring

Surveillance

The use of video cameras to monitor employees at work – which is on the rise in many workplaces due to terrorism threats and increased levels of security – can implicate employee privacy rights. Video monitoring may violate privacy rights in at least three circumstances:

- Video surveillance may violate state common law or statutes that protect employees. Generally speaking, the use of video cameras may infringe on employees' rights in situations where the employee has a reasonable expectation of privacy, such as bathrooms, locker rooms, or other locations where employees

can reasonably expect to be free from surveillance. An employer can eliminate this expectation, however, if it has a legitimate business need to conduct video monitoring and notifies employees of the monitoring.

- Video monitoring has the potential to violate federal and state wiretap statutes. Silent video surveillance does not implicate the Wiretap Act or Georgia's similar wiretap statute, but videotaping that includes an audio signal does constitute "interception" of an oral communication. An employer can avoid liability by conducting surveillance without audio recording or, as with other interceptions, by obtaining written consent from employees.

- Federal labor law may limit the use of video monitoring and other surveillance. The National Labor Relations Board has held that a company committed an unfair labor practice when it failed to bargain with its employees' union regarding the use of surveillance cameras. According to the Board, a labor union has a statutory right to bargain with employers over the activation of video cameras, the placement of cameras, and the discipline of employees who are observed engaging in misconduct.

Workplace searches

Unquestionably, employers have a significant interest in monitoring the workplace to minimize employee theft, drug abuse, and other wrongdoing. Especially in light of post-9/11 security concerns, employers also have an important interest in ensuring workplace safety. Employee searches are one way that employers can prevent wrongdoing and maintain a safe work environment, but employers must recognize that there are limits on intrusive, unwarranted workplace searches.

Searches at work may take a number of forms. Sometimes the employer needs to search company property – such as offices, desks, drawers, or lockers – that has been provided for employee use. The employer may also want to search the property of an employee, like a purse, gym bag, or briefcase. Finally, an employer might search an employee's person, as with a pat-down search. These searches, some of which are more intrusive than others, can constitute an invasion of employee privacy rights.

Whether a search is justified depends on both the need for the search and the privacy interests of the employee. Non-investigatory searches, such as entering an employee's office or opening a desk drawer to locate necessary business items, are generally allowed if the employer has a legitimate business reason and the search is limited to what is necessary. If possible, an employer should contact the employee **before** conducting this type of search.

Investigatory searches, such as a search for illegal drugs or a concealed weapon, should generally be limited to situations where the employer has a specific reason to believe an employee is engaged in wrongdoing. The more intrusive the search, the more likely it will amount to an invasion of privacy. For example, a search of an open bag left in an

employee's cubicle is less intrusive (and therefore less likely to violate privacy rights) than a search of a locker sealed with an employee-provided lock or key.

An employer can limit an employee's reasonable expectation of privacy by maintaining appropriate policies. Employers should notify employees, either in an employee handbook or by posting a policy, that lockers, desks, and offices may be searched. Employers should also be discreet and, when possible, avoid contact with the employee's person or using force. Solutions that do not involve searches – such as inventory control systems and systems for tracking Internet use – can eliminate the need for many searches.

Investigation

Another way employers may monitor employees is by conducting investigations:

- making inquiries to others about the employee
- reviewing prior employment records, credit reports, and school records (see also Chapter 5, **Background checks**)
- investigating workplace harassment or other wrongdoing.

There are many legal issues implicated in employer investigations, which are covered in Chapter 18, **Workplace investigations**.

Testing

Employee testing is yet another way of monitoring workplace conduct. Testing may be as simple as a drug test or as complicated as a battery of questions for psychological evaluation. What makes testing different from other types of monitoring is that the information is supplied directly by the employee. Certain testing, such as physical examinations, may be prohibited by statutes such as the Americans with Disabilities Act (ADA) (see Chapter 19, **Disabilities and reasonable accommodation**). Testing existing employees for illegal drugs is not covered by the ADA, but employers should seek legal counsel in developing drug testing policies and should consider complying with Georgia's Drug-Free Workplace Act, which may result in a discount on workers' compensation premiums (see also page 338, **Controlling costs**). Psychological tests may have an adverse impact on minority applicants or employees and therefore raise an inference of discrimination. As a general rule, employers should work with counsel to develop testing policies that comply with all applicable employment laws.

Guidelines

The courts continue to deal with the difficult tug-of-war between employers' legitimate business interests and employees' reasonable expectations of privacy. As technology develops new ways to monitor employees, employers will continue to need legal counsel to advise them of what sorts of monitoring may expose them to liability. What constitutes acceptable monitoring and investigation by employers, as well as what employee expectations are reasonable, continue to

evolve. However, there are certain guidelines that employers can follow to avoid liability arising from monitoring their employees:

- Determine how the relevant state and federal laws impact your monitoring policies. The law in this area is evolving, and practices that are acceptable today may incur more risk in the future, so keep an eye on legislation that is currently being considered. Because many employee monitoring systems are costly to design and implement, you should consider future legal developments when planning to incorporate monitoring policies.

- Inform employees in writing of the ways in which you plan to monitor them. By giving employees notice, you diminish any reasonable privacy expectations they might have. Written notice is also critical for establishing that the employee consented to the monitoring, which places you in a strong legal position to defend alleged privacy violations. Consider consulting an attorney for assistance in drafting and obtaining signed consents that will best shield you from liability.

- Create a well-written policy regarding information technology practices and provide it to employees. Employees generally want to know what the policies are regarding e-mail, telephone use, and other forms of office communication, so it is critical to formulate a reasonable and well thought-out policy for technology use. Make clear to employees that work communications, including voice-mail and e-mail, can and will be monitored, and explain that you, the employer, are the sole owner of electronic communications.

- Clearly define the ways you will monitor employees, including the types of monitoring that will be used and the kinds of technology at your disposal, and then educate employees on what the rules are regarding use of the employers' communication technology. Adequate instruction will help employees understand the rules and also prevent claims that employees were not aware of policies regarding technology resources.

- Give employees notice that e-mail messages may be monitored even though it may seem to them that they are private. Many employees may mistakenly believe that because their e-mails may be deleted and password-protected, they cannot be viewed by the employer. Stress that abuses of communications systems will not be tolerated and intellectual property will be vigilantly guarded.

- Forbid defamatory, offensive, and abusive communications. Make efforts to prevent communications that could amount to defamation, slander, verbal abuse, harassment, or trade disparagement of employees, customers, clients, vendors, competitors, or any person or entity. Communications that are harassing or threatening, including derogatory comments based on race, national origin, marital status, sex, sexual orientation, age, disability, pregnancy, religious or political beliefs, or any other characteristic protected under local, state, or federal law should be forbidden.

  Note
  You must be cautious about total prohibitions against non-work-related communications. Union-related e-mails or postings cannot be prohibited if you

allow employees to make other non-work-related communications on the same systems.

- Justify employee monitoring from the start with legitimate business interests. You should be able to list the reasons for monitoring and the business interests served by the monitoring, such as preventing unacceptable levels of personal technology use, maintaining productivity and high levels of employee service, and ensuring that employees abide by local, state, and federal laws. If surveillance is done for a specific investigatory purpose, then be able to prove that you had a specific reason for suspecting the individual employee or employees.

- Be vigilant in enforcing a policy of keeping business lines open for business purposes only and not for personal calls. However, if you do monitor calls, stop listening once a call is identified as personal.

- Inform callers that their phone calls may be monitored. You can inform callers through a recording at the beginning of the call. Georgia law does not require a periodic beep to remind the person that their call is being recorded.

- Tailor your monitoring so that sensitive information will be disclosed only to individuals who have a legitimate need to know the information. Use the information for lawful business purposes only, and limit dissemination of the information to individuals with a legitimate need to know, such as upper level management or law enforcement officers.

- On a regular basis, review your policies regarding employee privacy and access to communications and information, as well as the relevant law governing such issues. Because this area of the law is rapidly evolving, it is important to keep up with developments that may impact existing privacy policies.

Chapter 15

Internet issues and electronic surveillance

Electronic commerce, like the Internet itself, has grown by leaps and bounds in recent years. E-commerce has until recently been almost exclusively a self-regulated industry with little or no governmental intervention. In recent years, however, government has shown increasing influence in the world of online business.

Employers in the Internet age are impacted by the increased governmental presence, if not by the Internet itself. Most employees now have access to a relatively unregulated digital domain on their computers in which they can access content that may be inappropriate for the work environment and that may easily distract them from their jobs. The ease and seeming anonymity of electronic mail can lead to harassment claims. Communications by e-mail have replaced memos, letters, telephone conversations, and even in-person conversations for many communications. Blogs may disclose internal company business or confidential matters. Internet access presents the risk of copyright and trademark infringement litigation. With these issues in mind, this chapter will address some of the most serious and pressing aspects of operating a company in the Internet age.

Electronic surveillance of employees

State law prohibits the intentional interception of any wire, oral, or electronic communication as well as the disclosure or use of any data obtained through unlawful wiretapping or surveillance. However, the prohibition does not apply where the interceptor is a party to the communication or where at least one party to the communication has given prior consent to its interception. Therefore, the prohibition would apply to an employer where it was not a party to the communication.

Employees who bring wiretapping actions against employers also commonly assert claims for invasion of privacy.

Given the ever-increasing tide of employee disloyalty, espionage, and theft, employers are increasingly using a variety of monitoring techniques to keep employees in line. Surveillance of employees raises a host of privacy concerns and potential liability for employers.

Many employers feel that surveillance of employees can not only be an effective tool to combat such things as employee espionage and theft, but also can improve employee productivity and

efficiency. Opponents, however, maintain that computer and electronic monitoring wrongfully intrudes into employee privacy. There is no question that electronic surveillance is more intrusive than human monitoring because employees can be watched at all times, sometimes in complete secrecy.

This chapter will first address how employers monitor employees via computer and other electronic means and the legal issues that arise out of such monitoring.

Video display terminals and computers

Given the advances in technology, employers now have the ability to monitor display terminals. Technology is available which allows employers to monitor when an employee turns the monitor on or off, the number and sequence of keystrokes, and so on. Many employers also review Internet "histories" of employees to determine whether sites visited are in the best interest of the company and are work-related.

Computers can, for example, be used to track the number of sales made by employees. Some trucking companies use computers to monitor the drivers' speed and duration of stops. Building access security cards now enable employers to determine when employees arrive and leave work.

Telephone

Listening to employees' business-related telephone calls is one of the most common forms of workplace monitoring. Companies dependent on telephone communications often listen in on employees to evaluate the quality of their interaction with the public.

Video and audio surveillance

Employers use video and audio equipment to monitor employee activity on the shop floor, in break rooms, etc. Video and audio surveillance is used by employers not only for the purpose of investigating thefts, but also to prevent sabotage to equipment and unlawful harassment. In addition, some surveillance of employees is conducted simply to monitor work performance.

Federal Wiretap Act

Congress enacted the Federal Wiretap Act as part of the Omnibus Crime Control and Safe Streets Act of 1968 in an effort to protect wire and oral communications of individuals. As more advanced methods of communication became available, Congress amended the Wiretap Act with the Electronic Communications Privacy Act of 1986 (ECPA) to prohibit the intentional interception, accession, disclosure, or use of electronic communications.

The Wiretap Act forbids "interception of wire or oral or electronic communication through the use of an electronic, mechanical or other device" and establishes a civil cause of action for any such violation. Interception is defined as "the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any

electronic, mechanical, or other device." The Wiretap Act does not apply to video surveillance, but does apply to oral communication intercepted in conjunction with such surveillance.

Wire communication

A wire communication includes "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other connection." Telephone calls are wire communications.

Oral communication

An oral communication is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." Therefore, any oral communication is protected under the Act so long as the speaker has a reasonable expectation of privacy. If the communication is protected, then the interception of the conversation by a hidden microphone, for example, may give rise to a cause of action.

Electronic communication

The ECPA defines an electronic communication as "any transfer of signs, signals, writings, images, sound, data, or intelligence of any nature transmitted in whole or in part of a wire, radio, electromagnetic, photoelectronic or photo optical system..." This includes e-mail and text messages, among other things.

Reasonable expectation that communication will not be intercepted

Liability under these laws only attaches when the communicator reasonably expected that his communication would be private and free from interception. Employees may expect that conversations uttered in a normal tone of voice will be overheard by those standing nearby, so there would be no liability under the Wiretap Act in those situations. On the other hand, an employee would not expect that his employer would electronically intercept and monitor his conversations from another part of the building or another location. Therefore, absent specific notification from the employer about monitoring, liability under the Wiretap Act would be a very real possibility in this situation.

Prior consent

No violation of the Act occurs where one of the parties to the communication has given prior consent. The consent should be in writing and signed by the employee. Courts have rejected employers' arguments that employee consent should be implied.

Ordinary course of business exception

The prohibition against wiretapping does not apply to monitoring of telephone calls in the "ordinary course of business." The interception must be for a legitimate business purpose, routine, and with notice. Employers may continue to monitor an employee's call only as long as the employer has determined that it is in fact a business call. After determining that it is a personal call, the monitoring is no longer "in the ordinary course of business." It is **eavesdropping** and against the law.

Electronic Communications Privacy Act of 1986

The Electronic Communications Privacy Act allows employers to retrieve electronically stored information. Not much litigation has arisen under this section because the employer's legal right to retrieve information is fairly broad and clear. Some plaintiffs, however, have tried to be creative. For example, a plaintiff claimed an "interception" occurred where messages were retrieved from storage before they were sent. The court rejected the argument. Similarly, another court held that an employer's search of e-mail messages was not illegal. The court found that no "interception" had occurred and that the applicable statute was Title II (electronic storage) rather than Title I (interception).

Common law privacy claims

Generally, employers may monitor employee activities to analyze performance or investigate misconduct, as illustrated by the following examples of conduct courts have found to be legal:

- checking the license plates of visitors' cars parked on a public street near the home of a security guard who was under investigation
- taking photographs of production employees for an efficiency study
- photographing an employee returning stolen property
- recording the errors employees made on computers to measure the performance of the equipment.

Such monitoring need not be restricted to the workplace. It should, however, be confined to public areas. For example, monitoring an employee doing yard work while on workers' compensation leave is allowable, but monitoring them after they have entered their home is not.

Common e-mail

Courts have held that even if an employer had repeatedly told its employees that its e-mail system would remain confidential, an employee does **not** have a reasonable expectation of privacy in sending a threatening e-mail to a supervisor over the company e-mail system. The company's interest in preventing inappropriate and unprofessional

comments (or even illegal activity) over its e-mail system outweighs any interest in employee privacy.

Video surveillance

Employers may film an employee in public areas as part of an investigation of the employee's claim for worker's compensation. Courts have rejected employees' claims that filming activities at home constitute an invasion of privacy because employees should expect claims of injury to be investigated, and surveillance conducted in a reasonable and unobtrusive manner will not give rise to liability for invasion of privacy. The same activities could be observed by a neighbor or passersby, and filming in such situations is neither unreasonable nor highly offensive to a reasonable person.

Employees do have a reasonable expectation of privacy in rooms such as bathrooms, locker rooms, and changing areas. Therefore, any employer video surveillance in those areas would be an unlawful invasion of employees' privacy interests.

Computer and communication policy

The technological advances of today's workplace have given employees access to many types of communication devices, including computers, computer networks, e-mails, pagers, the Internet, and phone systems with voice mail messaging capabilities. It is imperative that an employer implement a "computer and communication policy" stating that the purpose of such communication devices is to "facilitate company business." Some other suggestions for inclusion into the policy are as follows:

- The policy may state that the company's communication systems are not to be used for any business other than the company's business. The policy may also provide that incidental and limited non-business use of communications systems is acceptable, but that this privilege should not be abused. However, third parties (for example, any individuals who are not company employees) should always be prohibited from using a company's communication systems.

- The policy should address acceptable and appropriate uploading and downloading of information onto a computer and/or network to prevent virus infiltration. The policy should also address the use of passwords and any restrictions associated with passwords.

- The policy should address employees' use of e-mail. The policy could address what steps an employee should take if an e-mail message is inadvertently sent to a third party. A discussion of the appropriate tone and content used in e-mails is advisable. A strong statement should be included that warns against the use of e-mail or any other form of communication for purposes of sending, accessing, or storing any material of an insensitive, discriminatory, obscene or harassing nature. The policy can include a prohibition against chain letters or e-mails with illegal purposes.

- Another area of law that the policy should address is copyright laws. The policy could include a statement that employees should not transmit copies of documents in violation of copyright laws or copy or use any software in violation of copyright laws.

- The policy should inform employees that the company has a right to inspect, review, and monitor use of its computers and communication systems. The company should state that information contained in computers, e-mail, or voice mail that is incidental or of a personal nature is not treated differently from other information. Therefore, employees should not expect that the company's computer network or telephone system is private.

Binding effect of e-signatures

Since 2000, the Electronic Signatures in Global and National Commerce Act (ESIGN) has allowed online documents signed using digital signatures to carry the same legal weight as written documents. ESIGN allowed the expansion of fully electronic e-commerce, unhindered by any requirement for a signed written document. This allows, as an example, real estate purchases to be carried out by parties across the world and completely online, without these parties having to attend closings or to fax documents back and forth.

The key to ESIGN is authenticity and identity. This technology has been in place for several years and is already used in the transfer of certain files from online providers. The technology allows a signature to be permanently affixed to the online document, much like an ink signature, and transferred with the document wherever it is sent.

Important intellectual property concerns

Intellectual property is intangible property that is the result of creativity (such as patents, trademarks, and copyrights). Several concerns arise with intellectual property in the employment context.

Business method patents

Whether starting a company's venture into online commerce or simply ensuring the company's continued success, any company should check business method patents to avoid infringement issues. Business method patents are patents covering new methods of doing business, whether those methods are online or not. These patents differ from the traditional nuts and bolts patents of the physical world and pull the United States Patent and Trademark Office into the digital realm. For example, the use of a "shopping cart" for online transactions was unique enough to be patented.

It is important for employers to protect business method patents and to avoid infringement of others' patents. Because this issue is new and technologically driven, it is wise to consult with a patent attorney about these issues.

Shop rights

Where an employee develops an invention on the employer's time, using the employer's money, property, and labor, then a "shop right" arises. A shop right gives the employer the non-exclusive right to use an invention for its own business purposes. The employer can neither assign this right to another nor prevent others, including the employee/ inventor, from using the invention.

Generally, the inventions of an employee belong to that employee. However, an employer can gain entitlement to all or part of these inventions through agreement or contract with the employee. Even without an agreement, though, an employer may be entitled to free, non-exclusive "shop rights" for use of the invention if it was conceived using employer time and resources or the employee was hired to invent. The resources utilized by the employee must be substantial and not "trivial." The ownership of the patent remains with the employee, and he retains ownership even if he leaves his employment. If the employer has a shop right, then it may continue to exercise that right after the employee has left.

These "shop rights" are based on fairness. An employer spends money to assist in the invention, and it is equitable and fair to allow it to reap the rewards of this expenditure. However, the employer has a non-exclusive license, so the employee can also benefit from his or her work. In a situation where the employer has not contributed, it would be contrary to equity to allow the employer to benefit from the outside work of the employee simply because the employee worked for the company at the time of the invention.

Combating disparagement on the Internet

Employers have sometimes been victimized by improper use of the Internet by current or former employees. Some people who are hostile to a company may operate or post unfavorable and disparaging information about the company on various websites or make disparaging comments in Internet chatrooms or blogs. Sometimes the information posted on the Internet may be confidential and proprietary company information that should not be disclosed outside the workplace. The identity of the person who discloses such information, however, may be difficult to determine because Internet users often use an alias or pseudonym when posting comments on Internet sites.

Taking legal action to protect the company

Employers who believe that the information or comments posted on an Internet site have violated their legal rights by disparaging them or revealing proprietary business information can, if they act swiftly, determine who has posted the improper comments or information in order to pursue claims against those persons. In order to learn their identity, it may be possible for the employer to file a lawsuit against an unknown person identified in the lawsuit as "John Doe." Once the lawsuit is filed, the employer may seek information from the Internet host through a subpoena aimed at identifying the electronic

address of the person who posted the offending comments. It may also be possible for the employer to issue a subpoena to the offender's Internet service provider to learn the identity of the person who posted the data in question.

It is important for employers to act quickly to attempt to trace the origin of an offensive posting or improper e-mail because many of the website hosts and Internet service providers retain the identifying information for a very short period of time, sometimes as short as 30 or 60 days. If the subpoena is not served within that time frame, the information may be lost. Once the employer knows the identity of the person who has posted the improper comments, the employer can determine whether the employee violated an obligation to the employer to protect confidential data, breached a duty of loyalty, or made false and disparaging statements about the employer.

Anti-blogging policies

Employers should adopt policies in employment handbooks that prohibit employees from hosting or contributing content to Internet blogs or chat rooms if doing so discloses confidential information about the employer or reflects adversely on the employer.

Chapter 16

Lie-detector tests

Polygraph tests, also known as lie detector, deceptograph, voice stress analyzer, and psychological stress evaluation tests are investigative tools often considered by employers. However, employers may use such tests only in very limited circumstances. As the Georgia Polygraph Examiners Act was repealed in 1994, federal law governs the use of polygraph tests in the workplace. The Employee Polygraph Protection Act of 1988 (EPPA) severely restricts private sector employers from administering polygraph tests to current and prospective employees except under extremely limited circumstances.

However, a statutory remedy for damages suffered from the negligent or improper administration of a polygraph test is still available in Georgia. The polygraph examiner can be liable for the actual damages sustained, together with reasonable attorneys' fees, filing fees, and reasonable costs of the action. Damages may include, but are not limited to, back pay for the period during which such person did not work or was denied a job as a result of such examination.

Who is covered

The EPPA applies to most private employers. The EPPA specifically does not apply to public sector employers except for certain employees of the federal legislative branch.

Employees may not waive by contract or a release the rights and procedures provided by the EPPA unless the waiver is the result of a written settlement agreement based on a pending EPPA action or claim.

What is prohibited

The prohibition on employer-conducted polygraph tests extends to any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.

Employers and their agents may not:

- directly or indirectly require, request, suggest, or cause any employee or prospective employee to take or submit to any polygraph detector test
- use, accept, refer to, or inquire concerning the results of any polygraph test of any employee or prospective employee

- discharge, discipline, discriminate against, deny employment or promotion to, or threaten such actions against any employee or prospective employee who refuses, declines, or fails to take or submit to any polygraph test

- discharge, discipline, discriminate against, deny employment or promotion to, or threaten such actions against any employee or prospective employee on the basis of the results of any polygraph test

- discharge, discipline, discriminate against, deny employment or promotion to, or threaten such actions against any employee or prospective employee because the individual made a complaint under or related to the EPPA, testified or is about to testify in any proceeding related to the EPPA, or exercised rights provided by the EPPA.

Enforcement

The Secretary of Labor enforces the EPPA and may impose civil penalties of up to $10,000 against an employer. The Secretary also may bring a court action against an employer. If a court determines that an employer violated the EPPA, the court can issue an injunction against the employer and also can award employment, reinstatement, promotion, lost wages, and lost benefits to the affected individuals.

Likewise, individuals affected by an employer's misuse of the EPPA may bring a private court action against the employer in either state or federal court. In the event a court determines an EPPA violation occurred, the affected individual could receive employment, reinstatement, promotion, lost wages, and lost benefits. Furthermore, the court, in its discretion, may allow the prevailing party to recover reasonable costs, including attorneys' fees. An individual who believes that an employer has violated the EPPA must bring such a claim in court no more than three years after the date of the alleged violation.

Exemptions

Although the EPPA essentially prohibits a private employer from conducting or causing to be conducted a polygraph test, several exemptions exist. Half of the exemptions apply only to the federal government – however, the other exemptions apply to private employers in certain limited situations.

Federal government exemptions

National defense

The federal government, in the performance of any counterintelligence function, may administer a polygraph test to any employee, contractor, expert, or consultant working for or under contract to the Department of Defense and/or the Department of Energy in connection with the atomic energy defense activities.

Security

The federal government, in the performance of any intelligence or counterintelligence function, may administer a polygraph test to any applicant, employee, expert, consultant, or individual employed by, assigned to, detailed to, or under contract to the National Security Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the Central Intelligence Agency, or any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency. Likewise, the federal government may administer a polygraph test to any employee, expert, or consultant under contract with any federal government department, agency, or program whose duties involve access to information that has been classified at the level of top secret or designated as being within a special access program under certain Executive Orders.

FBI contractors

The federal government, in the performance of any counterintelligence function, may administer a polygraph test to the employee of a contractor for the Federal Bureau of Investigation (FBI) when that employee is engaged in the performance of any work under contract with the FBI.

Private employers

Security services

When the primary business purpose of a private employer consists of providing armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel, the private employer may administer polygraph tests to employees whose duties include protecting facilities, materials, or operations having a significant impact on the health or safety of any state or political subdivision, or the national security of the United States.

Examples include:

- facilities engaged in the production, transmission, or distribution of electric or nuclear power plants
- public water supply facilities
- shipments or storage of radioactive or other toxic waste materials
- public transportation
- currency
- negotiable securities
- precious commodities or instruments

- proprietary information.

This special exemption for security services applies only to the employees actually employed to protect such facilities, materials, operations or assets, and not to all employees of the employer.

Drug security, theft and diversion investigations

Any employer authorized to manufacture, distribute, or dispense controlled substances may administer polygraph tests in limited circumstances to employees and prospective employees when the individual has or will have direct access to the controlled substances. For an existing employee, the employer may conduct polygraph test only in connection with an ongoing investigation of criminal or other misconduct.

Ongoing investigations

For the average private employer, only the "ongoing investigation" exemption likely applies. Unfortunately, this limited exemption seldom fits most situations due to the strict regulation on its use. For an employer to take advantage of the ongoing investigation exemption, the employer must ensure the following:

- the polygraph test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an unlawful act of industrial espionage, or sabotage

  and

- the employee had access to the property that is the subject of the investigation

  and

- the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation

  and

- the employer must write-out a statement detailing the specific incident or activity being investigated and provide it to the examinee before the test.

  The statement provided to the employee prior to testing must be signed by a person legally authorized to bind the employer and must be retained for at least three years from the date of testing. The statement must identify the specific economic loss or injury to the business of the employer and must indicate that the employee had access to the property

that is the subject of the investigation. Furthermore, the statement must describe the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation. If the employer's statement fails to meet these detailed requirements, the ongoing investigation exemption will not apply.

Restrictions on exemptions

Even on the rare occasion when a private employer discovers that an exemption may allow for a polygraph test, the EPPA further restricts the use of any polygraph results. For all three exemptions applicable to private employers (the security services; drug security, theft, and diversion investigation exemption; and the ongoing investigation exemptions) the EPPA still prohibits an employer from using solely the results of a polygraph test in determining whether to discharge, discipline, deny employment or promotion, or otherwise discriminate against the tested individual. In other words, an employer must be able to provide other supporting evidence (in addition to the results of the polygraph test) to lawfully discharge, discipline, terminate, refuse to hire or otherwise discriminate against a tested individual.

Rights of the examinee

In the event that a private employer may test an individual, the EPPA provides specific rights to individual to be tested.

Throughout all phases of the testing, the employer must allow the individual to terminate the test at any time and the examiner may not ask questions designed to degrade or intrude on the individual. Specifically, the examiner may not ask any questions concerning:

- religious beliefs or affiliations beliefs
- racial matters
- political beliefs or affiliations
- any matter relating to sexual behavior
- regarding unions or labor organizations.

An employer may not test an individual who provides sufficient written evidence from a physician that the individual suffers from a medical or psychological condition that might cause abnormal responses during the test.

The EPPA further restricts testing depending on the phase of the testing.

Pre-test phase rights

During the pretest phase, an employer must provide the individual with reasonable written notice of the date, time, and location of the test, and inform the individual that

he/she may consult an attorney or an employee representative before each phase of the test. The individual must receive written notice of the nature and characteristics of the test, the instruments involved, whether the testing area contains a two-way mirror, camera, or other device through which the test can be observed, whether any other device will be used, and that the employer or individual may make a recording of the test.

The employer also must provide a written statement for the individual to sign. This statement must include notice that the individual cannot be forced to take the test as a condition of employment and that any statement made during the test may constitute additional supporting evidence as to the basis for subjecting the employee to the test. This statement also must include a summary of the legal rights that are available to the individual if the exam is not conducted according to the EPPA. Finally, the statement must remind the individual that the employer may turn over to the appropriate governmental agency any admission of criminal conduct.

As a final condition on testing, the EPPA requires that prior to the test the individual be provided an opportunity to review all questions to be asked during the test and informed of the right to terminate the test at any time.

Actual test phase rights

During the actual testing, the individual may not be asked any question that was not presented in writing for review prior to the test.

Post-test phase rights

Before the employer may take any action based on the results of the test, the employer must further interview the individual on the basis of the results of the test, provide a written copy of any opinion and/or conclusions rendered as a result of the test, and provide a copy of the questions asked during the test along with the individual's responses.

Disclosure of information

The EPPA provides for limited disclosure of information obtained during a polygraph test. The polygraph examiner may disclose information to the examinee, someone specifically designated in writing by the examinee, the employer that requested the test, or any court, governmental agency, arbitrator, or mediator in accordance with due process of law according to an order from a court of competent jurisdiction. The employer that ordered the polygraph examination may disclose information to the examinee, someone specifically designated in writing by the examinee, or a governmental agency if the disclosed information is an admission of criminal conduct.

Notice requirement

The EPPA requires an employer to post in a conspicuous place a notice of the EPPA and the rights it provides to employees. Employers must post the notice with other required

employment postings. Employers may obtain the required poster from the Wage and Hour Division of the Department of Labor or from the Department of Labor website.

Interaction with other laws and agreements

The EPPA does not preempt any state or local law or collective bargaining agreement that prohibits lie detector tests or is more restrictive than the EPPA.

Polygraph testing by public employers

The EPPA does not apply to public employers. As a general rule, public employers may require employees to submit to a polygraph test and a public employer could discharge an employee who refused to be tested.

If a public employer conducts a polygraph test as part of a criminal investigation, the employer must take certain precautions to protect the employee's constitutional rights. For example, the employee has a right to counsel and, may have an attorney present.

Likewise, a public employer could violate an employee's due process rights if the employer takes adverse employment action based only on the results of the polygraph test. To avoid this violation, an employer should base its employment decisions on the basis of both the polygraph test and other evidence obtained. Furthermore, public employers should consider allowing an employee a fair hearing during which the employee could present a defense to the employer's allegations.

Chapter 17

Discrimination in employment

Federal law prohibits employers from discriminating against employees on the basis of race, color, national origin, religion, sex, pregnancy, age, disability, veteran status, and genetic information. Georgia employers are wise to become familiar with the following statutes in order to lessen their exposure to costly lawsuits and damage awards.

Laws prohibiting discrimination include, but are not limited to:

- Title VII of the Civil Rights Act of 1964 (Title VII)
- Section 1981 of the Civil Rights Act of 1866 (Section 1981)
- the Immigration Reform and Control Act of 1986 (IRCA)
- the Equal Pay Act of 1963 (EPA)
- the Pregnancy Discrimination Act of 1978 (PDA)
- the Age Discrimination in Employment Act of 1967 (ADEA)
- the Older Workers Benefits Protection Act of 1990 (OWBPA)
- the Genetic Information Nondiscrimination Act of 2008 (GINA)
- the Executive Order 11246
- the Uniform Services Employment and Reemployment Rights Act (USERRA)
- the Americans with Disabilities Act (ADA)
- the Georgia Fair Employment Practices Act of 1978
- Georgia's Labor and Industrial Relations statute.

Title VII of the Civil Rights Act of 1964

Title VII prohibits employment discrimination based on the following protected characteristics: race, color, sex, religion and national origin. It covers public and private employers who have 15

or more employees (volunteers, independent contractors and directors of corporations are not counted as part of this total).

Under Title VII, it is illegal to discriminate in any aspect of employment including, but not limited to:

- hirings and firings
- compensation
- transfers
- demotions
- negative referrals
- harassment.

Employees who file suit under Title VII may state their claim under one of two theories:

1. disparate treatment

   or

2. disparate impact.

Disparate treatment

The essence of a disparate treatment claim is:

- the employer treated the applicant or employee differently than other applicants or employees not within that individual's protected class

  and

- the employer's differential treatment was intentional.

When an employee brings a disparate treatment claim under Title VII, he is alleging that his employer treated him differently than others because of his race, color, religion, sex or national origin. For example, a female may bring a claim under Title VII alleging that she was treated differently than males, and that this treatment was because she was a female.

An employee cannot succeed with a disparate treatment claim by simply showing that he suffered some adverse employment action (such as being fired or demoted). To the contrary, the central issue in a disparate treatment claim is whether the employer's actions were motivated by discrimination, and, therefore, an employee must be able to prove discriminatory intent.

Proof of disparate treatment

Case based on direct evidence

Direct evidence is evidence based on personal knowledge or observation that, if true, proves discriminatory intent without inference or presumption. Examples of direct evidence include:

- a notation on an applicant's resume indicating a discriminatory bias
- statements (normally by decision makers) demonstrating unlawful bias against an applicant or employee.

A plaintiff may rely solely on direct evidence to prove intentional discrimination. If a plaintiff's direct evidence strongly suggests that discrimination could have in fact occurred, the employer usually defends against the claim in two ways:

- by producing evidence disputing the plaintiff's evidence (for example, showing that the supervisor did not make discriminatory statements)

  or

- by asserting other defenses, such as a plaintiff's failure to utilize an employer's established procedure for receiving and effectively responding to complaints of discrimination.

Case based on circumstantial evidence

More often than not, an employee does not have direct evidence of an employer's discriminatory intent and therefore must rely on circumstantial evidence to prove his or her claim. Circumstantial evidence is evidence that, by itself, does not directly prove a fact of consequence, but allows the judge or jury to infer the existence of the fact. For example, a female applicant suing an employer for sex discrimination could produce circumstantial evidence in the form of records showing that the company has never hired a woman for the position the applicant sought, despite having had several qualified female applicants over the years. This evidence is not direct evidence because there is no direct company statement that it did not want to hire women. Instead, the fact that the company had not in fact hired women **suggests** that this may be true.

If an employee brings a discrimination claim based on circumstantial evidence, the lawsuit will proceed in three steps:

1. **Plaintiff must establish an inference of discrimination**
   This simply means that the employee must be able to produce enough evidence to create some question as to whether the

employer unlawfully discriminated against the employee. The evidence differs depending on what type of discrimination is alleged.

2. **Employer must give a legitimate, nondiscriminatory reason**
   In the event the plaintiff is able to establish an inference of discrimination, the employer must then provide a legitimate, nondiscriminatory reason for its decision. For example, the employer could state that it did not hire the female applicant because she was not qualified for the position. The employer must be able to give some reason (other than the applicant's gender or other protected characteristic) for its decision.

3. **Plaintiff must prove pretext**
   Should the employer give a legitimate, nondiscriminatory reason for its decision, the employee must prove that the employer's stated reason is really just a falsehood to mask unlawful discrimination -- the "real" reason for the decision. In the above example, the employee must show that her qualifications (or lack thereof) were not the real reason for the company's decision. To succeed in her claim, she must be able to show that this stated reason is an attempt to cover up the "real" reason for the decision – her gender.

Mixed-motive cases

Suppose an employer is preparing to terminate an employee on a recommendation from two of the employee's supervisors. These supervisors claim that their recommendation is based on the employee's poor performance, but the employer discovers that the two supervisors have made statements which could be construed as discriminatory. Can an employer go ahead and terminate the employee and avoid monetary damages by claiming that the supervisors would have recommended the termination even if they did not harbor any discriminatory bias?

Indeed it can. A mixed-motive case is characterized by an employee's providing direct evidence of discrimination (such as discriminatory statements by supervisors) and an employer's assertion that, while discriminatory intent may have been a motivating **factor**, the employer would have made the same employment decision had the discrimination not occurred. Employers should be careful in defending a mixed-motive case, however. While an employer may be able to avoid damages in the form of back pay and front pay by showing the same decision would have been made even without discriminatory bias, a court can still award attorney's fees to an employee so long as discriminatory bias was involved to any extent in the decision-making process.

Avoiding discrimination

Here are some precautionary measures to help avoid or defend against a discrimination charge:

- **Update policies and apply them uniformly**
  One of the most important precautionary measures an employer can take to lessen exposure to a lawsuit is to ensure that all policies illustrate practices that are in compliance with federal and state laws. In addition, an employer should make certain that all supervisory personnel understand each policy and apply the policies uniformly to each employee. Employers should be able to demonstrate that employees outside the protected class at issue have not been treated favorably in comparison to the plaintiff, and that the employer's policies have been consistently applied.

- **Conduct honest employee evaluations**
  Performance evaluations can serve as a powerful tool for employers in defending against discrimination claims. However, if supervisors do not utilize them effectively, evaluations can be equally helpful to litigious employees. For example, as an employer, you do not want to terminate an employee for poor performance and then discover that the employee has received nothing but stellar reviews from his or her supervisors. These performance evaluations can be used as evidence to prove that the "poor performance" explanation is a falsehood used to mask the real (discriminatory) reason. It is imperative that employers train all supervisory and management employees to conduct honest performance evaluations.

- **Document poor performance/bad conduct**
  Like performance evaluations, conduct reports help to demonstrate an employee's performance problems. Employees should be made aware of all discipline policies, and employers are cautioned to document all disciplinary measures taken against an employee.

- **Provide employees with honest explanations for employment decisions**
  Initiating an adverse employment action (for example, discipline) is rarely a pleasant experience for either employers or employees. However, an employer is wise to be candid with employees when discussing reasons for demotions, transfers, discipline, or termination. Do not downplay the seriousness of conduct or policy violations in order to avoid an awkward confrontation. If an employer fails to honestly address an employee's performance problems, and then fires him for performance reasons, the employee will have an argument for pretext: How could the "real" reason for termination be performance if the employer never addressed the subject

with him during his employment? The employee may argue that if the reason isn't really his performance, perhaps it could be a protected characteristic such as his race.

Disparate impact

Unlike disparate treatment, which focuses on intentional discrimination towards an individual due to his membership in a protected group, the essence of a disparate impact claim is that an employer's seemingly neutral policy or practice is unlawful because it has a significant adverse impact upon a protected group. The fact that the employer had no discriminatory intent does not shield an employer from liability if the implementation of a policy or procedure results in a discriminatory impact. In short, disparate impact is the idea that some employer practices have a greater impact on one group than another.

As is the case with disparate treatment claims, an employee bears the burden of proving that a particular policy has a disproportionately adverse impact on a protected class. Plaintiffs often rely on statistical evidence to prove their cases. Examples of statistical evidence frequently relied upon include selection rates, pass/fail rates on qualifying exams, and population/workforce comparisons. Put simply, a plaintiff must show that a particular employment practice produced discriminatory results. Take for example, an employer that requires its applicants to have a high school diploma. If the diploma requirement screens out many more African Americans than it does Caucasians, the requirement produces a disparate impact based on race, even though there was no intentional discrimination.

Neither courts nor the language of Title VII have articulated what statistical evidence is sufficient to establish a "disproportionate impact," and courts make this determination on a case-by-case basis.

Employers should not let their fear of litigation drive employment decisions which themselves constitute express, race-based decision-making. In a recent U.S. Supreme Court case, a city held a test to determine which of its firefighters were best suited for promotion. Based on the results and the requirements for promotion, no African-American candidates would have been promoted. Out of concern for the racial disparity that would have occurred if the city were to certify the test results and make the called-for promotions, the city threw out the results of the test. In response, White and Hispanic firefighters who passed the tests and were denied a chance at promotion by the city's refusal to certify the results filed a lawsuit. The Supreme Court found that the city's refusal to certify the test results because the highest scoring candidates were white was express, race-based decision-making that was prohibited by Title VII.

Enforcement of Title VII

Title VII is enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and through private lawsuits filed in federal court. Before bringing a suit in federal court, a plaintiff must file a charge of discrimination with the EEOC no later than 180 days after the alleged discriminatory event occurred. If the employee's claim is based on allegations

that the employer maintained a continuous discriminatory practice, the employee must file his charge within 180 days of the last occurrence of the alleged discriminatory practice.

After a charge is filed, the EEOC investigates the claim using a "reasonable cause" standard which determines whether it is "more likely than not" that discrimination took place. The focus is on whether the employee established an inference of discrimination and whether there exists any reason to doubt the employer's stated reason for the employment decision. If the EEOC determines that the employee met the reasonable cause standard, it then attempts to eliminate the unlawful discrimination through mediation with the hopes of encouraging the parties to settle. If the EEOC determines that the reasonable cause standard has not been met, it will either file suit against the employer or issue notice to the employee of his right to file a lawsuit (often referred to as a "right-to-sue letter"). At that point, if an employee decides to file a lawsuit, he must do so within 90 days of receipt of this notice, or his claim is barred as untimely.

Remedies available for Title VII claims

Title VII disparate treatment remedies aim to eliminate discrimination and to "make whole" individual victims of discrimination by restoring them to the position they would have been in had the discrimination never occurred. Examples of available remedies include:

- **Injunctive relief**
  When ordering injunctive relief, a court is essentially directing an employer to **do** something. For example, a court may order an employer to banish its unlawful employment practices such as job requirements, educational requirements, scored tests, and age limits.

- **Reinstatement**
  Reinstatement is a preferred remedy in cases of discriminatory termination but will not be ordered if the result would be to return the employee to an excessively hostile or antagonistic work environment. In addition, courts generally will not order reinstatement if it would result in another employee's displacement.

- **Retroactive seniority**
  Retroactive seniority awards an aggrieved plaintiff the amount of seniority he or she would have enjoyed had the discrimination not occurred.

- **Front pay**
  Front pay is usually allowed where reinstatement is not possible and represents the amount of money the employee would have earned if he had been reinstated.

- **Back pay**
  Back pay awards typically reflect lost wages and benefits.

- **Promotion**
  Similar to reinstatement, a court will not order an employer to promote a successful Title VII plaintiff if the promotion would result in another employee's displacement.

- **Compensatory damages**
  Compensatory damages are only available as a remedy for intentional discrimination. Compensatory damages pay back an employee for non-economic injuries such as pain and suffering, humiliation, and harm to reputation.

- **Punitive damages**
  Punitive damages (money damages meant to punish an employer and to deter future discriminatory conduct) are also only available as a remedy for intentional discrimination. In determining the appropriateness of a punitive damages award, courts will consider:

  - the employer's conduct (and, more specifically, how egregious or culpable it was)
  - the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award
  - the difference between this particular remedy and the remedies authorized in comparable cases.

- **Combined compensatory and punitive damage awards will be capped at:**

  - $50,000 for employers with 15 to 100 employees
  - $100,000 for employers with 101 to 200 employees
  - $200,000 for employers with 201 to 500 employees
  - $300,000 for employers with more than 500 employees.

Race discrimination

Georgia's Fair Employment Practices Act makes it unlawful for a **state agency** to discriminate against any public officer or employee on the basis of race, color, national origin, religion, sex, disability, or age.

Under this statute, a public employer may not refuse to hire, terminate, segregate or classify employees on the basis of any protected class. The statute also contains an affirmative action provision which prevents public employers from hiring, promoting, advancing or segregating an individual solely because of his membership in one of the protected classes. However, the provision will allow an employer to voluntarily adopt a plan to fill vacancies in a manner which eliminates imbalances in the workforce with respect to the protected class.

As discussed above, employees may file claims based on race discrimination under Title VII. However, employers must be aware of a second source of protection – Section 1981 of the Civil Rights Act of 1866 (Section 1981). Section 1981 is often invoked by employees who are seeking to avoid Title VII's procedural requirements, and in some cases, to gain access to additional damages. Both Title VII and Section 1981 prohibit discriminatory employment decisions based on race or stereotypes often associated with race. In addition, both laws protect against racial harassment and retaliation. The differences between the two statutes can be summarized as follows:

Title VII vs. Section 1981

- Unlike Title VII, which protects employees against discrimination based on race, color, sex, national origin and religion, Section 1981 only protects against race discrimination.
- Unlike Title VII, which covers only those employers with 15 or more employees, Section 1981 covers **all** private employers, regardless of the number of employees.
- The administrative prerequisites to filing a suit in federal court under Title VII do not apply to Section 1981 claims. Thus, an employee with a Section 1981 claim does not have to first file a charge with the EEOC, nor must he wait for his right-to-sue-letter.
- Unlike Title VII, which requires a charge of discrimination to be filed with the EEOC within 180 days of the alleged discriminatory event, the courts have determined that Section 1981 generally permits claims brought within a maximum of four years of the alleged discriminatory conduct, depending on the circumstances.
- While Title VII allows claims under either disparate treatment or disparate impact, Section 1981 is appropriate only for cases in which the employer is charged with intentional discrimination (disparate treatment).
- Unlike Title VII, Section 1981 does not provide a statutory cap to its punitive damage awards.

	Title VII	Section 1981
Protected characteristics	Race, color, sex, national origin, and religion.	Race only.
Covered employers	Those employers with 15 or more employees.	All private employers, regardless of the number of employees.

	Title VII	Section 1981
Must a charge be filed with the EEOC to sue?	Yes.	No.
Employee's time to act	EEOC charge must be filed within 180 days of the alleged discriminatory event.	Lawsuit must be filed within four years of the alleged discriminatory conduct, depending on the circumstances.
Can claims be brought under theories of disparate treatment and disparate impact?	Yes, both.	No, only for cases of intentional discrimination (disparate treatment).
Statutory cap on an award of punitive damages?	Yes.	No.

Retaliation

Title VII prohibits employers from retaliating against applicants or employees because they opposed discrimination or participated in Title VII processes. Just this year, the Supreme Court confirmed that retaliation claims may also be brought under Section 1981. In order to establish a case of retaliation, an employee must be able to show that:

- he or she engaged in an act protected by statute

  and

- he or she suffered an adverse employment action

  and

- there is some causal connection between the two events.

Protected acts

Under Title VII's **participation clause**, an employer may not discriminate against an employee because the employee participated in Title VII processes. Protected Title VII processes include:

- filing a formal charge of discrimination against the employer

- expressing an intention to file a charge
- acting as a witness or testifying for a co-worker
- refusing to act as a witness for the employer
- and assisting fellow workers in their discrimination claims.

Under the **opposition clause**, an employer may not discriminate against an employee because that employee opposed an employment practice made unlawful under Title VII. In situations where the practice opposed is not deemed unlawful under Title VII, the employee's opposition is still protected so long as the employee had a **reasonable and good faith belief** that the practice opposed constituted a violation of Title VII.

Often times, it may not be clear what type of conduct qualifies as protected "opposition." Courts have held that the following activities **do** constitute opposition and therefore are protected under Title VII:

- complaining about sexual harassment
- contacting an attorney to complain about sexual harassment
- asking an employer whether race played a part in an employment decision
- indicating to a supervisor support for another employee who filed an EEOC charge
- filing an Equal Pay Act complaint
- discussing discriminatory activity – during an employer's internal investigation – even if by merely responding to questions.

Conversely, courts have held that the following activities **do not** constitute opposition:

- an African-American employee's act of sending a letter to his employer asking to meet to generally discuss affirmative action and race relations issues
- protesting an employer's decision not to transfer the employee's secretary, where the protest was not based on discrimination
- vague complaints about "ethnicism" and hints of racism.

Adverse employment action

It does not take much for an employment action to be deemed "adverse." All that the employee must show is that the action might have discouraged a reasonable employee

from making or supporting a charge of discrimination. Therefore, adverse employment actions such as the following could form the basis of a retaliation claim:

- termination
- discipline short of termination, such as counseling or warnings
- demotion
- transfer
- implementation of probationary period
- failure to promote
- negative references to potential employers
- harassment.

Causal connection

In a retaliation case, the plaintiff bears the burden of proving that the employer took an adverse employment action in response to the plaintiff's protected activity. One of the factors courts often consider is the amount of time that has elapsed between the protected activity and the adverse employment action. A short time period between the protected activity and the adverse employment action strengthens an employee's allegation that the employment action was in response to the activity.

National origin discrimination

Title VII prohibits discrimination based on national origin. National origin discrimination means treating someone less favorably because he or she comes from a particular place, because of his or her ethnicity or accent, or because it is believed that he or she has a particular ethnic background. Title VII also protects employees who **associate** with persons of a particular national origin. Therefore, according to EEOC guidelines, Title VII's protections cover:

- marriage with a member of a particular national origin
- use of a spouse's name that is associated with a particular national origin
- membership in schools, churches, temples, or mosques generally used by persons of a particular national origin
- membership in an organization which promotes the interests of national groups.

Immigration Reform and Control Act of 1986 (IRCA)

IRCA makes it unlawful for any employer to hire any person who is not legally authorized to work in the United States. Since this law may cause employers to discriminate against foreign-looking or foreign-sounding job applicants, IRCA also contains two anti-discrimination provisions.

The first provision extends Title VII's existing prohibition against national origin discrimination to cover employers with four or more employees and applies to employers that are otherwise outside Title VII's coverage. The Act's second provision prohibits discrimination based on citizenship status and applies to all employers with at least four employees, subject to certain limitations.

Religious discrimination

Religion is not defined by the law. Courts define it broadly as a sincerely held religious belief, regardless of whether such belief is approved or required by an established church or other religious institution. The law protects all aspects of a religion, its observances, and its practices.

Under Title VII, religious discrimination is marked by an employer's **failure to accommodate** an employee's religious beliefs, thereby forcing the employee to choose between his religion and his job. Therefore, Title VII's prohibition against religious discrimination creates an affirmative duty for an employer to reasonably accommodate an employee's religious beliefs and practices. This duty effectively makes Title VII's protection of religion different than the protection offered to other protected classes because, in many cases, the duty to accommodate results in an employer providing **preferential treatment** (instead of merely equal treatment) to those employees professing certain religious beliefs and participating in certain religious practices.

Burden of proof

A plaintiff who claims his employer discriminated against him by failing to accommodate his religious beliefs must first establish three elements:

1. he has a sincere belief that compliance with a work requirement is contrary to his religious faith

   and

2. he informs his employer of this conflict

   and

3. he is discharged or disciplined for failing to comply with the work requirement.

If the plaintiff establishes these three elements, the employer must then prove that it attempted to accommodate the plaintiff's religious beliefs or was unable to provide an

accommodation without undue hardship. Therefore, the issue in most religious discrimination claims is whether the employer's accommodation is reasonable.

The extent of the duty to accommodate

It is well settled that an employer, in order to fulfill its duty to accommodate, does not have to provide an employee with the "best accommodation" or the accommodation preferred or proposed by the employee. In order to defend against a failure to accommodate claim, an employer simply must show that it offered a reasonable accommodation to the employee.

An employer does not have to implement any accommodation at all, if doing so would result in an undue hardship. The Supreme Court has defined "undue hardship" as any accommodation that would impose more than a minimal cost for the employer to implement. Whether an accommodation is reasonable depends on the facts of each case.

Example
An employee requests to take off work for Yom Kippur, which occurs one day each year and may fall on a weekday. Courts will likely require an employer to accommodate him.

Example
An employee claims that his religion requires him to be off work every Monday and Tuesday. Courts are not likely to force an employer to accommodate this employee.

Sex discrimination

Title VII prohibits employment decisions based on sex or sexual stereotypes. "Sex" refers to gender and not to sexual practices or preferences. Other issues included under the broad umbrella of "sex discrimination" include compensation discrimination, pregnancy discrimination, and sexual harassment.

Under Title VII, an employer may not make employment decisions based on sex, nor may it implement employment practices that help foster sexual stereotypes. The sole exception to this prohibition is the Bona Fide Occupational Qualification (BFOQ) defense.

Bona fide occupational qualification (BFOQ)

A bona fide occupational qualification is a quality or attribute (here, sex) that an employer may consider when making decisions, even though it may be considered discriminatory in other contexts. For example, a manufacturer of men's clothing can lawfully argue that no woman can be hired as one of its models. The fact that she is a female disqualifies her from consideration – being male is a BFOQ for the position.

In order to establish a BFOQ defense, the employer must demonstrate:

- **Direct relationship between an employee's sex and his or her ability to perform the job**
  An employer may demonstrate a direct relationship by showing that all, or substantially all, individuals of one sex would be unable to safely and efficiently perform the duties of a particular position. However, courts will not uphold a rule that is based on sexual stereotypes. For example, an employer could not implement a policy excluding women from a position that regularly required lifting over 30 pounds, because this policy is based on the stereotype that all women are inherently weak.

- **Essence of business**
  Discrimination based on sex is lawful only when the essence of the business operation would be undermined if the employer is forced to hire members of both sexes.

  For example, Hooters restaurant attempted to exclude all male servers, claiming that male servers did not fit within Hooters' chosen entertainment theme. The court disagreed, finding that Hooters marketed itself as a family restaurant instead of an entertainment business, and therefore had no right to exclude men from service positions. In other words, a server did not have to be female in order to facilitate the essence of Hooters' business as a family restaurant.

- **No reasonable alternative**
  Although not universally required, many courts require that an employer must also be able to demonstrate that it has no less restrictive alternative other than the exclusion of one gender.

  Example
  A nursing home primarily servicing female patients rejected the application of a male nursing assistant because of his sex. The medical center argued that it was entitled to reject male applicants in order to protect its patients' privacy rights. The court rejected this contention, in part because there was a less restrictive alternative available to the medical center (for example, allowing the male nursing assistant to work with male patients or non-objecting female patients).

Factors to consider

Factors that courts consider when determining whether a sex-based discriminatory practice is lawful are:

- **Safety of others**
  The safety of others, not the safety of the employee, has traditionally been the most successful factor in justifying discriminatory practices.

- **Privacy**
  Courts occasionally uphold sex-based employment policies that are motivated by privacy interests of third parties. For example, courts traditionally have allowed health club owners who refuse to hire male personal trainers for their female-only clubs to show that sex is a BFOQ. Under this theory, club owners argue that hiring males for a position that often requires close, intimate contact with the female clients would be an intrusion into the clients' privacy.

- **Role models**
  Courts may be inclined to uphold a BFOQ defense in situations where an employer asserts a need for an employee to be able to interact and relate with those with whom the employee works. For example, a court upheld a rule implemented by the Omaha Girls Club prohibiting employment of unwed persons who became pregnant or caused pregnancy. The employer claimed the rule was enacted to provide positive role models in an attempt to discourage teenagers from becoming pregnant.

- **Customer preference**
  Normally, customer preference is not sufficient to support a BFOQ defense.

Compensation discrimination based on sex

Under Georgia's Labor and Industrial Relations statute, an employer is prohibited from discriminating on the basis of sex in compensating its employees. Like the EPA, the statute prohibits employers from paying different wages for jobs that require equal skill, effort, and responsibility and are performed under similar working conditions, except where payment is made according to a seniority system, a merit system, a system measuring earnings by quantity or quality of production or a differential based on any other factor other than sex.

The wage discrimination laws provide for both a civil remedy as well as a criminal penalty.

Equal pay

The Equal Pay Act (EPA) prohibits **sex-based** wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions. Under the Act, the term "wages" encompasses all forms of compensation. Therefore, a differential in fringe benefits (for example, health insurance benefits) may serve as the basis for a claim, even when all other compensation is equal.

In order to prevail, a plaintiff must be able to identify an employee of the opposite sex who is within the same establishment and receives higher compensation for performing equal work. Courts are clear that they will not compare wages paid to employees from separate places of business unless the plaintiff can show that the employer's operations are integrated within the separate facilities and that the administration of these facilities is centralized.

When determining whether two jobs are equal, it is the content of the job that is determinative, not the formal job description. Therefore, courts will look at the actual duties of the job and consider the following factors:

- **Skill**
  Courts will consider factors such as education, ability, experience, and training. Employers should note that courts will focus on what skills are required to do the job, not what skills an individual employee happens to possess. In other words, a difference in pay between two security guards cannot be justified by the fact that one has a master's degree in classical music because that type of degree is not required for the security guard position.

- **Effort**
  The EEOC defines effort as the amount of physical or mental exertion needed to perform the job. Therefore, under this definition, two workers on a factory assembly line could hold the same job title, but if one worker's job duties require more manual labor, the employer would be justified in paying him more. In addition, courts will also consider differences in the **volume** of work performed.

- **Responsibility**
  The EEOC defines responsibility as the degree of accountability inherent in the job. For example, a retail supervisor who is responsible for balancing registers and locking the store at the end of the day may be paid more than a sales associate, even if the two individuals perform much of the same duties.

- **Working conditions**
  Working conditions refer to "surroundings" (elements regularly encountered by a worker) and "hazards" (the physical hazards regularly encountered, their frequency and the severity of injury they can cause). Therefore, an employer is justified in paying more to an employee if his position exposes him to greater hazardous conditions.

Defenses

An employer may defend against a compensation claim by proving that the difference in pay rate is based on:

- an established seniority system
- an established merit system
- a system which measures earnings by quantity or quality of production
- any factor other than sex (for example, differences in education or experience levels and differences in training).

Employers should note that in correcting a pay differential, no employee's pay may be reduced. Instead, the pay of the lower-paid employee should be increased.

Enforcement

The EEOC enforces the Equal Pay Act. Unlike Title VII, individuals are not required to satisfy any administrative prerequisites before filing suit. Employees must file suit under the EPA within two years of a violation.

Compensation discrimination under Title VII

An employee can also sue for compensation discrimination under Title VII. Whereas the EPA prohibits only sex-based wage discrimination, Title VII prohibits wage discrimination on the basis of any of its protected characteristics (including race and color). The Lilly Ledbetter Fair Pay Act of 2009 expanded the definition of a "violation" under Title VII to include more than just a discriminatory pay decision. Under this new law, a violation occurs with each payment of wages, benefits, or other compensation that are the result of a discriminatory pay decision. Therefore, for example, an employee's claim for compensation discrimination under Title VII would be timely so long as it is filed within 180 days of his or her last paycheck – even if the actual discriminatory pay decision occurred many years in the past.

This new law raises the stakes for compensation discrimination claims. More than ever, an employer should ensure that its employees are compensated in a consistent manner. If they are not, the employer should be sure that it has proper documentation of the legitimate nondiscriminatory reasons for any differential treatment.

Pregnancy discrimination

Pregnancy Discrimination Act of 1978

The Pregnancy Discrimination Act (PDA) prohibits employers from intentionally discriminating against pregnant employees or maintaining policies that adversely affect pregnant employees.

What does the PDA protect

The PDA prohibits discrimination because of pregnancy or child birth only. Courts have held that the PDA protects those women who have an abortion and those who seek fertility treatments.

The PDA does not prohibit adverse employment decisions based on employee conduct caused by the pregnancy. For example, an employer is justified in terminating an employee for excessive tardiness, even if the tardiness is caused by the employee's pregnancy-related morning sickness. The PDA does not require employers to treat pregnant employees better than they would any non-pregnant employee who was equally tardy.

Right to voluntary leave

The PDA requires that pregnant women be given at least the same benefits and leave time as any other employee. For example, if an employer grants short-term disability to all employees, he must allow a pregnant woman sufficient leave to recover from the child birth. Likewise, if an employer allows employees to take leave for personal or family reasons, he must grant this same leave to pregnant employees.

Health insurance

The PDA prohibits employers from discriminating against pregnancy in their health insurance programs. Under the PDA, an employer must:

- provide the same pregnancy benefits to unmarried employees that it provides to married employees

  and

- reimburse pregnancy-related expenses under the same method used to reimburse other medical conditions

  and

- provide the same level of health insurance for spouses of male employees as it does for spouses of female employees.

Protection from hazardous work conditions

An employer faces a unique dilemma when employing individuals to work under hazardous work conditions. If it forbids a pregnant woman from working in hazardous areas, it risks Title VII litigation. If it chooses not to exclude pregnant women from hazardous areas, it increases its exposure to claims if the child is born with injuries that can be tied to the hazardous environment. The Supreme Court has held that it is a violation of Title VII to exclude pregnant women from hazardous positions and has suggested that an employer that fully informs a woman of the risks involved could shield itself from liability.

Sexual harassment

Sexual harassment is a form of sex discrimination that violates Title VII. Title VII protects against two types of sexual harassment: quid pro quo harassment and hostile work environment harassment.

Quid pro quo vs. hostile work environment

Quid pro quo harassment

Under the quid pro quo theory, an employee claims that a supervisor promised benefits or threatened reprisals based on the employee's willingness to provide

sexual favors. Examples of quid pro quo harassment include: "I will give you a promotion if you sleep with me" and "Sleep with me or you will lose your job." In order to prove harassment under the quid pro quo theory, an employee must establish:

- membership in a protected class

  and

- unwelcome sexual advances

  and

- adverse employment action

  and

- causal connection (that the sexual advance was made because of the employee's sex and that the employee's reaction to the sexual advance significantly impacted the employee's employment)

  and

- employer responsibility.

Hostile work environment

Under the hostile work environment theory, an employee claims that he or she was subjected to a work environment that was sufficiently offensive to substantially affect a term or condition of employment. In order to prove harassment under the hostile work environment theory, the employee must establish:

- membership in a protected class

  and

- unwanted sexual harassment

  and

- that the harassment is based on his or her sex

  and

- that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment

  and

- a basis for holding the employer liable. For example, the employee must show that the conduct occurred in the work environment. Otherwise, there would be no way for the employer to know of or prevent the conduct and, thus, no basis for employer liability.

In order to form the basis of a lawsuit, the harassment must be both objectively and subjectively offensive. In other words, the environment must be one that a reasonable person would find hostile or abusive and one that the employee in fact did perceive to be hostile and abusive. Courts determine whether an environment is sufficiently hostile or abusive by considering the following factors:

- frequency of the discriminatory conduct
- whether the conduct is physically threatening or humiliating or consists of a mere offensive utterance
- whether the environment unreasonably interferes with the employee's work performance.

Example
An employee was the first woman to work in the new car section of a car dealership. The employee's male coworkers constantly berated her and called her highly offensive names, often in front of customers. In addition, they repeatedly ridiculed her appearance. The court found that this level of harassment was sufficient to hold the employer liable for hostile work environment.

Employer responsibility

In quid pro quo cases, employers are strictly liable when harassment perpetrated by supervisory personnel results in a tangible employment action, which is defined as "a significant change in employment status." Supervisory personnel are those who have the authority to grant or deny promotions, demotions, or transfers. Courts traditionally hold that supervisors who have the authority to make employment decisions are legally acting on their employer's behalf, even if the employer did not know of the unlawful conduct or even if the employer had policies forbidding such conduct. In these cases, the employer has no defense.

On the other hand, in cases of sexually hostile work environments, employers can be held liable for the hostile environments created by co-employees and even non-employees (such as customers or vendors) **if** the employer knew, or should have known, about the harassment and failed to take prompt corrective action. This same standard also applies in cases of quid pro quo harassment that do not result in a tangible employment action.

An employer may defend against sexual harassment claims by establishing:

- that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior

and

- that the employee failed to take advantage of any preventive or corrective measures.

Again, note that this defense is not available in quid pro cases resulting in a tangible employment action. In these cases, the employer is strictly liable.

An employer should:

- **Implement and distribute anti-harassment policies**
  An employer can defend against a sexual harassment claim by showing that it exercised reasonable care to prevent sexually harassing behavior. Therefore, employers should ensure that they implement a comprehensive anti-harassment policy. This policy should:

  - state that the company will not tolerate harassment by managers, employees or non-employees
  - give examples of some types of prohibited conduct or statements (without limiting the application of the policy to these examples)
  - outline procedures for reporting harassment and promise that employees will not be retaliated against for raising claims of harassment
  - warn that employees who engage in unlawful harassment will be subject to disciplinary action, up to and including termination.

  In addition, employers should make sure that the policy prohibits all forms of harassment, not just sexual harassment.

- **Educate employees about harassment issues**
  Employees need to be educated on the types of conduct that are prohibited under the policy. An employer may want to conduct an anti-harassment seminar as part of any new hire training program. Supervisors and managers should be trained on how to recognize problems and handle complaints.

- **Develop an effective reporting/grievance procedure**
  Often, an employer's liability is based on its failure to provide employees with a reasonable method to report harassment rather than its failure to have an anti-discrimination policy. For example, the Supreme Court has found that an employer's policy did not protect it from liability because the policy required the employee to report the harassment to her direct supervisor, the very person who was harassing her. Therefore, employers should ensure that their policies identify at least two different avenues through which an employee may report a complaint, usually to a supervisor and a member of human resources. Employers may also

want to consider supplying their employees with a toll-free hotline for reporting complaints.

- **Conduct prompt, thorough investigations into complaints**
  Do not wait for an employee to make a formal complaint. Courts have held employers directly liable for harassment if they knew or reasonably should have known about the harassment and did nothing to stop it. Furthermore, do not promise an employee that you will keep his or her complaint strictly confidential. Total confidentiality may not be possible because the employer may have to disclose the nature of the allegations, and perhaps even the identity of the alleged victim, to the accused or to witnesses in order to conduct a thorough investigation into the claim. Therefore, the policy should only promise that complaints will be kept confidential "to the extent possible." (See Chapter 18, **Workplace investigations**.)

- **Take appropriate corrective action**
  Following an investigation into a harassment complaint, the employer should determine what corrective action is warranted and will be sufficient to stop the harassment, and should discipline the harasser as appropriate. The employer should meet with the complaining employee and explain the outcome of the investigation and what steps, if any, have been taken to resolve the complaint. Finally, the employer should review the sexual harassment policy with all parties involved in the complaint.

Same-sex harassment

Although the majority of sexual harassment claims involve members of the opposite sex, the Supreme Court has held that a male can be discriminated against by members of the same sex under Title VII, even where there is no motivation of "sexual desire." In a landmark decision, the Supreme Court held that any discrimination based on sex is actionable under Title VII so long as it places the victim in an objectively disadvantageous working condition, regardless of the gender of either the victim or the harasser.

In short, harassment between members of the same sex can still be considered discrimination "because of … sex" in violation of Title VII. Although same-sex harassment is prohibited under Title VII, employment discrimination based on sexual orientation is not forbidden by federal law. The distinctions between the two remain unclear.

Discrimination based on sexual orientation

Neither Georgia state law nor federal law currently provides protection against discrimination based on sexual preference. However, some municipal laws (such as those of the City of Atlanta) prohibit discrimination based on sexual preference or perceived sexual preference.

City of Atlanta's ordinance

Atlanta's ordinance covers any employer who has ten or more employees, but its protection does not extend to municipal, county, state or federal governments. The ordinance also covers employment agencies and labor organizations.

It protects any individual employee or applicant and includes traditional workers, temporary workers and part-time workers. In addition to sexual orientation, the ordinance prohibits discrimination because of an individual's, or the perception of an individual's, race, color, creed, religion, sex, domestic relationship status, parental status, familial status, national origin, gender identity, age, disability, or the use of a trained guide dog.

Under the ordinance, an employer commits an unlawful employment practice if it:

- fails to hire, terminates, or otherwise discriminates against an individual based on his or her membership in a protected class
- segregates or classifies employees in such a way that would deprive them of employment opportunities or would otherwise adversely affect their status as an employee
- prints or publishes any notice or advertisement relating to employment indicating any preference, limitation or discrimination based on membership in any of the protected classes
- adjusts the scores, uses different cutoff scores, or otherwise alters the results of employment related tests on the basis of membership in a protected class
- considers membership in any of the protected classes as a motivating factor for any employment decision, even if other factors also motivated the decision.

The ordinance does allow an employer to assert a BFOQ defense. Private citizens may either file a lawsuit in court or file a complaint with the city's Human Rights Commission.

Age discrimination

Georgia's Labor and Industrial Relations statute prohibits discrimination based on age and protects employees ages 40 to 70. Under this statute, an employer is allowed to implement retirement policies so long as they are not intended to evade the purposes of the statute.

The statute also allows for compulsory retirement for "bona fide executives" or "high policy-making" executives. Individuals in either category must have been employed in the position for two years immediately before retirement and must be entitled to an immediate, nonforfeitable retirement benefit which equals at least $27,000.

The statute does not provide for any civil remedies. Instead, an employer found to have violated the statute is guilty of a misdemeanor and shall be subject to a fine between $100 and $250.

In addition to Georgia's statute, Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA) with several goals in mind. Specifically, the ADEA is designed to:

- promote the employment of older individuals based on their ability rather than age
- prohibit arbitrary age discrimination in employment (for example, refusing to consider a 55-year-old individual for employment because of their age)
- help employers and employees find ways to resolve problems arising from the impact of age on employment.

The ADEA protects individuals who are 40 years of age or older from employment discrimination or retaliation based on age, and its protections apply to both employees and applicants in public and private employment. Under the ADEA, it is unlawful for an employer to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

Enforcement

The ADEA applies to employers with 20 or more employees. The number of individuals employed at the time discrimination occurred (not the year in which the charge was filed or the action is brought in federal court) determines whether the number of employees is sufficient to invoke the protection of the ADEA. Like Title VII, filing a charge with the EEOC is a prerequisite to bringing a lawsuit under the ADEA. An employee must file a charge of discrimination with the EEOC within 180 days of the alleged discriminatory act or employment decision and then has 90 days from the receipt of the EEOC's right-to-sue letter to file suit in federal court.

Disparate treatment

Although plaintiffs can bring claims under the ADEA based on a disparate impact theory, most discrimination cases under the ADEA are brought under the disparate treatment theory. The ADEA has adopted the same general principles governing the burdens of proof as those established in Title VII disparate treatment claims. Therefore, the plaintiff presents evidence to support his contention that discrimination in fact occurred; the employer responds with a legitimate, non-discriminatory explanation for the adverse employment action; and the plaintiff must prove that the employer's reasoning is a falsehood to mask unlawful discrimination.

Recently, the U.S. Supreme Court made it much more difficult for age discrimination plaintiffs to win their lawsuits because they are now subject to a higher standard of proof. Previously, employees claiming they were discriminated against on the basis of their age could attempt to prevail on a "mixed-motive" theory if they established that age bias was

a "motivating factor," or, in other words, that their age played some part or role in an unfavorable employment decision, even if it was not the only factor in the decision. Now, employees must meet the "but-for" standard, which requires that the employee prove that the only reason the employer took the unfavorable employment action was intentional age discrimination.

In order to establish an inference of discrimination, a plaintiff must prove:

- he is a member of the protected age group (40 years of age or older)

  and

- he was qualified for the position in question

  and

- despite being qualified, he was adversely affected

  and

- someone substantially younger, with similar or lesser qualifications, received the position (or other job benefit) denied to the plaintiff.

  - **Is it sufficient for a plaintiff to show that he was replaced by someone younger, or must the replacement be outside the protected age group?**
    The Supreme Court has held that an employee is not required to show that he was replaced by someone outside the protected age group. A 56-year-old employee may establish a case of age discrimination by alleging that he was terminated and replaced by an employee who was 40 years old.

    However, the Supreme Court has also stated that the plaintiff's replacement must be **substantially** younger. A 68-year-old who is replaced by a 67-year-old will not be able to succeed on an age discrimination claim.

  - **May a plaintiff bring a claim if there is no younger replacement at all?**
    In limited instances, an employee may bring an age claim even though he was not replaced. This situation typically arises after a reduction in force (RIF) when an employee alleges that his job was eliminated altogether because of his age and, he cannot identify a younger replacement.

Defenses to an age discrimination claim

Bona fide occupational qualification (BFOQ)

The BFOQ is a defense in which the employer concedes that age was considered in an employment practice or policy, but asserts that using age as a qualification is "reasonably necessary to the normal operation of the particular business." The Supreme Court has adopted a two-part test for determining whether the BFOQ is a valid defense:

1. the employer must prove that the challenged policy or practice is "reasonably necessary to the essence of the employer's business"

2. the employer must demonstrate that it is compelled to rely on age as the determining factor for its practice or policy.

   The employer may demonstrate this second factor either by demonstrating that it has a "substantial basis for believing that all or nearly all employees above a certain age lack the qualifications required for the position," or that it would be very impractical for the employer to test each individual employee to determine if he or she has the necessary qualifications.

Bona fide seniority system

The ADEA permits employers to implement a bona fide seniority system (for example, a system that typically provides benefits based on length of job tenure) so long as it is not intended to evade the purposes of the ADEA. To be valid, a seniority system may not require the involuntary retirement of any employee on the basis of age. Seniority systems typically favor rather than discriminate against older workers, and employees rarely challenge termination decisions based on them.

Employers must ensure that all benefit programs comply with the Older Workers Benefit Protection Act of 1990 (OWBPA), which amended the ADEA to specifically prohibit employers from denying benefits to older employees. Under the OWBPA, any age-based reductions in an employer's employee benefit plans must be justified by significant cost considerations. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

The OWBPA contains a few exceptions to this cost-justification defense. For example, while an early-retirement incentive program is typically legal, it will be deemed invalid if a court finds that it is involuntary or is inconsistent with the purposes of the ADEA. The OWBPA also states that an employer may not reduce contributions to an employee's pension plan for any age-related reason.

Good cause or reasonable factors other than age (RFOA)

An employment decision based on good cause or a reasonable factor other than age is lawful. Typically, an employer uses this defense by stating the legitimate business reason motivating the decision, such as poor performance. Courts have held that factors that usually correlate with age (such as pension eligibility, tenure, or seniority) usually fail to satisfy the RFOA defense.

Bona fide executives or high policymaking employees

The ADEA allows an employer to enforce mandatory retirement at age 65 for "bona fide executives" or "high policymaking" employees. When determining whether a particular employee qualifies, courts will consider the nature of the employee's duties, responsibilities, and authority. The ADEA specifies that the employee must have been serving in the bona fide executive position or the high policymaking position for at least two years, and the employee may be retired only if he or she is entitled to an immediate, nonforfeitable, annual retirement benefit of at least $44,000 from the employer.

Reduction in force (RIF)

A reduction in force (RIF) occurs when a company reduces its workforce by eliminating one or more positions in the company. The central issue raised in ADEA claims involving a RIF is the validity of the employer's determination of which employees to layoff. There are several criteria on which employers may lawfully base layoff selections. Examples include:

- performance, skill, and ability
- productivity
- inverse seniority (laying off those employees with the least seniority first).

Potential pitfalls

Employers invite liability during a RIF when they fail to articulate clear selection standards and review processes. Thus, it is important for employers to implement layoff procedures and to provide documentation justifying each termination based on factors other than age. Employers should be sure to:

- Confirm that supervisors are providing and documenting candid and accurate evaluations. Employees should have a good indication of how they are performing and should not be blindsided during a RIF with the revelation that their performance is lacking.
- Avoid a situation in which an older employee's performance rapidly deteriorates in the face of an impending RIF. In this situation, the

employer must make an effort to document this decline through conduct reports. Without this safety net, employers may have to rely on performance evaluations that may have occurred before the employee's performance declined.

There are two techniques employers may use to limit the fallout from RIFs:

1. Consider providing a voluntary separation or early retirement incentive.
2. Make sure that separation occurs across all age groups.

Waivers of ADEA rights

At an employer's request, an individual may agree to waive any rights or claims he may have under the ADEA in exchange for some benefit to which he is not otherwise entitled. The OWBPA imposes specific requirements for these waivers of ADEA claims (also called "releases").

According to the OWBPA, in order for a waiver that is part of an individual separation to be valid, it must:

- be in writing and plainly communicated
- specifically refer to ADEA rights or claims
- not waive rights or claims that may arise in the future
- be in exchange for valuable consideration (for example, money or any other benefit) in addition to any benefits or amounts to which the employee is already entitled
- advise the employee in writing to consult with an attorney before signing the waiver
- provide the employee at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

If the waiver is requested in connection with a termination or exit incentive program offered to a group of employees, the requirements are more extensive. In addition to the requirements above, each employee must be given at least 45 days to consider the agreement. Furthermore, at the outset of the 45-day period, the employer must inform each eligible employee, in writing, of:

- the class of eligible employees
- the specific eligibility requirements
- any applicable time limits on participation

- the job titles and ages of all employees eligible or selected for the program
- the ages of all employees in the same job classification or organizational unit who are not eligible or selected.

Must an employee return severance benefits in order to file a lawsuit

The ADEA aims to prevent employers from forcing employees into early retirement for the economic benefit of the company. Thus, while a release may prevent a separating employee from filing a suit based on claims under the ADEA, the employee is always free to challenge the validity of the release itself.

> **Example**
> Suppose an employer implements an early-retirement incentive program and has the participants sign releases in exchange for additional severance benefits. The employees accept the benefits, but later wish to challenge the release, claiming they signed under duress. Must the employees return the benefits they have already accepted as a prerequisite to filing suit?

The Supreme Court has held that employees have no obligation to return benefits before filing a suit challenging the validity of a release. To require employees to tender back their benefits would have a "crippling effect" on the ability of such employees to challenge releases obtained by illegal means such as misrepresentation or duress.

Discrimination based on genetic information

Genetic Information Nondiscrimination Act of 2008

Title II of the Genetic Information Nondiscrimination Act (GINA) is unique because it is the first anti-discrimination law that was enacted to work proactively and prevent discrimination before it becomes entrenched in society. Because GINA prohibits discrimination based on an employee's genetic information, its protections are intended to encourage Americans to take advantage of genetic testing as part of their medical care. GINA also prohibits health insurers from restricting enrollment and adjusting premiums for health insurance on the basis of genetic information or genetic services. GINA, which borrows its remedial and enforcement structure from Title VII, became effective on November 21, 2009.

"Genetic information" means:

- an individual's genetic tests
- the genetic tests of family members of an individual

- the manifestation of disease or disorder in family members of an individual.

Title II of GINA prohibits employers from:

- discriminating based on genetic information
- acquiring genetic information, except in certain specific circumstances (such as monitoring the effects of workplace exposure to hazardous materials)
- using or disclosing genetic information, should an employer acquire it.

Therefore, genetic information cannot be used in making employment decisions such as hiring, firing, job placement, and promotion. Employers also cannot retaliate against individuals who assert their rights under GINA or treat their employees differently because of their genetic information. Unlike Title VII, however, GINA does not provide for a disparate impact cause of action.

Federal contractors

The Executive Order 11246 (E.O. 11246) prohibits companies holding contracts and subcontracts with the federal government from discriminating against employees or applicants on the basis of race, color, religion, sex or national origin. In particular, E.O. 11246 prohibits discrimination with respect to compensation. The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is the agency in charge of enforcing E.O. 11246 and regularly conducts compensation audits in order to detect **systemic** discrimination across pay grades (as opposed to isolated, individual cases of discrimination).

The OFCCP has established a set of guidelines to be used in enforcing the nondiscrimination requirements of E.O. 11246. The interpretive guidelines articulate the methods and legal and statistical standards that will be applied by the OFCCP during routine compliance evaluations. The self-evaluation guidelines articulate the standards that contractors can voluntarily follow in order to audit their compensation practices for systemic discrimination.

Interpretive guidelines

The regulations indicate that the OFCCP will determine if there is systemic compensation discrimination by analyzing the compensation of similarly situated employee groups (SSEGs) using a multiple regression model. A multiple regression model allows the agency to factor in legitimate reasons for differences in compensation, such as education, experience, performance, and productivity.

The OFCCP will also conduct employee interviews in order to establish appropriate SSEGs and to investigate possible compensation discrimination. The agency will rarely find discrimination based on statistics alone and will almost always require anecdotal evidence of discrimination. The OFCCP will explain its findings to the contractor and will allow the contractor the opportunity to explain any disparities in compensation.

Self-evaluation guidelines

Under the guidelines, the OFCCP requires contractors to evaluate their own compensation systems to determine if there are any race- or gender-based disparities. The contractor does not have to use the same methods as prescribed under the "interpretive guidelines." However, should the contractor choose to use this method, the OFCCP will deem the contractor in compliance with E.O. 11246 and will orchestrate its compliance monitoring activities with the contractor's self-evaluation approach.

Regardless of which statistical method is used, contractors are expected to group their employees into SSEGs and must analyze these SSEGs at least once per year. The contractor is obligated to investigate any statistically significant disparities. If the disparities cannot be explained, they must be remedied.

Chapter 18

Workplace investigations

Why investigate employee complaints

Employers often conduct workplace investigations because of constitutional or statutorily imposed requirements. Indeed, various civil rights and anti-discrimination laws, as well as health and safety laws, require employers to investigate complaints or accidents and take appropriate action. Thus, after a written or oral complaint is made by an employee regarding improper conduct, a duty may arise requiring the employer to investigate the allegations. As discussed below, the investigation of complaints yields a number of additional, practical benefits for employers as well. Even when no official complaint is made concerning improper conduct, an employer may be under a duty to investigate if the employer has "constructive knowledge" (reasonably should have known) of that conduct.

Defense to charge of harassment/hostile environment

It is critical for an employer to investigate claims of harassment, as an investigation can be used as an affirmative defense to a hostile environment harassment charge. In other words, even if harassment occurred, a strong anti-harassment policy and an effective investigation might prevent the employer from being liable. Generally, the plaintiff in a potential lawsuit against the employer must show that the employer knew or should have known about any harassment which is the basis for the lawsuit. If the employee did not complain to management, he may not be entitled to pursue a claim. Likewise, if the employee complained and the employer took prompt action, then the employer might also have a defense to the harassment complaint.

Limit liability for discrimination or quid pro quo sexual harassment

An investigation may also limit the employer's liability for discrimination or quid pro quo (Latin for "something for something") sexual harassment by a supervisor. Although employer knowledge and prompt action are not defenses to disparate treatment discrimination claims or quid pro quo sexual harassment claims (see Chapter 17, **Discrimination in employment**), a proper investigation can still limit employer liability. If the employer immediately investigates any claims of discrimination, it may

stop the discrimination, and thus limit the amount of the plaintiff's damages – especially punitive damages. Also, the employer may be able to limit the scope of the lawsuit to only those issues which the plaintiff/employee raised during the internal investigation. For example, if the employer is only aware of one alleged harasser and investigates that claim, that employee may not be permitted to raise other claims in a lawsuit.

Limit claims relating to negligent retention

If an employee is harassed or discriminated against, he or she may bring Georgia law claims alleging that the employer negligently retained someone that it knew or should have known was a sexual harasser or discriminator. Such a claim would be strengthened if the plaintiff could show that the employer had received several complaints about the individual who harassed or discriminated against him. Thus, an employer who has a policy and a practice of investigating every claim of harassment or discrimination is in the best position to defend a subsequent lawsuit for negligent retention. Alternatively, if there were no complaints, the employer could argue that it had no reason to know that this particular person had a tendency to harass or discriminate.

Creates a less litigious workforce

Generally, a proper investigation policy creates a less litigious workforce. Employees who feel that the employer takes their complaints seriously and investigates their complaints will be less likely to sue later. Many times, plaintiffs will say that if the employer had just treated them right after they raised their complaints, they wouldn't be in court today. Investigations are beneficial for the employer generally because when a complaint is filed, the employer knows to keep an eye on the alleged wrongdoer for possible future transgressions.

Investigation is a good source of information about the complaint

Finally, an investigation is the employer's first and most reliable source of information about the complainant's allegations. Based on the investigation, the employer will be better able to make decisions about what disciplinary action should take place. Also, if a lawsuit ever arises out of the complaint, the investigation better protects the employer. The employer will also be in a better position to determine whether to offer to settle the case, and whether to represent or indemnify an individual manager or employee accused of harassment or discrimination.

The mechanics of internal investigation

Determining whether a complaint has been made

An employee has raised a complaint of harassment or discrimination any time he or she makes such an allegation to anyone in the Human Resources department or to any

manager or supervisor. In particular, managers must be reminded to report any complaint of harassment, discrimination, or retaliation for a prior complaint to Human Resources, no matter how minor it seems or how informally it was raised. Managers should not investigate such complaints on their own. It is important for managers (and everyone in the employer organization) to remember that in the long run, it will be better for the employer to find out the truth regarding such allegations. That way, if there is a problem in the workplace, the employer can address the situation.

Receiving a complaint

When a complaint is made, a productive initial conversation with the complainant is a critical first step in determining whether an official investigation may be necessary. Likewise, obtaining a complete and accurate statement regarding the complaint is essential to determine the extent of the investigation required. The following steps should be taken promptly in order to ensure that an investigation is effective.

- **Instruct the complainant regarding the investigation**
  The complainant should be told that his complaint is treated very seriously by the employer, and that it will be investigated according to employer policy (and describe any applicable policy). The complainant should also be told that he will not be subjected to adverse action for coming forward, and that the complainant should contact the investigator immediately if he feels that he is being retaliated against for any reason. Finally, the employee delivering the complaint should be told not to discuss the matter with others, and that, while the investigation will be treated confidentially, the investigator **will** discuss the matter with those necessary to the investigation or any action taken as a result of the investigation.

- **Have the complainant write out a signed, dated complaint, indicating:**

  - **who** harassed/discriminated against the complainant (including the name and work relationship to complainant)

  - **what** did that person do? (include specific statements, improper conduct which is the subject of the complaint, and any reasons which the complainant may believe initiated the conduct)

  - **where** and **when** the conduct took place (including the first time, each subsequent time, and the last time the conduct took place)

  - **how** did the complainant respond? (did the complainant indicate the conduct was objectionable? did anyone else?)

  - **witnesses** to the harassment/discrimination (have the complainant identify the witnesses' names and what the witnesses may have seen or heard – and ask the complainant whether he told anyone about the improper conduct).

- **Take detailed notes of the conversation with the complainant**
  Include the name of the interviewer, date, time and location of the interview, who was present, and length of the interview. This document may become an important piece of evidence in the event that the complainant or the alleged wrongdoer sues the employer. It is important that the interviewer document only the facts as stated by the complainant and not his opinions or conclusions about the interview.

- **Do not ask the complainant what he or she wants**
  Asking the complainant about the outcome he hopes to achieve as a result of the complaint may set him up for disappointment. At this stage, there is no need to set his expectations.

- **Do not make promises or offer opinions**

  - Do not promise complete confidentiality.

  - Do not promise that the alleged wrongdoer will not come to know of the complaint.

  - Do not promise to keep the complainant's identity a secret from the alleged wrongdoer.

  - Do not tell the complainant whether you believe him or her.

  - Do not promise that the alleged wrongdoer will be disciplined.

- **Do not discipline the complainant for reporting the complaint**
  Even if the complainant has complained to the wrong person or gone "outside the chain of command," do not indicate that the complaint could result in any sort of discipline for the complainant. This may be considered unlawful retaliation for reporting the complaint (See Chapter 17, **Discrimination in employment**). Likewise, employers must be mindful that third-party witnesses interviewed during the investigation might submit their own complaint during the interview, and that adverse employment decisions towards such witnesses may not be based on their complaints or participation in the investigation.

Identifying an investigator

Determining whether to engage an internal or external investigator is a very important decision with many legal ramifications. The chosen investigator must be well-trained and impartial. A wrongly chosen or biased investigator may discourage candid interviews or even the reporting of illegal conduct. An employer should choose an investigator who is experienced, properly trained and objective. Generally, an employer should have several qualified and trained investigators within the company, and may engage more than one investigator in any one investigation. It is important to remember that everything that the employer does to investigate a claim of discrimination or harassment may be admissible in

a lawsuit. Thus, the written materials may be obtained by the plaintiff, and the person who conducted the investigation may be called upon to testify. If the investigation is conducted at the request or recommendation of an attorney, the employer may be able to make an initial argument that the investigation is protected by the work-product or attorney-client privileges. However, courts generally will not give this argument much merit. There are several potential investigators available to the employer.

A more appropriate choice is the employer's Human Resources representative. The HR representative should be trained regarding proper procedure, and can be impartial, thereby obtaining more accurate testimony from witnesses. However, if the employer uses an HR representative, the work will be discoverable during litigation and would allow the employee/plaintiff the ability to review the HR representative's notes and findings.

Another choice is an in-house attorney or outside attorney. Either one can be properly trained regarding procedure, impartial, more familiar with legal ramifications, and can better handle accusations against high-level managers. However, the use of an attorney may force the employer to waive privilege, exposing legal advice to discovery. Also, an outside attorney operating as a fact witness will be prevented from representing the employer in any lawsuit arising from the complaint.

The smartest choice for the employer would be to obtain an outside consultant. The consultant can be properly trained to handle the situation, will be impartial, will be familiar with legal ramifications, and will be able to deal with accusations against high level managers.

Initial discussion with the alleged wrongdoer

It is advisable to have two people interview the alleged wrongdoer in order to ensure that there is a witness to the discussion and, specifically, to any remarks which the alleged wrongdoer may make. If the alleged wrongdoer is a member of a collective bargaining unit, then he or she is entitled to have a union representative present during any interviews or investigations of him or her. However, the employer does not have to offer the alleged wrongdoer such representation unless he or she requests it.

The initial interview of an alleged wrongdoer is a critical part of the investigation, and he should be told that the employer takes the allegations of his conduct seriously by fully investigating them consistent with its policy. The interviewer should inform the alleged wrongdoer of the allegations against him, and review relevant employer policies with him. In addition, the alleged wrongdoer may be told that there is a possibility of disciplinary action if the complaint is found to be true, but that he or she will be given an opportunity to respond to all allegations and that the employer has not yet determined that the alleged wrongdoer is guilty.

Instruct the alleged wrongdoer to immediately minimize contact with the complainant, and warn the alleged wrongdoer that they may be separated during the investigation. The alleged wrongdoer should be given a strict warning not to retaliate against the complainant,

and instructed to keep the matter confidential in order to protect his privacy, prevent rumors and protect the integrity of the interview process. Finally, the alleged wrongdoer should be advised that if he violates any of these instructions, the employer will consider it insubordination and possible ground for termination.

Identifying witnesses and relevant documents

It is important to interview all individuals involved with the complaint, including all witnesses identified by the complaining employee. Companies should also consider interviewing all employees who work closely with the accused. However, be careful interviewing non-employee witnesses, as they are less likely to keep the matter private and may be less reliable. Schedule meetings at a time and place so that the meetings will not attract attention. Explain the need for confidentiality to the witnesses, and ask questions designed to discover the who, what, when, where, and how of the situation. Document all interviews, keeping in mind that this documentation may be admissible in a future lawsuit, so be careful of making unsubstantiated statements or hasty opinions. If the investigation lasts more than two to three days, follow up with the complainant and keep him informed of your progress – reassure him that the employer is looking into the matter.

Next, collect any relevant files, documents or statistics that may help verify or disprove the allegations. In a sexual harassment case, for instance, review any notes, calendars, and diary entries maintained by the complainant, including correspondence between the complainant and the accused, or the complainant's friends or supervisors. You should also acquire the personnel file of the accused, desk files maintained by the supervisor of the accused, and investigation or discipline files for other individuals accused of similar conduct.

In a disparate treatment case, obtain and review certain files or records regarding employees who are "similarly situated" with respect to the complainant. Generally, the complainant will identify several individuals outside of the protected classification who he believes have been treated better than he has. The employer should pull the files of those individuals, as well as employees whom the complainant's supervisors feel are similarly situated with respect to the complainant. Files you may need to review include:

- personnel files
- payroll or compensation files or records
- hiring, promotion or transfer records
- evaluation forms
- reduction in force plans or termination statistics.

Employer rules, policies, procedures and instructions should also be reviewed in most investigations.

Take immediate, temporary steps to stop any wrongdoing

If the investigation will take more than one day, take immediate steps to deal with the alleged wrongdoing – particularly any harassment. Consider:

- giving the complainant the option of taking paid leave from work
- giving the complainant the option of moving to a different work location on a temporary basis
- instructing the alleged wrongdoer not to talk to the complainant
- changing the supervisory reporting structure.

Be careful to avoid the appearance that the alleged wrongdoer has already been deemed guilty of the offense.

Preparing the investigation file and log

The investigation file should be complete, accurate and thorough. It is important to include:

- a chronology of events
- a list of all people involved or contacted
- a list of all documents reviewed
- all communications with those involved
- witness statements
- documents that establish or refute the issues investigated
- physical evidence
- investigator's reports
- documentation of results or remedial actions
- a summary of the allegations and responses
- a complete record showing the employer's prompt and appropriate action.

Companies should not include conclusions about credibility or the merits of the complaint, as the file may be admissible in a later lawsuit. Instead, the file should only contain objective, fact-finding information.

Investigation files usually include a log of all complaints and actions. Keeping the complaint logged is a good way to keep track of complaints within a changing workplace. The log also makes the employer aware of multiple claims against the same person or within the same group. The log should include:

- date of the initial complaint
- name of the complainant
- type of claim
- name of the alleged wrongdoer
- department/division involved
- level of complaint (for example, internal-informal, internal-formal grievance, lawsuit)
- resolution and date
- person assigned to investigate.

It is crucial to always keep the log confidential.

Reaching a conclusion

As a consequence of the investigation, the employer should reach one of three conclusions concerning a complaint or wrongdoing:

1. that the wrongdoing actually occurred

   or

2. that the wrongdoing complained of did not occur

   or

3. if the employer is truly unable to determine whether the wrongdoing occurred, it can find that the evidence was inconclusive.

A determination that evidence is inconclusive, however, should not be used as a means of avoiding a difficult decision.

In determining whether the complained-of conduct occurred, the investigator should evaluate the credibility of all witnesses, considering whether the complainant's story or the alleged wrongdoer's story is consistent with the stories provided by other witnesses. The investigator should determine whether the complainant and the alleged wrongdoer were cooperative or appeared to be withholding information, and consider whether the complainant or alleged

wrongdoer exhibited characteristics of lying (failure to make eye contact, squirming, internally inconsistent story, lack of details). In addition, an investigator might consider the past history of the complainant and the alleged wrongdoer. Even if past complaints against the alleged wrongdoer were investigated and found to be inconclusive, multiple complaints may indicate that the current complaint is true.

The employer must document any decision reached. Documentation should include a review of the complaint, each witness's version of the facts, and the employer's conclusion with an explanation for its reasons.

Prompt remedial action

Finally, if the employer's conclusion is that wrongdoing occurred, an employer should promptly take all necessary, appropriate, and remedial action to stop the wrongdoing, while considering the severity of any improper conduct and the surrounding circumstances. The disciplinary action (or other action) must be sufficient to end the improper conduct and to ensure that the conduct will not be repeated. Prompt remedial action will reduce the risk of legal liability and will demonstrate the employer's commitment to maintaining a healthy working environment that is free from harassment.

Chapter 19

Disabilities and reasonable accommodation

Georgia's disability statute, the Georgia Equal Employment for Persons with Disabilities Code, closely parallels the Americans with Disabilities Act (ADA). By complying with the ADA, Georgia employers also comply with Georgia's requirements governing disabilities in the workplace. Under Georgia law, an individual with a disability is defined as "any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities and who has a record of such impairment." Included in "major life activities" are functions such as:

- caring for oneself
- performing manual tasks
- walking
- seeing
- hearing
- speaking
- breathing
- learning
- working.

Signed into law on July 26, 1990, the ADA is the most comprehensive federal civil rights statute protecting the rights of people with disabilities. The provisions of the ADA protect the rights of the estimated 49.7 million Americans with some form of disability. The ADA is divided into five titles, each addressing a unique area, including:

- employment (Title I)

- public services (Title II)
- public accommodations (Title III)
- telecommunications (Title IV)
- miscellaneous provisions (Title V).

Title I of the ADA directly affects employers and is the focus of this chapter.

Recently, in response to several Supreme Court decisions that limited the ability of disabled persons to recover in discrimination lawsuits under the ADA, Congress passed the ADA Amendments Act of 2008 (ADAAA) which broadened the definition of "disability" and expanded the list of major life activities.

Who is covered

The ADA applies only to private employers with 15 or more employees, including part-time employees. The ADA also applies to all public employers, labor organizations, and employment agencies. The ADA **does not apply to**:

- employers with fewer than 15 employees
- the executive branch of the federal government
- private membership clubs
- churches
- parochial schools
- Native-American reservations.

Title I of the ADA requires employers to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment opportunities available to non-disabled individuals. Specifically, the ADA prohibits employers from discriminating against persons with disabilities who are able to perform the essential functions of a job, either with or without reasonable accommodation. This protection extends to all areas of the employment relationship, including the application process, testing, hiring, training, assignments, evaluations, disciplinary actions, compensation, promotions, leave, benefits, and all other terms, conditions and privileges of employment.

To be protected under the ADA, an employee must be considered a "qualified individual with a disability." A qualified individual with a disability is a person who:

- has a disability

  and

- is qualified for the job

  and

- can perform the essential functions of the job either with or without a reasonable accommodation.

ADA disabilities

Given the wide variety of possible disabilities, neither the statute nor the accompanying regulations lists all diseases or conditions that are considered disabilities under the ADA. Rather, the definition of what is a disability is analyzed on a case-by-case basis. An individual with a disability is a person who meets one of these requirements:

- has a physical or mental impairment that substantially limits one or more major life activities

  or

- has a record of such an impairment

  or

- is regarded as having such an impairment

  or

- has a relationship or association with someone with a known disability.

Substantially limiting impairments

The first step in determining if an individual has a physical or mental impairment that substantially limits one or more major life activities is understanding what is considered an "impairment" under the ADA. The ADA broadly defines the term impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body's multiple systems, including:

- special sense organs
- neurological
- musculoskeletal
- respiratory
- cardiovascular
- reproductive

- digestive
- genito-urinary
- hemic and lymphatic
- skin
- endocrine systems.

The ADA further defines impairment as any **mental or psychological disorder**, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. Major depression, bipolar disorder, anxiety disorders, schizophrenia, and personality disorders are also examples of mental impairments.

Because impairment under the ADA is defined as a physiological or mental disorder, simple physical characteristics, such as eye or hair color, left-handedness, or height or weight within a normal range, are not impairments. Physical conditions that are not the result of a physiological or mental disorder, such as pregnancy or a predisposition to a certain disease, are also not impairments. Similarly, personality traits, such as poor judgment, quick temper or irresponsible behavior, are not considered impairments. Finally, environmental, cultural, or economic disadvantages, such as lack of education or a prison record, are not impairments.

After it is established that an individual has an impairment, the second step is to determine whether that impairment substantially limits that individual. An impairment is substantially limiting if it prohibits or significantly restricts an individual's ability to perform a major life activity as compared to the ability of the average person to perform the same activity. While there is no absolute standard, federal regulations provide three factors to consider in determining whether a person's impairment substantially limits a major life activity:

1. its nature and severity
2. how long it will last or is expected to last
3. its permanent or long term impact, or expected impact.

These factors must be considered because, generally, it is not the name of an impairment or a condition that determines whether a person is protected by the ADA, but rather the effect of an impairment or condition on the life of a particular person. Some impairments, such as blindness and deafness, are by their nature substantially limiting, but many other impairments may be disabling for some individuals but not for others. For example, although cerebral palsy often significantly restricts major life activities such as speaking, walking and performing manual tasks, individuals with very mild cerebral palsy which only slightly interferes with the ability to speak and which has no significant impact on other major life activities are not individuals with a disability.

Under the ADA and ADAAA, major life activities generally include caring for oneself or performing normal tasks such as:

- walking
- speaking
- breathing
- seeing
- hearing
- learning
- sleeping
- reading
- thinking
- eating
- concentrating
- communicating
- standing
- lifting
- bending
- breathing.

The inability to perform a specific job is not a disability, rather the employee must be limited with regard to a major life activity.

A record of such an impairment

Even if an employee has no current impairment which should be classified as a disability, an employee may nevertheless succeed in a claim under the ADA if he or she has a record of such an impairment. For example, if a job applicant was hospitalized for cancer ten years ago, but has been cured, and if she is qualified to perform a job, it would be discriminatory to reject her based on the record of her former illness. Persons who have a history of a physical or mental impairment that substantially limits one or more major life activities fall under this type of protection. This also includes individuals who have been misclassified as having such an impairment. Thus, for example, if a job applicant was once a patient at a state institution, was misdiagnosed as being psychopathic, and this

misdiagnosis was never removed from his record, assuming he is qualified for a job, the employer would violate the ADA if it did not hire her based on this record of an impairment.

Regarded as having such impairment

People who are perceived as having disabilities from employment decisions based on stereotypes, fears, or misconceptions about disability are covered by the ADA. It applies to decisions based on unsubstantiated concerns about productivity, safety, insurance, liability, attendance, cost of accommodation, accessibility, workers' compensation costs, or acceptance by co-workers and customers. Under the ADAAA, an individual is "regarded as" disabled if the individual can show that she was subjected to an action prohibited under the statute (for example, termination, failure to hire) because of an actual or perceived impairment. However, an impairment which is transitory and minor with an expected duration of 6 months or less does not satisfy the regarded as standard.

Employers are not required to provide a reasonable accommodation to individuals who are regarded as disabled.

If an employer makes an adverse employment decision based on unfounded beliefs or fears that a person's perceived disability will cause problems in areas such as those listed above, and cannot show a legitimate, nondiscriminatory reason for the action, that action would be discriminatory.

Having a relationship or association with someone who has a known disability

The ADA specifically provides that an employer may not deny an employment opportunity or benefit to an individual, whether or not that individual is disabled, because that individual has a known relationship or association with an individual who has a disability.

The term "relationship or association" refers to family relationships and any other social or business relationship or association. Therefore, this provision of the law prohibits employers from making employment decisions based on concerns about the disability of a family member of an applicant or employee, or anyone else with whom this person has a relationship or association.

There are generally three situations in which this provision arises:

1. When an employee is discriminated against because the disability of a family member may pose an increased expense to the employer. For instance, an individual may not be denied employment because his or her spouse is disabled and is covered by the company health plan.

2. When an individual is considered disabled because of their relationship with a disabled person. For example, if an employee's spouse or partner is infected with HIV and the employer fears that the employee may also have become infected, the person is considered disabled by association. Likewise, if an employee's blood relative has a

genetic ailment and the employee is likely to develop the disability as well, then the employee is disabled by association.

3. When an employee is distracted or otherwise unable to adequately perform his or her job duties because of the disability of another. For instance, if an employee is somewhat inattentive at work because his or her spouse or child has a disability that requires his or her attention, the employee would be considered disabled by association.

This provision of the law prohibits discrimination in employment decisions concerning an individual, whether the individual is or is not disabled, because of a known relationship or association with an individual with a disability. However, an employer is not obligated to provide a reasonable accommodation to a non-disabled individual simply because that person has a relationship or association with a disabled individual. The obligation to make a reasonable accommodation applies only to qualified individuals with disabilities. These individuals may, however, have rights under other federal laws such as the Family Medical Leave Act (FMLA).

Conditions that are not disabilities

Certain impairments and conditions are not considered to be disabilities. These include:

- current illegal drug use (including the use of illicit drugs such as cocaine and the unlawful use of prescription drugs)
- temporary conditions such as broken limbs, sprains, concussions, appendicitis, influenza, and common colds
- physical characteristics such as height, weight (other than severe obesity), eye color, or hair color that are within normal ranges
- common personality traits such as poor judgment or quick temper
- most sexual behavior disorders
- others problems such as pyromania, kleptomania, and compulsive gambling.

The EEOC does not consider complication-free pregnancies to be a disability under the ADA because pregnancy is not the result of a physiological disorder. If, however, a pregnant woman is substantially limited in a major life activity due to her pregnancy, she can be considered disabled under the ADA.

Qualified individual under ADA

The ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job. It is the employer's responsibility to define what a job is and the essential functions required to perform it. The ADA simply requires that an individual with a disability who is otherwise qualified for a job be evaluated in relation to the essential functions of the position in the same manner as non-disabled individuals.

The ADA defines a qualified individual as one who possesses all of the "requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." There are two basic steps in determining whether an individual is "qualified" under the ADA:

1. **Determine if the individual meets the necessary prerequisites for the job, such as:**

    - education
    - skills
    - experience
    - licenses
    - training
    - certificates
    - job-related requirements, such as good judgment or ability to work well with other people.

2. **Determine if the individual can perform the essential functions of the job, with or without reasonable accommodation.**
   The essential functions of the job generally include those duties which are fundamental to the performance of the job. Whether a job duty is an essential function is decided on a case-by-case basis. The following questions will help determine the essential functions of a job:

    - **What standards have you set?**
      For example, an employer can require typists to type 75 words per minute or a cleaning person to clean 16 rooms a day. Employers are not required to show that the standards are necessary, but may be required to show that all employees are, in fact, held to the performance standards.

    - **Are employees actually required to perform tasks that the employer claims are essential?**
      An employer may list typing as an essential function of the job, but if the employer has never required someone in the position to type, that will indicate that typing is, in fact, not an essential function.

    - **Does the position exist to perform a specific task?**
      An individual may be hired to proofread documents. The ability to proofread is an essential function since that is the only reason the job exists.

- **How many employees are available to perform the job function?**
  If there are a limited number of employees who can perform the job function, it is more likely to be an essential job function.

- **What functions did past employees in the job perform? What do current employees in similar jobs do?**
  The experience of those who have actually performed the job in question will highlight the essential job functions of that position.

- **How much time is spent performing the function?**
  The more time is spent on a particular function, the more likely it is to be an essential job function. For instance, if an employee spends the vast majority of work time at a cash register, that is evidence that operating the cash register is an essential function of the job.

- **What is the consequence of not performing the job? What will happen if the job is not performed?**
  Sometimes a function that is performed infrequently can still be considered essential because there will be serious consequences if it is not performed. For example, airline pilots spend a relatively small amount of their time landing planes, but the consequence of not being able to safely land a plane makes that an essential function of the pilot's job.

- **Was a written job description prepared before advertising or interviewing for the position?**
  If the function is listed in the job description, there is a strong possibility that the EEOC or the courts would consider it essential.

- **Do the functions require special training or expertise?**
  Functions that require training or possession of a specialized skill or license are likely to be considered essential.

- **Is there a collective bargaining agreement in place?**
  For employers of union workers, the terms of a collective bargaining agreement are relevant to determining the essential job functions of particular positions.

Job descriptions can help identify essential job functions. Although the ADA does not force employers to put job descriptions in writing, written job descriptions can help employers set forth educational, experience, skill, licensure and other requirements needed to perform a particular job. Written job descriptions can also help employers establish legitimate qualitative and quantitative production standards related to the essential job functions. Finally, written job descriptions also aid employers in determining whether a particular individual is qualified to perform a particular position. In short, a well-crafted, written job description can be the best evidence if your company has to defend against a charge of disability discrimination. See page 8, **Job descriptions**.

Reasonable accommodation obligation

Disabled persons who are otherwise qualified and able to perform essential functions of a job are entitled to reasonable accommodations, which the EEOC defines as "modification or adjustment to a job, the work environment, or the way things usually are done that enables (a disabled person) to enjoy an equal employment opportunity."

Reasonable accommodation is required in at least three situations:

1. to allow an employee or job applicant to perform the essential functions of a job
2. in application and testing procedures
3. to permit an employee with a disability to enjoy privileges and benefits that are substantially equivalent to those given to non-disabled employees in similar situations. This aspect of reasonable accommodation includes access to areas such as lunch and break rooms. It also guarantees that employees with disabilities can participate in employer-sponsored events, such as picnics and parties.

Employers are only required to accommodate known disabilities, and it is the responsibility of the individual with the disability to make the need for accommodation known to the employer. This notice does not have to specifically address either the ADA or reasonable accommodation. Rather, it may come from the individual, his or her family, friends, health professional or representative. Indeed, EEOC Guidance assumes what most employers understand: few applicants or employees will walk into an employer's office and say, "I need a reasonable accommodation under the ADA." Most individuals will present an employer with a set of facts that may indirectly indicate the need for an accommodation. For example, an employee may tell a supervisor, "I am having trouble getting to work on time because of the medication I am taking," or an employee's doctor may send a note indicating that the employee cannot lift more than 50 pounds.

Once an individual requests accommodation, an employer must make a reasonable accommodation for known disabilities of the employee or job applicant unless:

- accommodation would cause the employer an undue hardship
- accommodation would pose a direct threat to the health or safety of the individual for whom the accommodation is made or for others
- the only available accommodation is to transfer the individual to a fully staffed position
- the only available accommodation requires creating a new position for the individual (except in circumstances allowing temporary alternative work).

Verification of need for reasonable accommodation

Where a disability or the need for an accommodation is not obvious, employers may ask for reasonable documentation about the disability and about any functional limitations. This can be done by obtaining documents from an appropriate health care provider or rehabilitation professional. Employers should take care in these situations not to request an employee's entire medical history or information unrelated to the existence of a disability. An employer may also choose to discuss with the individual the nature of the disability and the need for further information. Finally, an employer may arrange for the individual to see a health care or rehabilitation specialist (at the employer's expense) to determine the nature of the disability. If the need for an accommodation is not obvious and the individual refuses to provide reasonable documentation or information, then there is no entitlement to a reasonable accommodation.

Specific accommodations

Specific reasonable accommodations may include but are not limited to:

- part-time or modified work scheduling
- restructuring of non-essential job functions
- reassignment of a disabled individual to a vacant position
- modification or acquisition of equipment or devices, which may include making existing facilities readily accessible to individuals with disabilities
- modification of examinations, training materials, or policies
- providing qualified readers or interpreters (but not including personal items such as glasses and hearing aids)
- providing a leave of absence.

Each request for accommodation must be analyzed on a case-by-case basis. A reasonable accommodation must always take into consideration two factors:

1. **the specific abilities and functional limitations of a particular applicant or employee with a disability**
2. **the specific functional requirements and essential functions of a particular job.**

Both the employer and the employee should be involved in the interactive process of identifying the possible accommodations. An employer should consider:

- its resources and financial ability to provide an accommodation

- the functional requirements of the job
- the functional limitations of the employee
- the potential disruption the accommodation may cause in the place of employment.

It is important to remember that the employer is not required to provide the best accommodation or the one requested by the employee. Rather, the accommodation need only be sufficient to meet the job-related needs of the employee seeking accommodation. Finally, during the process of determining a reasonable accommodation, the employer should record all attempts it makes to accommodate a disabled employee.

Employers should accommodate a current employee by reassignment to a different job only when the employee cannot be accommodated in his or her present position. If the employer does reassign an employee with a disability, the employer may only reassign the employee to an available position. Under no circumstances is the employer required to remove another qualified employee from his or her position in order to reasonably accommodate another employee.

Sometimes the ADA reasonable accommodation obligation conflicts with other obligations mandated in collective bargaining agreements. In unionized employment settings, governed by a collective bargaining agreement where job assignments and other conditions of employment are based on seniority, the United States Supreme Court has ruled that a requested accommodation which conflicts with that seniority system is not a "reasonable accommodation." In other words, a disabled employee with less seniority, who seeks to be reassigned to an available position cannot take over a non-disabled employee with greater seniority who has already applied for that position. Additionally, the United States Supreme Court ruled that established seniority systems trump the reasonable accommodation obligation regardless of whether employees are represented by unions and covered by labor contracts. However, if numerous exceptions had been made in the past or if the seniority system had undergone frequent changes, it may be reasonable to make an exception to the seniority system to accommodate a disabled employee.

Undue hardship

An employer is not required to provide a reasonable accommodation where the accommodation would create an undue hardship on the employer. An undue hardship is defined as an action that would create significant difficulty or expense to an employer or would fundamentally alter the nature or operation of the company. In determining whether an accommodation would create an undue hardship on an employer, the following factors are considered:

- the nature and cost of the accommodation, considering the availability of tax credits, deductions, and outside funding

- the overall financial resources of the facility or facilities
- whether the affected employer is connected with a larger organization that has additional financial resources
- the number of employees working at a specific facility
- the overall financial impact of the accommodation on the facility's expenses, resources, and operation, including whether the accommodation would substantially hinder other employees in accomplishing their respective jobs
- the company's type of business, size, location, and other relevant geographical data
- whether the accommodation will benefit more than one person with a disability
- any disruption the accommodation may cause.

In contrast, the following factors are **not** considered when determining whether the accommodation would cause an undue hardship on the employer:

- A comparison of the cost of the accommodation to the salary level of the position. For example, an accommodation costing $50,000 would not be considered an undue hardship merely because the disabled employee's salary is $25,000.
- A negative effect on the morale of co-workers. For example, an employer would violate the ADA if it refused to provide a disabled employee a part-time schedule because his co-workers would resent that he got to leave work early and not because it would be too disruptive to operations.

Just as the EEOC and the federal courts determine whether to provide a reasonable accommodation on a case-by-case basis, they also determine whether the accommodation would create an undue hardship on a case-by-case basis.

Direct threat to health and safety

An employer may also deny accommodation to an individual normally protected under the ADA where an individual poses a "direct threat" to the health and safety of others in the workplace.

The EEOC defines a direct threat as a significant risk of substantial harm. In determining whether a direct threat exists, the EEOC and the federal courts examine the employer's reasonable judgments regarding the following:

- the duration of the risk
- the nature and severity of the harm

- the likelihood that the potential harm will occur
- the imminence of the potential harm.

These factors must be based on objective, factual evidence and cannot be founded on subjective fears or stereotypes regarding the nature or effect of a particular disability. The United States Supreme Court has ruled that an employer may consider not only the health and safety of other employees, but also the health and safety of the employee requesting reasonable accommodation. The direct threat defense only applies in situations where a reasonable accommodation that would eliminate the risk or reduce it to an acceptable level is not available.

Light-duty or restricted-duty positions

Sometimes an employer may be required to provide a light- or restricted-duty position for an employee with a disability. It is important to remember that the ADA does not require the creation of a light-duty position for a disabled individual or injured employee, unless the heavier duties of the job are marginal functions that are not essential to the job. However, the employer may be obligated to create a light-duty accommodation to a disabled employee if the employer has created light-duty positions in the past. Furthermore, the ADA prevents employers from eliminating long-standing light-duty positions when the position is filled by a disabled employee.

If an employer is considering providing a disabled employee with a light-duty position, the employer should first determine whether the light-duty assignment will be permanent or temporary. If it is temporary, the employer should next decide how long it will last and follow-up regularly to determine whether the light-duty assignment is still necessary or appropriate. This is important because employers could lose the ability to eliminate the temporary position if the disabled employee performs duties in that position for a lengthy period of time.

Once an employer places a disabled employee in a permanent light-duty position, the employee's ability to perform the essential functions of the job must be measured in relationship to the light-duty position and not to the previous position. Therefore, the employer cannot terminate an employee because the employee is unable to perform the essential functions of his or her previous position if the employee is able to fulfill the essential job functions of the light-duty position.

The hiring process

Pre-offer vs. post-offer

The ADA prohibits an employer from requiring a medical examination before an offer is extended. For more information on ADA laws affecting the pre-offer stage of the hiring process, please refer to Chapter 3, **Recruiting and hiring**.

After an offer of employment, employers may inquire into an individual's:

- prior sick leave usage
- illnesses
- diseases
- impairments
- general physical or mental health.

Post-offer questions do not have to be related to the specific job for which the applicant has applied. However, the post-offer questions must follow a real offer and cannot mask any intent to question the applicant based on a tentative offer of employment.

Even though an employer may require a physical agility test or a physical fitness test before an offer is extended to an applicant, an employer may not measure an applicant's physical or biological responses to any such test at the pre-offer stage. For example, an employer may measure how much an employee can lift or how fast he or she can run at the pre-offer stage. However, the employer may not measure an applicant's blood pressure or heart-rate after performing the task. This would constitute a medical examination and is prohibited by the ADA.

Medical examinations

An employer may only require a medical examination after an offer of employment has been made, but the employment offer can be conditioned upon the applicant's successfully passing the examination. The EEOC has defined a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health." The post-offer medical examination can include a complete medical history and does not have to be job-related. In contrast, it is important to remember that medical examinations of current employees must be job-related and consistent with business necessity. If disability-related inquiries made during a post-offer medical examination yield information about an applicant's disability, and an employer withdraws a conditional offer of employment based on that information, the decision must be job-related and consistent with business necessity.

Depending on whether the tests are intended to or actually do determine medical or biological data, psychological examinations may or may not be considered medical examinations under the ADA. For example, a test that measures whether an applicant has a compulsive disorder or depression is considered a medical examination for purposes of the ADA.

Medical records

Employers must keep the confidential medical information of employees and applicants separate from the individual's personnel files. Furthermore, employers

may only reveal medical information in limited situations to the degree necessary for:

- managers and supervisors when the information is necessary for reasonable accommodation purposes
- first-aid and safety personnel in the event emergency treatment is necessary
- state or federal government offices during an investigation for compliance with the ADA
- insurance purposes.

Applicants

If an employer chooses to administer a pre-employment test, reasonable accommodations must be provided if an applicant requests accommodation or if the employer has reason to believe one is necessary. Under the ADA, employers must give applicants or employees with impaired sensory, manual, or speaking skills tests that do not require the individual to use that impaired skill. For example, employers must give oral, rather than written, tests to individuals with dyslexia. Furthermore, individuals with impaired vision may require a large print, Braille, or sign language accommodation. However, if the employer is measuring a skill necessary to perform an essential job function of the position, the employer is not required to provide an applicant with an alternative method of testing. For example, where reading is an essential job function, the ADA does not require the employer to provide an oral test format.

If the need for accommodation is not obvious, the employer may ask an applicant for documentation from a professional regarding the applicant's disability, the limitations that accompany that disability, and the need for accommodation for testing purposes. Because employers may only request information necessary for accommodation during testing, it is important that employers specify to the applicant that it is only requesting the information to verify the existence of the disability and the need for accommodation.

Drug tests

An employer may test an applicant or employee for current illegal drug use, as this test is specifically exempted from the ADA medical examination restrictions and is allowed at any time. Alcohol tests and tests for legal prescription drugs, however, are considered medical examinations under the Act – therefore, an employer is prohibited from administering these tests at the pre-offer stage of employment.

Other important issues

Health benefit plans

While the ADA prohibits employers from discriminating on the basis of disability when employers provide health care benefits to their employees, Congress has created a way to shield certain health benefit plans from inspection under the ADA. The determination of whether a health benefit plan is lawful under the ADA involves a two-step analysis.

Step 1

The first issue is whether the employer's health benefit plan includes a disability-based distinction. A disability-based distinction is a provision in a health benefit plan that singles out a particular disability from coverage. If the provision is not a disability-based distinction, it is probably lawful under the ADA. For example, the ADA has indicated the following benefit distinctions are not disability-based and are lawful under the ADA:

- providing fewer benefits for eye-care in comparison to other physical conditions
- providing a lower level of benefits for the treatment of mental conditions in comparison to other physical conditions
- setting limits on, or excluding from coverage entirely, benefits for experimental drugs or elective surgery
- the inclusion of a pre-existing condition clause in the health benefits plan.

Step 2

Secondly, if the health benefit plan includes a disability-based distinction, the employer may be able to validate it by showing that the distinction is bona-fide, such as demonstrating full compliance with Employee Retirement Income Security Act (ERISA) reporting and disclosure requirements in developing the benefit plan. Not only must the employer show that the plan is bona-fide, the employer must also demonstrate that the disability-based distinction is not a subterfuge to avoid the ADA. An employer can show that a health benefit plan is not a subterfuge by demonstrating that the provision is necessary to keep any unacceptable or drastic change from occurring, either in the health benefit plan's coverage or in the premium charges for the plan.

Substance abuse

Under the ADA, alcoholism and past drug addiction are protected as disabilities. An alcoholic who is otherwise qualified to perform the essential functions of the job with or without accommodation would therefore be protected. An employer may, however, hold an employee who is an alcoholic to the same qualification standards for employment or job performance and behavior as other employees, even if any unsatisfactory performance

or behavior is related to the alcoholism. Additionally, an employer can prohibit the use of alcohol on the job.

An employer may not discriminate against a drug addict who is not currently using drugs and who has successfully completed rehabilitation for drug addiction in the past. The ADA states that it should not be construed to exclude a qualified individual who:

- has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use

  or

- is participating in a supervised rehabilitation program and is no longer engaging in such use

  or

- is incorrectly regarded as engaging in such use, but is not.

While recovering addicts are protected under the ADA, the definition of a qualified individual with a disability does not include an individual who is currently engaging in the illegal use of drugs.

Food handling positions

The ADA requires the Department of Health and Human Services to prepare an annual list of infectious and communicable diseases that are transmitted through food handling. In situations where an individual with a disability has a disease on the list and has either applied for or works in a food handling position, the employer must be sensitive to both the health concerns of others and the needs of the disabled individual. To do this, the employer must determine whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease. If there is no reasonable accommodation, the employer may refuse to assign the individual to a position involving food handling. If the individual is a current employee, the employer must consider reassigning the employee to a vacant position that does not involve food handling.

Chapter 20

Employee discipline

In recent years, there has been a nationwide increase in employment suits, many of which arise from disciplinary action or discharge decisions. Therefore, it is important for employers to have in place appropriate disciplinary procedures to reduce their exposure to lawsuits. Such procedures, if applied consistently and fairly, are an important part of enforcing company rules and policies, encouraging a more efficient working environment and placing employers in a good position to defend against claims from employees.

Discipline policies

An established company discipline policy is key to the success of employee disciplinary procedures. Though discipline policies vary with regard to the specifics of prohibited conduct and the amount of discretion given to supervisors (in terms of deciding how to discipline an employee), it is important that all discipline policies be administered fairly and consistently and be communicated effectively to employees.

Progressive discipline

Some employers may desire a more fixed discipline policy. Employers that do not want open-ended discipline policies may implement a progressive discipline policy, one that sets forth various types of employee misconduct and a corresponding penalty for each type. A progressive discipline policy assigns specific penalties for employee misbehavior that increase in severity with each subsequent offense. For example, the first violation may result in a verbal warning, the second in a more severe penalty such as probation or a written warning, and the third in suspension or termination. A progressive discipline policy makes employees responsible for individual violations, but also seeks to identify and correct patterns of misbehavior.

The lack of decision-making placed in the hands of supervisors under a progressive discipline policy can be beneficial to both employers and employees. From an employer's perspective, it is less likely that supervisors will unevenly discipline employees because they do not personally determine the penalty for every offense. Meanwhile, employees are more likely to respond quickly to warnings of infractions because the violation is immediately brought to their attention and the penalties for future violations are predetermined.

The inflexibility of the progressive discipline policy, however, is also its biggest potential disadvantage. The progressive discipline policy does not take into account any outside factors surrounding a violation that may exist. For instance, a company may not wish to punish an employee who misses work due to a family emergency in the same manner as an employee who misses work for less legitimate reasons. It is important that supervisors maintain some level of discretion in order to ensure that the disciplinary action is appropriate. Also, as with any disciplinary policy, a progressive disciplinary policy must be enforced consistently to be effective.

Flexible discipline

A company may wish to afford greater discretion to supervisors and adopt a flexible discipline policy. A supervisor is often in the best position to determine the gravity of the offense and the appropriate disciplinary measure to impose. The difficulty with leaving discretion in the hands of the supervisors is the possibility that discipline will be unevenly applied. Therefore, supervisors must be trained to be consistent and fair when disciplining employees.

Documenting disciplinary actions

Companies must make sure to keep organized, written records of all disciplinary actions taken against its employees. Every act of discipline taken against an employee needs to be documented and placed in the employee's disciplinary file, including verbal warnings. All disciplinary records should be accurate, detailed, and objective. If the company ever needs to defend itself against a claim of discrimination, the employee's personnel file is often an effective means of convincing a judge or jury that the company's decision to discipline an employee was based on legitimate, non-discriminatory or non-retaliatory reasons.

As soon as problems develop, a supervisor should discuss them specifically with the employee and suggest ways of correcting the situation. Any such discussions should be documented and kept in the employee's file. Copies of oral and written warnings should also be placed in the personnel file, and the supervisor should notify the employee of the employer's expectations in order to avoid further discipline or discharge, including a time-frame for correction if applicable. Disciplinary action should be taken as quickly as possible following misconduct in order to avoid suspicion of an improper motive for disciplinary action, and the discipline taken should be documented accordingly.

Language of disciplinary notices

A company must be careful in its choice of language to describe an employee's conduct and cause for discipline. A supervisor should not use terms that could be viewed as a reference to an employee's psychological or medical condition, as such comments could be used in support of a claim that the discipline was based upon the employee's condition in violation of the Americans with Disabilities Act. The supervisor also should list specific examples of misconduct rather than issuing a blanket criticism of an employee's character.

Verbal warnings

Verbal warnings should be given for relatively minor violations of the company rules. A supervisor should speak to the employee in private with another supervisor present (who can later verify what transpired). The employee should also be informed that future infractions will result in further discipline. Documentation that the verbal warning was given should be kept in the employee's file.

Written warnings

If the employee disregards a verbal warning or if the violation is more severe than those warranting a verbal warning, a written warning may be in order. A supervisor should discuss the warning with the employee to ensure that the employee understands the reasons for the disciplinary action. A copy of the warning should be given to the employee at the time of the discussion and the employee should be asked to sign and date the warning, acknowledging its receipt. The original warning should be placed in the employee's file.

Suspension or probation

Suspension is a form of discipline usually administered only for severe infractions of the rules or for excessive violations after at least one written warning. Some employers may not wish to use suspensions since they are less private and can be humiliating to the employee. As a result, some companies may prefer to use probation instead of suspension. Regardless of whether a company prefers to use probation or suspension, there are several basic steps that an employer should take before severe disciplinary action is taken.

Conduct a preliminary investigation

Once misconduct is suspected, the employee's supervisor or another management official should immediately begin an investigation. If negative consequences result from the misbehavior, then action should be taken to correct them in order to minimize the impact of the misconduct. The initial investigation should yield enough information to conduct a more thorough investigation.

Interview the employee

The employee suspected of misconduct should be interviewed as soon as possible after the misconduct. The interview should be conducted in private, away from other employees. If possible, the supervisor may wish to request another supervisor be present to take notes and later corroborate the investigator's account of the conversation. The employee should be given an opportunity to explain what happened, including the chance to identify all witnesses that the employee believes would have information relevant to the investigation. At the close of the interview, the investigator should inform the employee that someone will contact him or her after the investigation is complete. If the suspected behavior is serious, the employer may wish to consider suspending the employee, with or without pay, while the investigation is ongoing.

Interview all witnesses

After interviewing the employee, the investigator should interview all other witnesses who may have knowledge of the facts. Again, these interviews should take place as soon as possible. The interviews should be conducted separately and in private. The investigator may wish to obtain signed and dated statements from all witnesses.

Decision-making process

At the close of the investigation, the information gathered should be reviewed by the personnel department or management staff. Any files that shed light on how similar misconduct by other employees was treated in the past should also be examined. To aid in this process, the company may wish to institute a recordkeeping system that has a separate file for each company rule or policy.

If disciplinary action is to be taken, the supervisor should place everything in writing to serve as a record. The record should describe:

- the nature of the misconduct, including the date and time of the offense
- a description of the events surrounding the incident
- the company rules or policies violated by the employee
- the duration and nature of the discipline.

All decisions regarding severe disciplinary action should be approved by the personnel director or some other appropriate management official in order to ensure the adequacy of the investigation and fairness of the disciplinary action to be taken.

Communicating the discipline decision

Once a final decision is made, the employee should be allowed to review the company's written account of the incident. The employee should understand the nature of the offense, the company rules it violated, the nature of the disciplinary action, and finally what action the company will take if there is another violation of company rules. The employee also should sign the disciplinary action record presented to the employee, the purpose of which is to verify that the employee saw the document.

Appeal process

Some companies may want to provide employees with a right to appeal any discipline decision more severe than a written warning. This appeal should be to a management official who had no involvement in the investigation or discipline process. If a company chooses to allow appeals, the employee should be given a

reasonable time in which to give written notice of appeal to the appointed management official.

Who should be involved in the decision to terminate

The final decision to discharge any employee should not be made exclusively by the employee's direct supervisor. Two levels of management should be involved and, if there are difficult or extenuating circumstances, an attorney should be consulted before a decision is made. See Chapter 21, **Termination**.

Chapter 21

Termination

Perhaps no disciplinary decision carries as much potential liability for an employer as the termination of an employee's employment. In order to reduce the risk as much as possible, employers must implement procedures that require employee terminations to be handled in a consistent and professional manner. Employers should also maintain prior, consistent documentation to support the termination should the employee later challenge the termination decision.

As a general rule, Georgia follows the employment-at-will doctrine. This means the employer may discharge the employee at any time, with or without cause. The employee may also, in turn, quit his employment at any time, with or without notice. As discussed below, there are, however, some circumstances in which the employment-at-will doctrine may be limited by federal or state law, employment contracts, or collective bargaining agreements.

Exceptions to the employment-at-will doctrine

While there are several exceptions to the employment-at-will doctrine, Georgia has held to the employment-at-will doctrine and has, for the most part, refused to subject employers to liability for wrongful discharge. Unlike other states, Georgia does not recognize the tort of wrongful discharge in violation of public policy. The Georgia legislature and courts have, however, carved out a few exceptions to the employment-at-will doctrine. Various federal anti-discrimination statutes protect employees from being discharged on the basis of race, color, national origin, sex, pregnancy, religion, age, disability, military status, union activity, and genetic information. Employees working under a written employment agreement or a union contract may also be protected from discharge other than for good cause as defined by the particular agreement. Below are the generally recognized state and federal law-based exceptions to the employment-at-will doctrine.

Discrimination

Title VII of the Civil Rights Act of 1964, amended by the Civil Rights Act of 1991 (Title VII), applies to both private and public employers with 15 or more employees, labor organizations, and employment agencies, but not to certain bona fide private membership clubs. Among other protections, Title VII prohibits an employer from discharging an employee on the basis of race, color, religion, national origin, or sex (including pregnancy,

childbirth, or related medical conditions). See Chapter 17, **Discrimination in employment** for a more detailed discussion of Title VII.

Other protected categories are governed by specific regulations.

Pregnancy discrimination

The Pregnancy Discrimination Act (PDA) also applies to both private and public employers with 15 or more employees, labor organizations, and employment agencies. The PDA prohibits employers from discharging or otherwise discriminating against employees on the basis of pregnancy. The law requires pregnant women to be treated the same as men or non-pregnant women whose ability or inability to work is due to a non-pregnancy related illness or disability. The PDA does not, however, require better treatment for pregnant women.

Age discrimination

Employer coverage under the Age Discrimination in Employment Act (ADEA) is similar to that under Title VII, except the ADEA applies only to employers with 20 or more employees.

The ADEA, as amended, prohibits an employer from discriminating against an individual with respect to discharge and other terms, conditions, and privileges of employment on the basis of the individual's age, provided that the individual is age 40 or older. See Chapter 17, **Discrimination in employment** for a detailed discussion of the ADEA.

Disability discrimination

The Americans with Disabilities Act (ADA) applies to employers who have 15 or more employees. The ADA generally prohibits discrimination and harassment in any aspect of employment, including discharge, applications, testing, hiring, assignments, evaluations, disciplinary actions, compensation, promotions, leave, and benefits. See Chapter 19, **Disabilities and reasonable accommodation** for a detailed discussion of the ADA.

Genetic discrimination

The Genetic Information Nondiscrimination Act (GINA) prohibits discrimination, including discriminatory termination, based on an employee's genetic information (meaning an individual's genetic tests, the genetic tests of an individual's family members, and the manifestation of disease or disorder in an individual's family members).

Leave

Family and medical leave

The Family and Medical Leave Act (FMLA) applies to employers who have 50 or more employees. Under the FMLA, the employee is entitled to up to 12

weeks of unpaid leave for the birth or adoption of a child, the employee's own serious health condition, or to care for a spouse, parent, or child with a serious health condition, or because of a qualifying exigency arising out of the fact that the employee's spouse, child, or parent is on active military duty. In addition, eligible employees may take up to a combined total of 26 workweeks to care for an injured member or veteran of the Armed Forces. An employer may not discharge the employee for exercising his or her rights to leave under the FMLA. See Chapter 23, **Family and medical leave** for a detailed discussion of the FMLA.

Military leave

Private employers must restore employees who take qualified military leave to the same or a similar position. See Chapter 24, **Military leave** for a more detailed discussion.

The Uniformed Services Employment and Reemployment Act (USERRA) applies to all employers. USERRA imposes obligations on employers to reemploy employees who take military leave and limits the terms under which an employer may subsequently discharge such employees. USERRA also prohibits employers from discriminating against employees based on their uniformed service. (See Chapter 24, **Military leave,** for a more detailed discussion.)

Jury duty

An employer may not discharge, discipline, or otherwise penalize an employee who is absent from his or her employment for the purpose of attending a judicial proceeding in response to a subpoena, summons for jury duty, or other court order or process that requires the attendance of the employee at the judicial proceeding.

Protected activities

The National Labor Relations Act (NLRA) prohibits discrimination, including discriminatory discharge, based on the employee's exercise of protected concerted activity (including, but not limited to, union activity).

Labor organization membership

An employer may not, as a condition of employment or continuance of employment, require that an employee join a labor organization or require the employee to refrain from such membership.

Garnishment

No employer may terminate an employee because his or her earnings have been subjected to garnishment for indebtedness, even where more than one summons of garnishment may be served upon such employer with respect to the debt.

Safety and health

An employer may not discharge an employee for requesting information regarding hazardous chemicals, filing a complaint relating to the employer's use of hazardous chemicals under either the Occupational Safety and Health Act (OSH Act) or the Public Employee Hazardous Chemical Protection and Right to Know Act of 1988, or otherwise reporting or participating in an action under either of these laws.

Employment contracts

An employee who has entered into a written employment agreement that specifically limits the circumstances under which his or her employment may be terminated may bring a claim for breach of contract, claiming that the discharge violated the terms of the contract. In these situations, the employee commonly asserts that the employer did not have good cause (as defined by the contract) to terminate his or her employment.

Benefits

The Employee Retirement Income Security Act (ERISA) governs all employee benefit plans unless specifically exempted. ERISA prohibits discrimination, including discriminatory termination, against employees (benefit plan participants), who exercise rights under ERISA.

Guidelines for terminating employees

An employer generally may legally terminate an employee for a good reason, bad reason, or no reason at all (so long as that reason is not discriminatory). However, the company will be in a much better position to defend any challenged termination decision if it takes certain precautions before the decision to discharge.

Establish and follow work policies/rules

It is important, should a termination decision be challenged, that an employer has established written work policies and/or rules that support the basis for the decision to terminate. Rules and policies that are clearly communicated and consistently applied are very helpful in defending a discriminatory or retaliatory termination claim.

It is important that an employer continue to emphasize in its policies that it has the right to skip all levels of discipline and proceed to immediate discharge should the conduct at issue warrant this approach. The employer should also reserve the right to change its rules and policies at any time and note that any published rules and policies are not all-inclusive. Management should be thoroughly familiar with the employer's rules and policies so that managers and supervisors may fairly and accurately carry them out.

Review and investigate the matter

Any decision that is based on incomplete or inaccurate facts will be suspect, not only by the employee, but also by a jury. Thus, it is important for management and preferably an outside, objective party such as a human resources representative to:

- review the decision to terminate
- interview people with knowledge of the facts
- meet with the employee and hear the employee's version of events
- make a written record of the investigation.

Supervisors should contact a human resources representative whenever a significant problem with an employee arises. Meetings to discuss the employee's disciplinary problems or to terminate the employee should always include at least one representative from human resources to act as a witness and consultant. Ideally, any discharge decision will be carefully reviewed and approved by upper management and a human resource representative before it is finalized and communicated to the employee.

Confirm treatment of similarly situated employees

It is vital for employers to **be consistent** in their treatment of employees. Management should consider the company's past practice in situations similar to the situation at hand and determine whether the employee is being treated the same as other employees in similar situations. If not, can the different treatment be adequately justified? Some factors to consider are the employee's length of employment, position held, performance and disciplinary history, and other special circumstances that might distinguish the current situation.

Evaluate the possibility of a discrimination or retaliation claim

Before making any decision to terminate, the employer should consider the state and federal laws prohibiting discrimination and retaliation and evaluate whether the decision could trigger an employment discrimination or retaliation claim. The employer should take into account:

- Is the employee a member of a protected group?
- What will be the demographic makeup of the remaining workforce?
- Will the employee be replaced, and by whom?
- What is the employee's tenure?

- Is there a written contract with the employee?
- Was the rule the employee violated a published rule? How? Where? When?
- Did the employee receive a copy of the violated work rule (for example, in a policies and procedures manual or handbook)? Was the rule posted elsewhere?
- Has the employee been warned previously for violation of the work rule? By whom?
- Does the documentation in the personnel file support the termination?
- Has the employee recently filed a workers' compensation claim, an Equal Employment Opportunity Commission charge, or any other type of claim with a federal or state agency?
- Has the employee complained that he or she believes the employer has engaged in prohibited discrimination?
- Has the employee been involved in an internal investigation during which he or she provided information about alleged discrimination, harassment or retaliation in the work place?
- Is the justification for the termination consistent with past practice, procedure, and treatment of similarly situated employees?

Documentation to support the discharge

Accurate documentation of employee performance issues and/or discipline leading up to an employee's discharge is essential to the defense of any discharge decision. Written documentation is generally perceived as being true and accurate compared to recollections of witnesses. As such, all significant employer actions, including performance evaluations, disciplinary warnings, probationary periods, and performance improvement plans, should be documented and retained in the employee's personnel file.

An employer has a greater chance of prevailing when a termination decision is challenged if the documentation of the employee's performance and/or conduct supports the decision to terminate.

Communicating the decision to terminate

Terminating an employee is a delicate undertaking in the best circumstances. It is important that the employee understand the reasons for the discharge. Ideally, a representative of human resources should be present at the meeting in which the employee's manager communicates the discharge decision. Someone who attends the discharge meeting should document carefully the reason provided to the employee for the discharge and any response by the employee.

The termination meeting should be short and to the point, and the decision to terminate should be conveyed unemotionally and candidly. The employer should not try to soften the blow by complimenting the employee on other areas of performance, as this sends mixed messages to the employee. The employee should be treated with dignity and respect at all times. Employees who feel they were treated unfairly are more likely to file a claim for unlawful discrimination. Employers should also keep in mind the following points when conducting a termination meeting:

- Review the employee's employment history briefly with the employee, commenting on specific problems that have occurred and the attempts to correct these problems.

- Within the first few minutes of the interview, inform the employee that he is being terminated.

- Explain the decision clearly and concisely.

- Avoid counseling the employee.

- Make sure the explanation given for the termination is truthful. The reason provided to the employee for the termination is essential should a lawsuit be filed. In some cases, failure to state the true reason for the termination or stating reasons inconsistent with reasons later stated has been considered evidence of bad faith or discrimination. It is possible to say too little or too much, so careful consideration should be given to any communication regarding the reason for the termination. Where the termination involves a complicated matter, it may be wise to seek legal advice concerning the drafting of the separation notice.

- Explain fully any benefits, including COBRA and unemployment compensation, that the employee may be entitled to receive. If the employee is not entitled to certain benefits, explain the reasons for this.

- Allow the employee the opportunity to respond. Pay close attention to what the employee says, but do not argue with the employee or otherwise attempt to justify the decision.

- The decision to terminate must be based on a legitimate, non-discriminatory and non-retaliatory reason and, although not legally required, there should be business-related reasons for the termination to avoid the appearance of impropriety. When an employer is firing an older employee, a pregnant employee, an employee who is a member of a racial or ethnic minority, or any other employee who falls into a protected category, it is essential that the person conducting the conference not make any reference to the protected characteristic that could later be used as evidence of discrimination. This includes any references to race, color, national origin, sex, pregnancy, age, religion, disability, union activity, military service, or genetic information.

- The manager or human resources representative conducting the interview should be organized and confident in communicating the termination decision.
- During or after the meeting the employer should document what the employee was told and how the employee responded.
- At the time of the actual discharge, at least two managerial employees or at least one manager and one human resources employee should always be present.
- Provide for the return of materials, documents, tools, information, etc. in the personal possession of the employee.
- Establish a procedure to retrieve IDs, delete passwords, and change locks and related security matters. Anticipate whether physical security preparations are needed.
- Remind the employee of any non-competition, non-solicitation, or confidentiality requirements that may apply.
- If appropriate, consider seeking a separation and release agreement, as described on page 259.
- If appropriate, conduct a well-prepared exit interview and follow up on any useful suggestions made by the exiting employee.
- Ensure the employee physically leaves with as much dignity as possible. In the case of discharge, give specific thought to transportation arrangements if the employee is impaired or added security measures if the employer has reason to worry about potential workplace violence.
- Ensure that all employment-related documents are current, complete, accurate, signed and approved as appropriate, and dated.
- Make sure termination procedures and exit interviews are consistently applied to all employees.

Replacing a terminated employee

Employers should be cautious when replacing an employee who the employer suspects may file an employment discrimination claim. The former employee's discrimination claim is more difficult to prove if the employee is replaced by an employee of the same protected characteristic, such as sex, race, national origin, or age. However, the employer's focus should always be on finding the most qualified employee for the job.

Separation agreements and employee releases

If the employer believes the employee may file a claim upon termination or if a major dispute between the employer and employee exists at the time of termination, it may be in the employer's best interest to enter into a separation agreement that contains a release of all actual and potential claims from the employee. In a separation and release agreement, the employer agrees to provide some additional consideration (usually in the form of monetary compensation) in exchange for the employee's agreement to release the employer from any claims the employee might have that arose during the employee's employment. Separation and release agreements should always be prepared by the employer's attorneys. Separation and release agreements should not be viewed as an improper means to "bribe" employees. Instead, when properly drafted and executed, separation and release agreements are widely recognized as legitimate means by which an employer can resolve actual or potential disputes with an employee.

Chapter 22

Plant closings and mass layoffs

The Worker Adjustment and Retraining Notification Act (WARN) ensures that workers displaced by mass layoffs or plant closings receive adequate time to prepare for the transition between losing their jobs and finding global new ones. To that end, WARN essentially requires employers to provide at least 60 days' written notice to employees who will lose their jobs due to a covered plant closing or mass layoff.

A company's failure to comply with WARN can be a critical and costly mistake. An employer who fails to meet WARN's advance notice requirement is liable for full back pay and benefits to each displaced worker for each day that notice was not given during the 60-day period. In cases where large plant closings displace many employees, these liabilities can add up quickly and substantially affect a company's bottom line. In addition, a violating employer may be liable for civil penalties, attorneys' fees and costs.

Although some states have enacted similar "WARN" statutes that impose additional or different notice requirements and remedies under state law, Georgia has not enacted a state-law counterpart to WARN.

WARN's key terms

Before looking in depth at WARN's notice and other requirements, it is important to obtain a basic understanding of several of WARN's key terms. These key terms include:

- **Affected employees**
  Employees who may reasonably be expected to experience an employment loss due to a proposed plant closing or mass layoff by their employer.

  This term encompasses individually identifiable full- and part-time employees, including managerial and supervisory employees, who will likely lose their jobs because of "bumping rights" (meaning rights provided for one employee to displace another employee) or other factors, to the extent that such individual workers reasonably can be identified when notice must be given. Temporary workers and contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not affected employees.

- **Employer**
  Any private for-profit and not-for-profit business enterprise that employs 100 or more full-time workers (including all locations and including employees on layoff status or a leave of absence) or 100 or more full-time and part-time workers who work at least a combined 4,000 hours per week (not including overtime).

- **Employment loss**
  A termination (not including a discharge for cause, voluntary departure, or retirement), a temporary layoff exceeding 6 months, or a reduction in hours of work of individual employees of more than 50% during each month of any consecutive 6-month period.

  > **Note**
  > Reassignments or transfers of employees to other positions or employer-sponsored programs, such as retraining or job search activities, may constitute an exception to this definition if the employee continues to be paid.

- **Facility/operating unit**
  A facility refers to a separate building or buildings. An operating unit refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at a single site of employment.

- **Mass layoff**
  A reduction in force that:

  - does not result from a plant closing

    and

  - results in an employment loss at the single site of employment during any 30-day period for:

    - at least 50-499 full-time employees (if they represent at least 33% of the total active workforce)

      or

    - 500 or more full-time employees (in which case the 33% rule does not apply).

- **Plant closing**
  The permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more full-time employees.

- **Single site of employment**
  A single job location or a group of adjoining locations (for example, groups of structures that form a campus or industrial park). The term also includes separate buildings or job locations within a reasonable geographic proximity if they share staff and equipment.

WARN's advance notice requirement

Events that trigger WARN

WARN provides that, with a few exceptions, an employer must provide written notice to affected employees at least 60 calendar days **before** an anticipated plant closing or mass layoff. Generally, WARN is triggered (and an employer must give 60 days' written notice) when an employer:

- Permanently or temporarily closes a facility or discontinues an operating unit at a single site of employment which affects at least 50 full-time employees. (All of the employment losses do not have to occur within the operating unit that is shut down for a "plant closing" to occur. For example, an employer eliminates its 45-person accounting department. As a result, 5 additional positions in the administrative support staff at the same site are eliminated. In this situation, a covered plant closing has occurred because at least 50 employees have suffered loss of employment at a single site of employment due to the discontinuance of an operating unit.)

  or

- Lays off 500 or more full-time workers at a single site of employment during a 30-day period.

  or

- Lays off 50 to 499 full-time workers at a single site of employment, and these layoffs constitute 33% of the employer's total active full-time workforce at the single site of employment.

  or

- Implements a temporary layoff of less than six months that meets any of the above criteria but then extends the layoff to exceed six months. (In cases where an employer extends a temporary layoff beyond six months, WARN is triggered. Notice need only be given to affected employees when the need for the extension became known to the employer. However, if the need for extending the temporary layoff beyond six months was reasonably foreseeable to the employer when the layoff was implemented, WARN will apply and the required notice must be provided for the original layoff.)

  or

- Reduces the work hours of 50 or more workers by at least 50% for each month during a consecutive six-month period.

Events that do not trigger WARN

If the closing or layoff does not meet the definition of a plant closing or mass layoff under WARN, WARN is not triggered and an employer is not required to provide WARN notice to affected employees. For example, WARN does not apply to a temporary closing of a facility that is planned to last no more than six months. WARN only applies to closings or layoffs where there is an employment loss, which is defined as a layoff exceeding six months. Since there is no employment loss in a temporary layoff situation under WARN, an employer is not required to provide WARN notice in such a case.

WARN also is not triggered when an employer closes a temporary facility or finishes a temporary project, provided the employer hired the affected employees with the clear understanding that their employment would end with the closing of the facility or at the completion of the project.

Further, WARN is not triggered when a closing or layoff results from an employer's consolidation or relocation, provided an employer offers to transfer affected employees to another location within a reasonable commuting distance and the employees will not endure more than a six-month employment hiatus. In addition, if an employee accepts a transfer to any other job location within 30 days of the offer or plant closing (whichever is later), then there is no employment loss and WARN is not triggered.

Finally, WARN is not triggered by the closing of a facility or operating unit due to a strike or lockout.

Reduction of the 60-day notice requirement

There are only three situations or exceptions where WARN permits less than 60 days' notice.

Unforeseeable business circumstances

The business circumstances exception permits an employer to implement a plant closing or mass layoff before conclusion of the 60-day notice period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time the notice would have been required. A business circumstance that is not reasonably foreseeable is generally one that is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. Examples might include a strike at the employer's business or at a major supplier, an unexpected termination of a contract, or an unexpected cancellation of a major order. Determination of whether a business circumstance is reasonably foreseeable is made by focusing on an employer's reasonable business judgment and by considering industry standards.

Faltering company

The faltering company exception applies only to plant closings, not mass layoffs. To qualify for this exception, an employer must be actively seeking capital or other funding which would enable the employer to avoid or postpone the closing and the employer reasonably and in good faith believes that giving employees notice of the shutdown would prevent the employer from obtaining these resources. In other words, if providing WARN notice would scare away sources of new capital or business needed to keep the employer's facility open, then the employer may suspend the notice for such time as is practicable for it to obtain the funding or resources.

Natural disaster

The natural disaster exception applies to plant closings or mass layoffs that are the direct result of a natural disaster, such as an earthquake, tornado, or flood. In such a situation, notice may be given after the natural disaster. This exception does not apply if a plant closing or mass layoff occurs as an indirect result of a natural disaster. However, the unforeseen business circumstances exception might apply in such a situation.

None of these exceptions completely relieve an employer from WARN notice to the affected employees. Instead, they only excuse the employer from giving the notice 60 days before the closing or layoffs. The employer must still give notice as soon as reasonably possible when any of these exceptions apply. In addition, the employer must provide a statement of the reason for reducing the notification period to affected employees as soon as possible and explain the circumstances that caused the employer to conclude that the exception to the 60-day notice period applied.

Combination of employment losses under WARN

Under WARN, the required number of employment losses need not occur at the same time to trigger WARN's notice obligations. As a general rule, an employer must combine all employment losses that occur during a rolling 30-day period to determine whether WARN applies. This means that an employer must look ahead 30 days and behind 30 days from the date of each employment loss to determine whether the required number of employment losses have occurred (in other words, each employment loss starts a new 30-day period).

For example, if an employer decides to lay off 10 employees on October 1 and 39 employees 30 days later on October 31, WARN would not apply because only 49 employees have been affected during a 30-day period. However, if the employer decides to lay off 11 more employees 30 days later on November 29, then WARN would apply because 50 operating unit employees have been affected within a 30-day period (39 employees on October 31 and 11 employees on November 29). In this case, the employer must provide WARN notice to both sets of displaced employees.

90-day rule

In certain circumstances the 30-day period is enlarged to 90 days. The 90-day rule applies if two or more groups of employees suffer employment losses at a **single site of employment**, each of which separately would not trigger WARN, but combined would meet the minimum number of employment losses for a plant closing or mass layoff at the single site of employment. However, an employer is not required to give WARN notice if it can demonstrate that the separate groups of employment losses are the result of separate and distinct causes, and are not an attempt to evade WARN.

Who must be warned

- **Employees**
  Generally, an employer must provide WARN notice to all affected employees, including part-time employees. Although part-time employees are not counted when determining whether there has been a plant closing or mass layoff, part-time employees are entitled to receive WARN notice if either of these events occur. An employer must also provide WARN notice to employees already on temporary layoff if they have a reasonable expectation of being recalled in the future. This includes employees out on workers' compensation and medical, maternity, or other leave.

- **Unions**
  If an employer maintains a seniority system that involves bumping rights, the employer must make a real effort to provide WARN notice to the employees who will actually lose their jobs because of the seniority system. Alternatively, for covered union employees, an employer must provide WARN notice to the employees' union representative or chief union official (in other words, employers are not required to give individual notice to union employees).

- **Local/state government**
  An employer must also notify the chief elected official of the local government unit where the layoff or plant closing will occur and the state's Rapid Response Dislocated Worker Unit. In Georgia, this unit is the Employment Division of the Georgia Department of Labor. If the layoff or closing affects more than one local government unit, an employer should provide notice to the local government unit to which the employer paid the highest taxes in the previous year. Because many affected employees often live in surrounding areas that have different local governments, an employer should also consider providing notice to all nearby local governments so that coordinated planning of services for displaced workers may begin as soon as possible.

  Employers cannot require their employees to waive their right to advance notice under WARN. However, when an employer must implement a plant closing or mass layoff, the employer may request that employees voluntarily and knowingly

waive any claims that they may have against the company under WARN or other employment laws. Requesting such a release may require the employer to offer additional severance pay or benefits in exchange for the release, but a properly drafted release can operate as a waiver of any claims the employee may have against the employer under WARN.

Who does not need to be warned

Employers are **not** required to provide WARN notice to temporary workers, independent contractors or other non-employees, such as business partners, consultants or contract employees assigned to the business but who work for and are paid by another employer or who are self-employed. As noted earlier, employers also are **not** required to provide WARN notice to union employees who are striking or engaged in a lock-out. Employers may, however, be required to provide WARN notice to non-striking employees affected by the strike or lock-out.

Who must provide the WARN notice

WARN notice is typically provided to affected employees through a representative chosen by the employer (for example, a human resources manager or plant manager). In cases where WARN notice is required due to the sale of all or part of a business, the **seller** is responsible for providing WARN notice of a plant closing or mass layoff that occurs before and including the effective date of the sale. The **buyer** is then responsible for providing notice for all closings and layoffs that trigger WARN after the effective sale date.

What must the WARN notice contain

The specific content of the WARN notice varies depending on who is receiving the notice (the notice to non-union employees, union representatives, the state rapid response dislocated worker unit and local chief elected government official are each different). All WARN notices must be written in specific language that is easily understood.

Non-union employees

The WARN notice provided to each affected non-union employee must plainly set forth:

- a statement as to whether the closing or layoff will be temporary or permanent and, if a plant is being closed, a statement to that effect

  and

- the expected date when the closing or layoff will begin and the expected date when affected employees will be separated

  and

- a statement as to whether bumping rights exist

and

- the name and telephone number of a company representative to contact for further information.

Union representative

For union employees, the WARN notice provided to the union representative must plainly set forth:

- the name and address of the employment site where the layoff or closing will occur

  and

- the name and phone number of a company representative to contact for further information

  and

- a statement as to whether the closing or layoff will be temporary or permanent and, if a plant is being closed, a statement to that effect

  and

- the expected date of the first employment loss and the anticipated schedule for making separations

  and

- the job titles of positions to be affected and the names of the affected employees.

Dislocated state worker

The WARN notice provided to the state dislocated worker unit (the Georgia Department of Labor) and the chief local government official must plainly set forth:

- the name and address of the company where the mass layoff or plant closing is to occur

  and

- the name and telephone number of the company representative to contact for further information

  and

- a statement as to whether the shutdown or layoff will be temporary or permanent and, if a plant is being closed, a statement to that effect

  and

- the expected date of the first employment losses, along with a schedule of any further anticipated employment losses

  and

- the job titles of positions to be affected and the number of affected employees in each classification

  and

- a statement as to whether or not bumping rights exist

  and

- the name of each union representing affected employees and the name and address of the chief officer or representative of each union.

It may not always be possible for an employer to identify the exact date a closing or layoff will occur 60 days in advance. In such circumstances, WARN permits the employer's notice to identify a 14-day period during which the closing or employment loss will occur.

Inadvertent or minor errors in the employer's WARN notice do not violate WARN, but notices should be as accurate as possible under the circumstances. In addition, an employer may use any reasonable method to deliver the WARN notice, if the notice is received 60 days before the covered closing or layoff. However, verbal notices and pre-printed notices provided with or as part of an employee's pay-stub do not satisfy WARN.

The 60-day period begins to run on the date the notice was received by the employee or union representative. Thus, it is prudent for employers who mail WARN notices to verify that the affected employees or union representative actually received the notice.

Extension of WARN notice

Occasionally, a planned closing or layoff may occur later than originally planned and may be extended beyond the specific date or two-week period identified in the WARN notice. If the closing or layoff is postponed for less than 60 days, additional notice should be given by the employer as soon as possible. The notice should make reference to the earlier notice, state the new date when the closing or layoff will begin and provide the reason for the postponement. If the closing or layoff is delayed for more than 60 days, WARN requires an employer to provide a new notice. The additional notice should be treated as an entirely new notice and comply with the requirement.

Closings and layoffs resulting from the sale of a business

WARN can apply when an employer sells all or part of its business, including asset sales. As a general rule, WARN will apply if a plant closing or mass layoff results from the sale. In such a case, the seller is responsible for providing notice of a closing or layoff that will occur up to and including the effective date of the sale (the closing date). The buyer is responsible for providing notice of a closing or layoff that will occur after the effective date of the sale. For example, if employees are terminated without notice at the instant the sale becomes effective, the seller is the liable party under WARN.

If the buyer offers an employee a similar position with similar terms and conditions of employment and the employee declines the offer, WARN is not implicated. This situation is considered a voluntary departure. However, if the job would encompass significant changes in the employee's job duties, wages, benefits or working conditions, the offer may be deemed to constitute a constructive discharge and WARN will apply.

Bankruptcy and WARN

WARN does not apply to a bankruptcy trustee who is solely engaged in wrapping up the employer's business. There are, however, two situations where WARN would apply to an employer who files a petition for bankruptcy and then implements a plant closing or layoff. First, where an employer knew about or anticipated the closing or layoff before filing the bankruptcy petition, the employer cannot escape WARN liability because of the bankruptcy filing. Second, WARN will apply to an employer who, after the filing of the bankruptcy petition, continues to run the business in bankruptcy (for example, a debtor in possession). In such cases, after a bankruptcy petition has been filed, any WARN claim must be filed in bankruptcy court instead of district court.

Consequences for failing to provide notice

WARN is enforced through the United States federal court system. Affected employees, union officials and local government authorities each have standing to file a civil suit against an employer for WARN violations. An employer may be sued in the federal district where the violation occurred or in a federal district where the employer conducts business.

The penalties under WARN for failing to give timely notice are:

- back pay to each affected employee for a period of up to 60 days during which notice was not given (but in no event for more than one-half the number of days the employee was employed by the employer)

  and

- lost benefits to each affected employee for up to 60 days during which notice was not given

and

- reasonable attorneys' fees and costs to the prevailing party.

An employer's WARN liability may be reduced by any wages paid by the employer to the displaced worker during the violation period and by any voluntary and unconditional severance payment that is not required by an existing legal obligation. Thus, an employer is not entitled to a reduction for any payments required by a pre-existing severance plan or for any severance payment provided in exchange for a release. However, a properly drafted release that specifically waives an employee's claims under WARN may preclude the employee from obtaining monetary damages or other relief against the employer under WARN.

Because an employer's failure to provide WARN notice frustrates and undermines the purposes of WARN, WARN does not recognize or authorize payment in lieu of notice. However, since an employer's maximum liability under WARN is 60 days of unpaid back pay and benefits, an employer who provides its employees with full pay and benefits for the 60-day violation period effectively precludes any relief against it under WARN. As discussed above, severance payments required by a legal obligation cannot be deducted from an employer's back pay liability and would not serve as payment in lieu of notice.

If an employer fails to provide WARN notice to the chief elected official of the local government unit, the employer is subject to a penalty of $500 for each day of the violation. However, the employer may avoid this penalty if it satisfies its liability to each affected employee within three weeks from the date of the covered closing or layoff. The penalty may also be reduced or eliminated at the court's discretion if the employer acted in good faith and reasonably believed that its failure to give notice did not violate WARN.

WARN specifically prohibits courts from authorizing injunctive relief (meaning the court cannot order an employer to take, or to refrain from taking, certain action). Therefore, employers cannot be required under WARN to stop or delay a plant closing, or refrain from relocating operations or laying-off employees. WARN requires only that the employer provide 60-days advance notice of the closing or layoff or provide full back pay and benefits to affected employees for each day the employer failed to give notice, up to 60 days.

Interaction with other laws

An employer's obligations under WARN generally cannot be reduced by any law or agreement. WARN supersedes state or local plant closing/mass layoff laws and collective bargaining agreements. WARN does not, however, supersede any law or agreement that requires additional notice or that grants additional rights and remedies. For example, if a collective bargaining agreement requires an employer to provide written notice to the union 75 days before a plant closing or layoff, the agreement complies with WARN because it satisfies WARN's 60-day notice requirement. If, however, a collective

bargaining agreement establishes a 45-day notice period, WARN will supersede this provision of the bargaining agreement, and WARN's 60-day notice provision will apply.

Where to go for more information

For further information on WARN, please visit the U.S. Department of Labor's website at:

- www.dol.gov/dol/compliance/comp-warn.htm

where you may review the specific text of the law itself, the preamble to the WARN regulations and the WARN regulations. General questions and requests for related information on WARN may be addressed to:

U.S. Department of Labor
Employment and Training Administration
Office of National Response
Division of Worker Dislocation and Special Response
200 Constitution Ave, NW
Room N5422
Washington, DC 20210
(202) 693-3519

For further information on how to contact your state Rapid Response Dislocated Worker Unit, please visit

- www.doleta.gov/layoff

or contact the Employment and Training Administration's National Toll-Free Hotline at 1-877-US-2JOBS. Employers in Georgia should contact:

Employment Services Division
Georgia Department of Labor
148 Andrew Young International Boulevard, Suite 440
Atlanta, GA 30303-1751
(404) 656-6380
Fax: (404) 657-8285

Chapter 23

Family and medical leave

The Family and Medical Leave Act (FMLA) allows eligible employees to take up to 12 weeks of unpaid leave to recover from illness or pregnancy, to care for sick family members, or, as part of the recent changes to FMLA regulations, for qualifying exigencies arising out of the fact that the employee's spouse, child, or parent is on, or has been notified of an impending call to, active duty with the Armed Forces. New laws amended the FMLA in 2009, by, among other revisions, increasing employer notice requirements and allowing eligible employees to take up to a combined total of 26 workweeks to care for a sick or injured current member of the Armed Forces. Employers covered by the FMLA are required to grant such leave and reinstate the employee to the same or an equivalent position upon timely return from FMLA leave. Because of the complexity of the statute and its corresponding regulations, employers have had great difficulty discerning when an employee is entitled to leave and the conditions that may be placed upon such leave.

Georgia does not have any state laws that require unpaid leave for an employee with a serious health condition, a new child, a family member with a serious health condition, or because of a qualifying exigency. Therefore, covered employers are subject to only the FMLA, and employers not covered under the FMLA are not required to grant leave to any of their employees. Likewise, employees who are not eligible for protection under the FMLA, even where their employer is covered under the FMLA, are not entitled to any further protections under Georgia state law.

Who is covered

Private employers

A private employer is covered under the FMLA if the employer employs 50 or more employees each working day for 20 or more **full** (not necessarily consecutive) calendar workweeks in the current or preceding calendar year. Once a private employer satisfies the 50-employee and 20-workweek thresholds, the employer remains covered until it no longer employs at least 50 employees during 20 non-consecutive workweeks in both the current and preceding calendar years.

The definition for "employee" under the FMLA is relatively broad and includes:

- employees on the payroll even if no compensation is received (for example, between assignments as a temporary employee)
- employees on leave if there is a reasonable expectation that they will return
- part-time employees.

Public employers

All public employers and educational agencies are covered under the FMLA, regardless of whether they meet the private employer threshold requirements.

Employees

For an employee to be entitled to FMLA leave, the employee must have worked for a covered employer (public or private) for at least 12 months (these 12 months do **not** need to be consecutive) and worked at least 1,250 hours during the 12-month period that immediately precedes the start of the FMLA leave. These eligibility requirements are calculated as of the date the employee **begins taking** leave, and not from the date the employee **requests** leave.

The employee must also be employed at a location where the employer employs at least 50 employees within a 75-mile radius of the job site where the employee requesting leave is employed. These requirements are calculated from the date the employee **requests** leave.

Leave requirements

An employee need not specifically request protection under the FMLA. Rather, the employee must only provide notice and a qualifying reason for requesting leave to the covered employer. A covered employer must provide an eligible employee with up to 12 weeks of unpaid leave during any 12-month period for any of the following reasons:

- the birth of a child, and to care for the newborn child within one year of birth
- the placement of a child with the employee for adoption or foster care, and to care for the newly placed child within one year of placement
- to care for a child, parent or spouse who suffers from a serious health condition, which may include either physical or psychological care
- a serious health condition that makes the employee unable to perform one or more of the essential functions of the job
- for a qualifying exigency arising out of the fact that employee's spouse, son or daughter (of any age), or parent is on active duty or call to active duty status.

A covered employer must provide an eligible employee with up to 26 weeks of unpaid leave during a single 12-month period to care for a current member of the Armed Forces (including National Guard and Reserves) with a serious injury or illness incurred in the line of duty on active duty.

For purposes of military caregiver leave – a "serious injury or illness" is one that may render the service member medically unfit to perform duties and for which he or she is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the military's temporary disability retired list.

For purposes of leave based on a qualifying exigency – a qualifying exigency may include:

- a short-notice deployment
- military events and related activities
- childcare and school activities
- financial and legal arrangements
- counseling; rest and recuperations
- post-deployment activities and additional activities

provided that the employer and employee agree that such leave shall qualify as an exigency and agree to both the timing and duration of such leave.

If spouses work for the same employer, the FMLA entitles them to an aggregate of 12 weeks of leave per 12-month period for birth, adoption, foster care or to care for a sick parent. Each spouse, however, is entitled to the remainder of his or her 12-week entitlement for any other qualifying leave.

Calculating the twelve-month period

Employees are entitled to 12 weeks of FMLA leave during any 12-month period. The 12-month period may be calculated by any of the following methods:

- a calendar year
- a fixed 12-month period, such as a fiscal year or year that renews on the employee's anniversary date (the date the employee was hired or deemed a permanent employee)
- a 12-month period counted forward from the first day the employee takes leave
- a rolling 12-month period measured backward from the date the employee uses any FMLA leave

- for employees on military care giver leave (who are entitled to 26 workweeks in a single 12-month period) the single 12-month period begins on the first day of leave, regardless of how the employer calculates the 12-month period for other FMLA leave.

Most employers prefer the rolling method or the counting forward method because such methods prevent an employee from joining multiple leave periods together by taking 12 weeks of leave at the end of a calendar year and then 12 weeks of leave at the beginning of the next calendar year for a total of 24 consecutive weeks.

The employer must designate which method it wishes to use to calculate the 12-month leave periods and apply the method uniformly and consistently. If the employer fails to select a method and notify the employees of which method applies, the method most beneficial to the employee will apply. If an employer changes methods, it must notify employees at least 60 days in advance of implementing and enforcing such change.

Intermittent leave and reduced leave schedule

The FMLA defines "intermittent leave" as leave taken in separate blocks of time due to a single qualifying condition. A "reduced leave schedule" is a change from full-time to part-time employment. An employee is entitled to take intermittent FMLA leave or reduced leave where it is "medically necessary" to care for a serious health condition of the employee or the employee's immediate family member. An employee may take intermittent or reduced schedule leave for a service member's illness or injury if there is a medical need for leave that is best accommodated through intermittent leave. An employee may also take intermittent leave for a qualifying exigency arising out of the active duty status or call to active duty of a covered military member.

With respect to intermittent FMLA leave or reduced leave related to the adoption or birth of a child, however, an employee can take such leave **only** with the employer's consent.

If an employee has made a request for intermittent leave or a reduced leave schedule, an employer is entitled to temporarily transfer employees to an "alternative position" for the duration of the intermittent or reduced leave, provided that the employee:

- receives equivalent pay and benefits

  and

- is returned to his or her prior position after the period of leave has ended.

Benefits may be reduced proportionate to the number of hours worked only if such reduction is normal practice.

Serious health condition

The FMLA defines the term "serious health condition" as an illness, impairment or physical or mental condition involving one of the following:

- inpatient care at a hospital, hospice or residential medical care facility

  or

- continuing treatment by a health care provider, which is defined as:

  - **Absence plus treatment**
    Period of incapacity of more than three consecutive days that also involves either two or more treatments by a health care provider or treatment by a health care provider which results in a regimen of continuing treatment and supervision.

    - "Incapacity" is the inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment for the serious health condition or recovery from the serious health condition.

    - "Treatment" includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations or dental examinations.

    - A "regimen of continuing treatment" includes, for example, a course of prescription medication (for example, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (for example, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications (such as aspirin, antihistamines or salves); bed rest, drinking fluids, exercise, or other similar activities that can be initiated without a visit to a health care provider is not alone sufficient to constitute a regimen of continuing treatment for purposes of the FMLA.

  - **Pregnancy**
    A period of incapacity due to pregnancy or for pre-natal care, including severe morning sickness.

  - **Chronic conditions requiring treatment**
    Any period of incapacity due to a chronic condition requiring treatment. A chronic serious health condition is one that:

    - requires periodic visits or treatments by a health care provider

and

- continues over an extended period of time

and

- may cause episodic periods of incapacity.

Treatment or a visit to a health care provider is not required for every absence. Examples of chronic conditions requiring treatment are diabetes and asthma.

- **Permanent or long-term conditions requiring supervision**
  A period of incapacity for permanent or long-term conditions requiring supervision and involving treatments which may not be effective. Examples of such conditions are Alzheimer's disease and terminal cancer.

- **Multiple treatments for non-chronic conditions**
  A period of absence to receive multiple treatments by a health care provider for a condition that would likely result in incapacity for more than three consecutive calendar days if left untreated. Examples of such treatments include chemotherapy, radiation treatments and physical therapy.

Several types of illnesses or injuries are specifically excluded from the definition of serious health condition in the regulations. Some examples include the following:

- Absence because of substance abuse itself will not qualify an employee for FMLA leave. However, substance abuse may be a "serious health condition" if the other conditions are met, and FMLA leave may be taken for treatment of substance abuse by a health care provider such as enrollment in a drug rehabilitation program.

- Cosmetic treatment will not qualify an employee for FMLA leave unless inpatient hospital care is required or complications develop.

- Ordinarily, common cold, flu, earaches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems and periodontal disease will not qualify an employee for FMLA leave. However, like the other examples, any of these illnesses or conditions may be classified as a serious health condition if complications arise or any of the other conditions are met.

Health care provider

The Act defines "health care provider" as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices, or any other person determined by the Secretary of Labor to be capable

of providing health care services. The regulations include in this definition podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray) who are authorized to practice in the state. Also included are nurse practitioners, nurse mid-wives, clinical social workers and physician assistants who are authorized to practice in the state and performing within the scope of their practices as defined under state law.

Maintenance of benefits during leave

While the Act does not require a covered employer to pay employees during FMLA leave (unless the employer requires substitution of paid leave – see page 284, discussing substitution of paid leave in **Designation notice requirements**), the employer must continue to provide eligible employees any employment benefit that they may have accrued prior to beginning FMLA leave. If benefits are added or changed during the leave, the employee is also entitled to those modifications. The key here is that the employee maintains the benefits under the same conditions as those existing before the leave.

For example, a covered employer must continue to provide coverage under its group health plan to the employee during the leave period under the same terms as if the employee continued employment. If employees regularly pay a portion of the insurance premiums, an employee should continue to make such payments while on leave. Even if an employee does not pay his or her portion of premiums during leave, the employer should pay the premiums on the employee's behalf and attempt to recoup payment upon the employee's return. If the employee returns to work following the leave period, the employee is immediately entitled to reinstatement of insurance coverage. If the employee fails to return to work, an employer is entitled to recover premiums paid for maintaining coverage so long as the failure to return is not due to a serious health condition of the employee or other circumstances beyond his or her control. Although a covered employer's FMLA obligations end when the employment relationship ends, the employer may still have obligations to maintain health benefits as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) or Georgia law. For more information see Chapter 30, **Health care continuation**.

Employees also may not be excluded from perfect attendance bonuses, safety bonuses or similar bonuses because they are on FMLA leave. Similarly, an employee on FMLA leave will remain entitled to any unconditional pay increases granted during the leave.

An employee, however, is **not** entitled to the accrual of any seniority or employment benefits during the period of leave. For example, if an employee's bonus or pay increase is calculated based on work time or accrued earnings, the employee has not accrued such hours or earnings during the leave period and, therefore, an employer can pay the employee a lesser amount than other employees. However, any hours or earnings accrued at the time the leave began must be used toward calculating such bonuses or pay increases upon the employee's return from FMLA leave. Similarly, unpaid FMLA leave periods

need not be treated as credited service for purposes of benefit accrual, vesting or eligibility to participate in pension or other retirement plans.

Reinstatement after leave

Within a reasonable time after the employee is able to return from FMLA leave, the employer must restore the employee to his or her former job or to an "equivalent" position. An "equivalent" position is one that is virtually identical to the employee's former position in terms of pay, benefits, working conditions, duties, skill, authority, privileges and status. The position must be in the same or geographically similar worksite with an equivalent work schedule and shift.

If an employee is unable to perform an essential function of the position because of a physical or mental condition, the employee has no right to be restored to another position under the FMLA. In many circumstances, however, the Americans with Disabilities Act (ADA) may dictate further obligations for the employer. (See Chapter 19, **Disabilities and reasonable accommodation**.)

A reinstated employee has no greater entitlement to reinstatement or, as previously discussed, other benefits and conditions of employment, than if the employee had been continuously employed during the leave period. For example, if the employee's position was eliminated in a nondiscriminatory reduction in force, the employee informs the employer that he or she does not intend to return to work, or the employee fails to return after exhausting FMLA benefits, the employer's FMLA obligations end. An employer has the burden to prove that an employee would have been terminated if the employee had not taken FMLA leave in order to deny restoration to employment.

An exception to the FMLA's reinstatement requirement permits employers to exclude salaried employees who are among the highest paid 10 percent of all employees (both salaried and non-salaried) in the employer's workforce within 75 miles of the facility where the employee works. This exception, referred to in the regulations as the "key employee" exception, permits an employer to refuse reinstatement if:

- the employer informs the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a "key employee" and advises the employee of the potential consequences of this status

  and

- the employer subsequently determines that reinstatement (not the absence) would cause "substantial and grievous economic injury" to the employer's operations

  and

- the employer notifies the employee of its intent to deny reinstatement at this time

and

- upon receiving a request to return to work, the employer confirms the determination and notifies the employee that reinstatement has been denied.

Employee notice requirements

Where an eligible employee plans to take foreseeable leave in the case of expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition, or military caregiver leave, the employee must provide at least 30 days notice of the employee's intention to take leave before leave is to begin. If the employee fails to give 30 days notice for a foreseeable leave with no reasonable excuse for the delay, the employer may deny the taking of leave until at least 30 days after the employee provides notice, provided that the employee had actual notice of FMLA notice requirements. If the employee intends to take leave in less than 30 days or otherwise changes the start date, the employee must provide notice "as soon as practicable," which ordinarily may be satisfied by at least verbal notification to the employer, within one or two business days of when the need for leave becomes known to the employee. If an employee takes leave for planned medical treatment, the employee must make a reasonable effort to schedule the treatment in a manner that will not unduly disrupt the employer's operations, subject to approval by a health care provider.

Where the employee takes unforeseeable leave, the employee must provide such notice as is practicable, or within two or three working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.

The employee need not specifically assert rights under the Act or even mention the FMLA, but may provide adequate notice by only stating that leave is needed for a potentially FMLA-qualifying reason. As soon as the employee informs the employer that an absence may potentially qualify under the FMLA, the employer has the burden to determine whether the leave is actually for an FMLA-qualifying reason. The employer may request medical certification (see page 285, **FMLA certifications**) to determine if the reason for the leave qualifies as a serious health condition.

An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. However, if a collective bargaining agreement, state law or an employer's leave plan provides for lesser notice requirements, an employer cannot require compliance with the stricter FMLA requirements. Georgia does not require more liberal employee notice requirements.

Employer's notice requirements

One of the most significant changes under the new FMLA regulations is the "notice requirements" an employer owes to its employees. In an effort to clarify an employer's obligations, the regulations have divided the notice requirements into four separate categories.

General notice requirements

To comply with the FMLA's general notice requirements, employers must post and distribute general notice of an employee's rights under the FMLA.

- **Poster**
  Covered employers are required to post notice of FMLA rights conspicuously and prominently (even if there are no eligible employees at a particular worksite). Electronic posting is sufficient to meet the posting requirement if all employees have access to a computer. If a significant portion (usually ten percent) of the workforce is not literate in English, the posting must be in the language in which the employees are literate. Employers in violation of FMLA's posting requirements may suffer civil penalties of up to $110 per violation and forfeit their rights to take adverse action, including denying FMLA leave, against employees who fail to satisfy posting requirements for taking FMLA leave. Employers can obtain copies of the new mandatory FMLA poster that reflects the recent FMLA amendments through the U.S. Department of Labor website:
    - www.dol.gov.
- **Policy**
  Covered employer who have any eligible employees, must provide general notice of FMLA rights to each employee by including it in employee handbooks, or if there is no handbook, by distributing a copy of the general notice to each new employee upon hiring. Distribution of the FMLA policy can also be done electronically. Employers may duplicate the text of the DOL's notice which may be obtained from the DOL or the local offices of the Georgia Department of Labor.

Eligibility notice requirements

The Eligibility notice is a notice that employers must give employees who request leave or need leave informing them whether they meet the eligibility requirements of the FMLA (for example, length of employment, number of employees within a 75-mile radius). It does not inform the employee whether or not the reason for leave has been approved (for example, whether or not the employee's condition is a serious health condition or whether the employee has a qualifying exigency).

- **Timing of eligibility notice**
  When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA within five business days.

- **Content of eligibility notice**
  The eligibility notice must state whether the employee is eligible for FMLA leave. If the employee is not eligible for FMLA leave, the eligibility notice must state at least one reason why the employee is not eligible, including (as applicable) the number of months the employee has been employed by the employer or the number of hours of service the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. While notification of eligibility may be oral or in writing, it is recommended that employers provide written notice in order to demonstrate that the notice was provided.

Rights and responsibilities notice requirements

The rights and responsibilities notice is a notice that provides employees who need FMLA leave with general information about their rights and responsibilities under the FMLA. An employee must be given a rights and responsibilities notice each time an eligibility notice is given. A rights and responsibilities notice must include the following information:

- that leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying, and the applicable 12-month period for FMLA entitlement

- any requirements for the employee to furnish certification of a serious health condition, serious illness or injury, or qualifying exigency arising out of the active duty or call to active duty status, and the consequences of failing to do so

- the employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, conditions related to any substitution, and the employee's entitlement to unpaid FMLA leave if the employee does not meet conditions for paid leave

- any requirement for an employee to make any premium payments to maintain health benefits and arrangements for making such payments, and the consequences of failure to make such payments on a timely basis

- employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial

- employee's right to maintenance of benefits during the FMLA leave and restoration into the same or an equivalent job upon return from FMLA leave

- the employee's potential liability for payment of health benefits paid by employer during employee's unpaid FMLA leave if the employee fails to return to work after leave.

Designation notice requirements

The designation notice is a notice that the employer must give employees who have requested or need FMLA leave informing them whether that leave has been approved and will be counted as FMLA leave.

- **Timing**: When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee whether the leave will be counted as FMLA leave within five business days.

- **Form and content of notice**: The designation notice must be in writing and must notify the employee that the employer has determined that the leave does or does not qualify for FMLA.

    - **Substitution of paid leave** – If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave be taken under existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

    - **Fitness for duty certification** – If the employer will require the employee to present a fitness for duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice, and must include a list of essential job functions. If the employee handbook describing the leave policy clearly provides that a fitness for duty certification is required in specific circumstances, written notice is not required, but the employer must give oral notice no later than with the designation notice.

    - **Amount of leave counted as FMLA** – The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement.

Recordkeeping requirements

The FMLA imposes strict record-keeping requirements. Covered employers must make, keep, and preserve records pertaining to their obligations under the Act in accordance with section 11(c) of the Fair Labor Standards Act (FLSA) and FMLA regulations. Employers must keep records for at least three years and make them available for inspection, copying and transcription by the Department

of Labor upon request. Employers must maintain records of the following information:

- basic payroll and employee identification data
- dates of FMLA leave
- if FMLA leave is taken in increments of less than a day, the hours of leave
- copies of employee notices of leave and copies of general and specific notices given to employees
- documents describing employee benefits and employer policies and practices regarding the taking of paid and unpaid leave
- premium payments of employee benefits
- records of disputes between the employee and employer regarding designation of FMLA leave.

Information relating to medical certifications, recertifications, or medical histories of employees or family members (created for the purpose of FMLA leave) must be maintained as confidential medical records in separate files from the usual personnel files.

FMLA certifications

When an employee submits a request for FMLA leave related to a serious health condition, an employer may require the employee to submit a medical certification form, signed by a health care provider, indicating that the employee (or the employee's family member) does in fact suffer from a serious health condition. Normally, an employer should make the request for written certification within two days of receiving notice of leave from the employee and can provide the employee with 15 days to respond to the request by certification, or as soon as reasonably possible due to the circumstances.

Once the employee has submitted a complete and sufficient medical certification, the employer cannot request additional information from the health care provider. However, the employer's human resources department or leave administrator (not the employee's supervisor) can contact the health care provider after the employee has been given the opportunity to cure any deficiencies in order to authenticate or clarify certification. If the employer has reason to doubt the validity of the certification, then it may require the employee to obtain a second or third opinion from another health care provider at the employer's expense, provided that the health care provider is not employed by the employer on a regular basis. Upon request, employers must provide an employee with copies of second and third opinions within five business days.

Certification is generally sufficient if it states the date on which the serious health condition commenced, the probable duration of the condition, the appropriate medical facts within the

knowledge of the health care provider regarding the condition and a statement that the employee is unable to perform the functions of the employee's position.

Employers may also require employees to submit a timely, complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency or for military caregiver leave due to a serious illness or injury. Sample forms are provided on the U.S. Department of Labor's website:

- www.dol.gov.

Enforcement

The statute and regulations governing family and medical leave are enforced by the Wage and Hour Division of the United States Department of Labor's Employment Standards Administration. Most violations of the FMLA are the result of employer confusion in interpreting and implementing the Act, as opposed to willful violations. Common violations committed by employers include the following:

- failure to notify an employee of his or her FMLA rights
- failure to notify an employee that leave counted towards the 12-week FMLA entitlement
- failure to grant leave to provide care to a family member with a serious health condition
- termination of an employee during or at the conclusion of FMLA leave.

An eligible employee may file a private civil action against an employer in state or federal court for FMLA violations. An employee must file such lawsuit within two years of the date of the alleged violation for ordinary damages, or within three years for willful violations. Unlike other civil rights statutes, an employee enforcing his or her rights under the FMLA is not required to file a complaint with the Wage and Hour Division prior to filing a civil lawsuit, although such employee is entitled to do so.

Chapter 24

Military leave

The Uniformed Services Employment and Reemployment Act (USERRA) establishes certain rights for employees of private employers who serve in the uniformed services. Specifically, USERRA prohibits private employers from discriminating or retaliating against such employees based on their uniformed service and ensures that those employees receive certain benefits and reemployment rights, as well as limited protection from termination, upon return from military leave. Regulations issued by the DOL's Veterans' Employment and Training Service, provide additional guidance on various provisions of USERRA.

Georgia also has a military leave statute which offers certain protections to employees who are absent from work due to military leave. The state law protects any private employee who serves in the state militia, the reserve component of the armed forces of the United States or the Georgia National Guard, or who attends military schools for a limited period of time.

This chapter provides a summary of USERRA's provisions, with references to Georgia law where it differs from USERRA.

Covered employees

USERRA

Any person who is a member of the "uniformed services" of the United States (or who applies to be a member of the uniformed services) is entitled to protection from discrimination or retaliation under USERRA. In addition, persons who are absent from their regular employment due to "service in the uniformed services" are entitled to certain reemployment rights and benefits.

The term "uniformed services" is broad and includes:

- all branches of the United States armed forces (including both the active and reserve components of the Army, Navy, Air Force, Marine Corps and Coast Guard)
- the Army National Guard and Air National Guard, when members are engaged in active duty training, inactive duty training (such as weekend drills), or full-time duty
- the commissioned corps of the Public Health Service and any other category of persons designated by the President in time of war or national emergency.

The phrase "service in the uniformed services" is defined as the performance of a duty on a voluntary or involuntary basis in a uniformed service, and includes:

- active duty
- active duty training
- inactive duty training
- full-time National Guard duty
- absence for an examination to determine fitness for duty
- absence for the purpose of performing funeral honors duty by the National Guard or reserve members.

USERRA does not protect employees who leave civilian employment to pursue a full-time career in the military.

Unlike some federal employment statutes, under USERRA, there is no minimum amount of time that an employee must work for the employer to be eligible for USERRA-protected leave. In fact, USERRA provides rights and protections to part-time and probationary employees and even to job applicants of private employers. However, USERRA does not cover temporary employees who are hired for a brief, non-recurrent period, where there is no expectation that the employment would continue for an indefinite or significant period of time.

Georgia National Guard

Georgia's military leave law protects individuals who perform military service in the Reserves or in the state's organized militia, such as the Army National Guard, the Air National Guard, the Georgia Naval Militia, and the State Defense Force. In addition, Georgia law provides limited protections for persons who participate in assemblies or annual training of the state militia, persons who attend service schools conducted by the U.S. armed forces, and persons who are called for active service in the Georgia National Guard.

Covered employers

USERRA applies to virtually all employers in the United States, including private companies, tax-exempt entities, and federal, state, or local governments and agencies. There is no exception for small employers. In addition, some courts have even found that individuals may be liable for discrimination or retaliation under USERRA.

Going out on military leave

USERRA requires all employers to allow covered employees to be absent from work to provide service in the uniformed services. Employees are protected by USERRA not only for the time that they are actually out on military leave, but also for the time taken off from work to travel to and from military duty. Employers are very limited in the restrictions that they can place on an employee's ability to take a military leave of absence.

Employers must allow an employee to take a military leave of absence. Employees must be excused from work to attend inactive duty training (such as weekend drills or annual military training summer camp) or other service in the uniformed services, as long as the employee has not exceeded five years of cumulative service for such leave.

Employee obligations

An employee is responsible for notifying the employer of his or her military obligation.

An employee is not required to submit official documentation of his or her military orders at the time the employee requests the military leave of absence because military orders are often issued on an informal basis. For example, the military rarely issues formal, written orders for inactive duty training (weekend drills). Nevertheless, any orders issued by competent military authority are considered valid.

An employer may not require an employee to reschedule drills, military training, or other military duty obligation to suit the employer's needs. However, when military duties require an employee to be absent from work for an extended period, during times of acute business need or when the requested military leave is unduly burdensome for the employer, the employer may contact the commander of the employee's unit to determine if the duty could be rescheduled or performed by another service member. If the commander determines that the employee's military duty cannot be rescheduled or performed by another service member, the employer must permit the employee to perform his or her military duty.

An employee is not required to find someone to cover his or her work duties during the employee's absence from work.

Returning from military leave

USERRA requires that a private employer reemploy eligible employees who have served in the uniformed services, subject to certain conditions. USERRA also contains detailed provisions concerning the position into which an employee must be placed upon his or her return from military leave.

Eligibility for reemployment

Under USERRA an employee who takes a military leave of absence must meet six eligibility criteria in order to be entitled to the reemployment rights and benefits of USERRA:

1. The employee must be absent from civilian employment due to service in the uniformed services (as defined above).

2. The employee must give timely advance written or verbal notice of his or her intention or obligation to serve, unless that notification is impossible due to military necessity or another reason outside the employee's control.

3. The employee's cumulative absence(s) from that employer due to military service must not exceed a total of five years. However, this five-year period does not include any:

    - service that is required beyond five years to complete an initial period of obligated service

    - service during which the employee is unable to obtain discharge orders through no fault of the employee

    - service required by the military for drills, annual training, or completion of skills training

    - involuntary active duty during domestic emergency, national emergency, war, or national security situations

    - service performed in support of an operational mission for which selected reservists have been ordered to active duty or a critical mission

    - federal service by members of the National Guard when called by the President to suppress an insurrection, repel an invasion, or execute federal law.

4. The employee must be honorably discharged from service. An employee who is separated from the military due to a dishonorable or bad conduct discharge or who is dropped from the military rolls or separated under less than honorable conditions is not entitled to reemployment rights or benefits under USERRA.

5. The employee must report for work or submit an application for reemployment within the following time periods depending on the length of military leave:

    - **Military leave of less than 31 days**
      The employee must **report** for work by the beginning of the first full regularly scheduled work period on the first full calendar day following

eight hours after the employee has returned home from military service, allowing a reasonable time to commute home from service.

- **Military leave of 31 to 180 days**
  The employee must apply not later than 14 days after completion of military service.

- **Military leave of more than 180 days**
  The employee must apply not later than 90 days after completion of military service.

- **Military-related injury or illness**
  Persons who suffered an illness or injury which was caused or aggravated by military service must report for work or submit an application for reemployment within the time periods listed above, after their period of recovery has ended, which cannot exceed two years from the date of the end of military service.

6. Upon request from the employer, an employee who has been absent from work for more than 30 days must provide documentation from the relevant branch of the uniformed services establishing the preceding criteria for reinstatement. Employers should note, however, that a failure to provide documentation cannot be a basis for denying employment if the documentation does not exist or is not readily available to the employee at that time. An employer should return the employee to work pending receipt of the requested documentation. If the documentation does become available and the employee does not meet the criteria for reinstatement, the employer may terminate the employee. An employer may not, however, delay reemployment by demanding documentation that does not then exist or is not then readily available.

Apply for reinstatement

USERRA does not define what it means to submit an application for reemployment. While a formal application is probably not necessary, something more than a mere inquiry concerning employment is usually required. For example, courts have found that an employee who simply asked his employer about conditions at the plant and another employee who asked for an application from the employer's security guard did not apply for reemployment under USERRA.

The employer is not permitted simply to terminate an employee who fails to return to work within the deadlines outlined above. If an employee fails to meet the USERRA reapplication deadlines, she will be subject to the employer's standard explanation requirements and disciplinary procedure for employees who are absent for scheduled work.

Exceptions to employers' obligation to reemploy

The employer is not obligated to reemploy a person returning from military service if:

- The employer's circumstances have changed sufficiently so as to make reemployment impossible or unreasonable (for example, when there was an intervening reduction in force that would have included the employee). An employer will always carry the burden of proving that its circumstances have changed sufficiently so as to make reemployment impossible or unreasonable. An employer cannot meet this burden simply by showing that another person has been hired to fill the position vacated by the veteran or that no opening exists at the time of the reapplication. Reemployment of the returning veteran must be more than inconvenient or undesirable in order for this exception to apply.

- Reemployment would cause an undue hardship on the company, such as where:

    - the returning employee has a disability incurred in, or aggravated during, service

      or

    - if the person is no longer qualified to be employed in the position to which she would have been reinstated and cannot become qualified with reasonable efforts by the employer to accommodate that person in any position nearest to that position.

- The employee's prior job with the employer was only for a brief, non-recurrent period, and there was no reasonable expectation by the employee at the time of departure that employment would continue for an indefinite or significant period of time.

Position to which the employee is assigned upon return from duty

Except with respect to persons whose disability occurred in or was aggravated by military service, the position into which an employee is reinstated is determined by priority, based on the length of military service (excluding travel):

- **Service of 1 to 90 days:**
  The employee must be reemployed:

    - Preferably in the position the person would have held if the military service had not interrupted his continuous employment (which may be a promoted position), so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer. To be "qualified" for a position, the serviceperson must be both physically and

emotionally capable of performing the duties of the position and working with co-workers and supervisors.

- If the person cannot become qualified for the above position, he should be reinstated to the position in which he was employed on the date of the commencement of the military service.

- If the person is not qualified for any of the above positions and cannot become qualified through reasonable efforts by the employer, he should be reinstated to any other position which is the nearest approximation to a position referred to above and which the person is qualified to perform.

- **Service of 91 or more days:**
  The employee must be reemployed:

  - Preferably in the position the person would have held if the military service had not interrupted his continuous employment (as long as the person is qualified for the job or can become qualified after reasonable efforts by the employer) or a position of like seniority, status and pay (as long as the person is qualified to perform the duties of the position).

  - If the person cannot become qualified for one of the above positions, in the position the person was employed on the date of the commencement of the military service or a position which nearly approximates that position.

  - If the person is not qualified for any of the above positions and cannot become qualified through reasonable efforts by the employer, he should be placed in any other position which is the nearest approximation to a position referred to above and which the person is qualified to perform.

  As stated above, the fact that another employee was placed in the serviceperson's former position does not render it impossible or unreasonable for the employer to reinstate the serviceperson. The employer is expected to accommodate a returning employee's right to his or her position, regardless of whether reinstatement would result in displacement of another employee.

Reinstatement

In Georgia, an employee who is absent for military service in the U.S. armed forces or Georgia's organized militia must be reinstated if:

- he receives a certificate of completion of military service from the appropriate officer

  and

- he is still qualified to perform the duties of the position

and

- he applies for reemployment within 90 days after he is relieved from such service.

An employee who either participates in assemblies or annual training of the state militia or attends service schools conducted by the U.S. armed forces for up to six months in any four-year period must be reinstated if:

- he is qualified for the position

  and

- he applies for reemployment within 10 days after completion of service.

An employee who is discharged or suspended by his employer because of **either** membership in the state militia or the U.S. reserves **or** active service in the Georgia National Guard must be reinstated if:

- he is qualified for the position

  and

- he applies for reemployment within 10 days after the discharge or suspension or the completion of service, whichever is later.

If the employee returning from military service meets the eligibility requirements for reinstatement, he must be restored to the same position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

Compensation

USERRA contains detailed provisions regarding the compensation that an employee is entitled to receive during military leave and upon return from military leave.

The employer is not required to pay the employee during military leave. However, under the Fair Labor Standards Act the employer cannot dock an **exempt** employee's pay for absences due to military leave in any workweek in which the employee performs **any** work for the employer. If an exempt employee works a partial workweek in the week military leave begins or ends, the employee must be paid for the entire week. In addition, if an exempt employee continues to do some work for the employer during military leave, by telecommuting or otherwise, the employee must continue to be paid. In all cases, the pay may be reduced by any military pay received. This reduced pay (the difference between military pay and the employee's civilian pay) is called differential pay. Some employers elect to pay differential pay even when it is not required. Other employers choose to provide a specific number of paid military leave days per year and pay differential pay only when required for exempt employees.

With respect to compensation after the employee returns from military leave, (see **Returning from military leave**, page 289), the employer is generally required to reinstate the employee in a position at the level of pay the employee would have achieved if the employee had never taken military leave. Pay includes all elements of compensation, such as salary, wages, commission, bonuses, shift premiums, hourly rate, and piece rate. Returning employees are also entitled to all seniority-based raises, as well as all merit-based raises that are consistently awarded to nearly all employees and which were granted during the period of military leave.

Benefits

USERRA contains detailed provisions regarding the benefits that an employee is entitled to receive during military leave and upon return from military leave. In order to be eligible for these benefits, the employee must meet the eligibility requirements of USERRA, as described above, namely:

- leaving work for temporary service in the uniformed services

  and

- providing proper notification prior to taking leave

  and

- returning to work within the required timeframe.

Health insurance benefits

USERRA includes specific rules for the provision of benefits under an employer-sponsored health plan, both during and after military leave. "Health plan" is broadly defined as an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided, or the expenses of such services are paid. This definition of health plan includes all health plans, regardless of the number of participants, the size of the employer or whether the employer is a government entity or church.

The employee and his dependents are entitled to re-enroll in the employer's health plan when the employee returns to work without any new waiting period, exclusions or pre-existing condition limitations. However, if the employee incurred an illness or injury during military leave and the Secretary of Veteran's Affairs determines that the illness or injury was incurred in or aggravated during service, that illness or injury may be subject to an exclusion or pre-existing condition limitation. A health plan can include a provision excluding from coverage an injury or illness incurred as a result of military service under those circumstances.

If the plan does not include such an exclusion, the plan's pre-existing condition limitations, if any, would apply – but, in all likelihood, the employee would have sufficient creditable coverage from TRICARE coverage (the military's health plan) to

eliminate the limitation. If the employee was in the middle of a waiting period or was subject to a pre-existing condition limitation at the commencement of military leave, that period is tolled during the military leave and resumes again when the employee returns to work.

The employer is not required to make employer contributions for health coverage for an employee or his family during military leave, although the employer may choose to do so. USERRA provides the employee with the right to elect to continue coverage upon the commencement of military leave in a manner similar to COBRA. Where COBRA applies to the employer, the employee could also elect COBRA continuation coverage. In addition, the employee's spouse may have a special enrollment right which would allow the family to be covered under the spouse's employer's health plan.

Continuation coverage

Under USERRA continuation coverage, if an employee and any dependents are enrolled in a health plan immediately prior to military leave, they have the option of remaining on the health plan for the lesser of:

- 24 months from the beginning of military leave

  or

- the period from the beginning of military leave to the day after the date on which the person fails to return to employment from military leave.

The employee may be required to pay up to 102% of the full premium for the coverage provided under the plan (calculated in the same manner as COBRA). But, if the period of service is for 30 days or less, the employee and his dependents must be maintained on the employer's health plan during the leave with an employee contribution no greater than that normally required of employees. There is no notice requirement for USERRA continuation coverage.

If COBRA applies to the health plan, COBRA is triggered by the beginning of military leave because of the employee's reduction in hours and the employer must provide COBRA notice. COBRA continuation coverage applies even though the employee and his family are eligible for coverage under TRICARE. This is an exception to the normal rule that eligibility under another employer's group health plan can cut off the right to COBRA continuation coverage.

In general, unless the spouse or a dependent is disabled, the employee and his family will receive the same coverage for the same cost under either COBRA or USERRA. In either case, if, during the military leave, the employee dies, becomes divorced or legally separated, becomes entitled to Medicare, or a dependent's status as a dependent under the plan terminates, the spouse and/or dependent, as applicable, will be entitled to elect COBRA coverage for a period of up to 36 months from the date of the employee's reduction in hours.

Because COBRA is triggered by the employee's reduction in hours at the commencement of military leave, **COBRA is not triggered by the employee choosing not to return to work at the end of the military leave**.

Special enrollment rights

USERRA also grants spouses of members of the uniformed services certain special enrollment rights in employer sponsored health plans. If a family loses health coverage because one spouse goes on military leave, and the spouse is otherwise eligible for coverage as an employee under another employer sponsored plan, rather than electing continuation coverage, the family could elect coverage under the non-serving spouse's employer's plan. This may be less expensive than electing continuation coverage if the spouse's employer pays a portion of the premium. The electing spouse must elect coverage within 30 days of losing eligibility for coverage under the initial plan to fall within the special enrollment provisions.

TRICARE

TRICARE, formerly known as CHAMPUS, is the military's health plan. A person reporting for a tour of active duty of 31 days or more will qualify for TRICARE coverage for himself and his dependents. Ongoing COBRA continuation coverage cannot be terminated because a reservist or his family receives or is eligible to receive health coverage under TRICARE.

Pension benefits

USERRA includes specific rules for employee pension benefit plans both during and after military leave. These rules apply to all employee pension benefit plans, whether they are defined benefit or defined contribution plans, including traditional pension plans, profit-sharing plans, 401(k) plans, 457 plans and 403(b) plans.

Military leave is treated as covered service with the employer for purposes of eligibility, vesting and accrual. The time an employee is on military leave does not constitute a break in service. Once the employee returns, the employee has the lesser of five years or three times the length of service to make contributions to the plan that the employee could have made during military leave. In addition, the employer has the same period to contribute an amount equal to the amount that would have been contributed during military leave, without taking into account either earnings or forfeitures. If matching contributions would have been made with respect to any employee contributions, had the employee contributions been made during the period of military leave, the employer is also obligated to make those contributions.

Employer/employee contributions

The employer is not required to, but could choose to, make employer contributions to an employee pension benefit plan on behalf of an employee who is on military leave. The employer is also not required to, but could choose to, allow the employee to make employee contributions during military leave.

Plan loans

If an employee borrowed against his or her employee pension benefit plan **prior** to commencing military leave, the Department of Labor requires that the interest rate on the loan be capped at six percent during the military leave, unless a court determines that the ability of the employee to make payments on the loan is not materially affected by the leave. Any borrowing **after** active duty begins is not affected by this law. The interest rate cap applies even if the employee has not complied with the previously described requirements of USERRA.

In addition to the interest rate cap, the plan may suspend the obligation to make payments on the loan during the period of military service, no matter how long. This is an exception to the normal rule that a suspension of repayment obligation during a leave of absence may only last for one year. In addition, the period in which the loan must be repaid is extended by the period of military service. The schedule of payments on the loan must conform to one of the amortization schedules approved by the Internal Revenue Service.

Other benefits

Benefits other than health and pension benefits are also addressed in USERRA. For USERRA purposes, benefits include "any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan or practice and includes rights and benefits under . . . an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment." Benefits have been found to include such things as:

- clothing allowance
- housing allowance
- law enforcement commission
- training.

Benefits during military leave

An employee on military leave is entitled to the same benefits as employees who are on furlough or another type of leave of absence during the same period. If different types of leave of absences or furloughs provide different benefits, employees on military leave are entitled to the most advantageous benefits provided under those other types of leave. Employees on military leave will be required to make the same employee contribution for benefits as employees on other types of leave. An employee on military leave is not entitled to any benefit that the employee would not be eligible for if not for the military leave. An employee on military leave would be entitled to accrue sick days during military

leave if persons on another type of leave are entitled to accrue sick days, because sick days are a benefit to which the employee is otherwise entitled. However, the employee would not be eligible to purchase stock under an employee stock purchase plan if the employee was not otherwise eligible to participate in the plan, even though other employees who satisfy the eligibility requirements are entitled to purchase stock under the plan during periods of leave.

- **Vacation or sick day accrual**
  The employer is not required to allow the employee to accrue vacation or sick days during military leave, unless employees on other types of leave are allowed to accrue vacation or sick leave. If vacation or sick leave is not accrued, but rather is allocated in one annual lump sum, then an employee on military leave on the allocation day should be granted the entire lump sum to the extent employees on other types of leave would receive the full benefit.

- **Vacation or leave time**
  The employer cannot require an employee to use vacation or leave time which the employee had previously accrued during military leave, unless all employees are required to use that leave time. If a plant shuts down every year for the week of Christmas and every employee is required to take vacation time during that one week period, any employees on military leave would also be required to take vacation time during that week.

  If an employee wants to take vacation or similar leave time while on military leave, the employer cannot refuse the request. If employees are allowed to accrue vacation or sick leave while taking vacation, the employee will accrue leave during any portion of the military leave in which the employee takes vacation. Taking vacation would be advantageous for an employee who is on military leave if the employer has a use-it-or-lose-it policy for vacation days. For instance, if the employee had accrued a week of vacation prior to going on military leave and could not use it before the military leave starts, he would risk losing it under the employer's use-it-or-lose-it policy. This employee could request use of this vacation time during the military leave. The employee would therefore be paid for the vacation time during the military leave and not entirely lose its value.

Benefits upon return from leave

The employee is entitled, upon return from military leave, to the seniority and all benefits **based on seniority** that the employee had immediately prior to military leave, plus the additional seniority and seniority-based benefits that the employee would have attained if the employee had been continuously employed with the employer during the military leave.

The employee is entitled, upon return from military leave, to all benefits that are **not based on seniority** in the same manner as any employee on **any** furlough or leave of absence upon return from leave. If the treatment of other types of leave varies, the returning employee is entitled to the most favorable benefits afforded another type of leave, regardless of the type of leave or if it is paid or unpaid. In no event is the employee entitled to any benefits to which the employee would not otherwise be entitled if not for the military leave. The employee returning from military leave will be required to make the same employee contribution for benefits as employees returning from other types of leave.

- **Vacation or sick day accrual**
  Once the employee returns to work, he is entitled to accrue the number of vacation and sick days per year that he would be accruing if he had remained in employment during the period of active duty. If employees with up to five years of service with the employer have two weeks vacation per year and employees with more than five years of service have three weeks, an employee who worked for the employer for four years before leaving for a two year tour of active duty would be entitled to three weeks of vacation per year upon her return.

- **Vacation or leave time**
  If vacation or sick days are non-seniority based, and persons on other types of leave are credited once they return to work with the vacation or sick days that would have accrued during the leave, the employer is obligated to do the same for employees returning from military leave.

  If vacation or sick days are seniority-based, the employee is entitled upon return from military leave to immediately be credited with all vacation or sick days the employee would have accrued during the military leave, less any days that would have been lost under a use-it-or-lose-it policy.

FMLA leave

An employee is entitled to FMLA leave if the employee worked for a covered employer for at least 12 months before the beginning of the FMLA leave, and during that time worked at least 1,250 hours. An employee returning from military leave is treated, for FMLA purposes, as having worked for the covered employer during the period of military leave. In addition, the employee is treated, for FMLA purposes, as having worked the number of hours during the period of military leave as the employee would have worked if he had not gone on military leave. An employee who normally works a 40-hour week, and who goes on a 26 week tour of duty, will be treated upon return, for FMLA purposes, as having worked for the covered employer during the 26 weeks of military leave. In addition, the employee will be deemed to have worked 1,040 hours (26 weeks at 40 hours per week) during the period of military leave.

As explained in detail in Chapter 23, **Family and medical leave**, in 2009, the DOL implemented new regulations expanding protection to employees under the FMLA by allowing, among other protections, eligible employees to take up to a combined total of 26 work weeks to care for a sick or current member of the Armed Forces.

Severance benefits

If an employer experiences a downsizing or reorganization while an employee is on military leave, the employee on military leave should be considered along with other employees not on military leave. If his position is eliminated, he will be entitled to any severance benefits based on length of service that are provided. If the downsizing or reorganization occurs after the employee returns from military leave, the period of military leave must be counted in determining eligibility for and the amount of any severance benefit.

Employee loans

If an employee borrowed money from his or her employer **prior** to commencing military leave, the interest rate on the loan must be capped, upon the employee's request, at six percent during the military leave. Any borrowing **after** active duty begins is not affected by this law. There is no obligation to inform the employee of this right and the employer need not adjust the rate unless the employee specifically requests it. If the employee specifically requests a rate adjustment, the request may be denied if the employer can prove that the employee is not financially affected by the active service. If the employer is providing differential pay, it is unlikely that the employee is financially affected. This interest rate cap applies even if the employee has not complied with the previously described requirements of USERRA.

Once military leave is completed the interest rate on the loan may return to a rate that is determined under the terms of the loan agreement. Any interest foregone during the period that the rate was capped may not be recouped.

Reinstatement

In Georgia, an employee who is reinstated pursuant to Georgia law, see above, must be considered as having been on furlough or leave of absence status. The employee must be restored to active employment without loss of seniority, and must be entitled to participate in insurance and other benefits offered by the employer pursuant to its established rules and practices related to employees on furlough or leave of absence.

Protection from discrimination, termination and retaliation

Discrimination under USERRA

USERRA protects individuals from all types of employment discrimination and retaliation based on their membership in the uniformed services. USERRA provides that an employer may not refuse to hire, promote or retain an employee based (in whole or in part) on his or her membership in the uniformed services, and it may not terminate such individual or deny him or her any benefit of employment on that basis. An employer can be liable for discrimination under USERRA even if military service is only one of several reasons the employer took an adverse action against the employee.

Termination only for cause

USERRA specifically provides that an employer may not terminate an employee without cause following military leave for a specified period of time. This requirement is significant because it effectively changes at-will employees into contract employees, who can terminated only for just cause. A person who has been reemployed by the company under USERRA cannot be discharged from employment except for cause for a particular time period, based upon the length of service:

- service of 30 to 180 days – within 180 days after the date of reemployment
- service of 181 or more days – within one year after the date of reemployment.

The burden of showing cause is on the employer. The statute does not describe what constitutes "cause" that would justify a termination during the protected time period. However, under recent USERRA regulations, "cause" for discharge exists if:

- it is **reasonable** to discharge the employee for the conduct in question and the employee had **notice** (either express or fairly implied) that the conduct would constitute cause for discharge

  or

- an employee's **position is eliminated** or the employee is placed on layoff status.

It is important to note that only employees who are eligible for reemployment (employees who meet the six criteria described above) are entitled to this protection from termination.

Retaliation under USERRA

Employers are prohibited from taking any adverse employment action against a person because that person has taken an action to enforce his rights under USERRA, testified in a proceeding to enforce USERRA, or has assisted or participated in an investigation under

USERRA. However, individuals who are dishonorably discharged from their military service are not protected under this provision.

Post-military termination

Georgia has a different requirement than USERRA regarding termination after military service, which provides even greater protection to employees. An employee who is entitled to reemployment under Georgia law may not be terminated without cause for a period of 1 year after the date of reemployment – regardless of the length of service.

To maintain a discrimination claim under Georgia law, an employee must show that any adverse employment action was taken solely on account of the military service –a more stringent standard for plaintiffs than is applied under Federal law.

Waiver of employment rights

Under USERRA, an employee may waive non-seniority-based rights if, before or during the employee's service, the employee expresses to the employer the intent not to return to work following the employee's service. However, the waiver must be:

- knowing and voluntary

  and

- submitted **in writing** to the employer.

In contrast, employee waivers of seniority-based rights and benefits, as well as the right to reemployment, are unenforceable if they are made before or during an employee's service in the uniformed services. An employee may waive the right to reemployment only when the employee's service in the uniformed services has concluded. Even then, such a waiver still must be knowing, voluntary, specific and unequivocal.

Enforcement and remedies

How USERRA is enforced

A person who claims that his or her employer has failed or refused to comply with USERRA may either file a complaint with the Veterans' Employment and Training Service (VETS) (which is a Department of Labor agency) or file a complaint in federal court.

If the employee files a complaint with VETS and VETS determines that the complaint is substantiated, VETS will attempt to resolve the complaint by making reasonable efforts to ensure that the employer complies with USERRA. If these efforts fail, VETS will notify the employee of the results of its investigation and the employee's right to file a complaint against the employer in federal court. A person who receives a notification from VETS of an unsuccessful effort to resolve a complaint may request that VETS refer the complaint to the Department of Justice. The Department of Justice may appear on

behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action on the employee's behalf in federal court. Remember that the employee does not have to file a complaint with VETS and may individually file a claim in federal court.

Statute of limitations for filing claims under USERRA

USERRA does not contain an express provision setting the applicable limitations period, and it even explicitly prohibits the application of state statutes of limitations. While USERRA provides no deadline for filing a lawsuit, courts will consider whether the plaintiff's delay in bringing action is unreasonable. If a plaintiff waits too long to file a claim, his claim may be barred by the equitable doctrine of laches.

Damages under USERRA

The remedies available to persons who have been aggrieved by violation of USERRA include:

- injunctive relief
- the wages and other benefits (including overtime and vacation pay) that the employee would have received
- reimbursement of court costs and legal fees
- in the case of a willful violation, liquidated damages (double lost pay and benefits).

Courts are prohibited from taxing costs against a losing plaintiff under USERRA.

Employers also need to be aware that even if an employee cannot prove he or she suffered any monetary damages because of a violation of USERRA, the court may be authorized to approve an award of attorney's fees and costs to a prevailing plaintiff.

An aggrieved employee may sue his employer under the Georgia military leave law or he may petition the Attorney General to bring suit on his behalf. A judge of the Superior Court will conduct a bench trial in the case.

Georgia law also provides that the court may order injunctive relief or the payment of lost wages or benefits. It does not provide for an award of attorneys' fees or punitive damages. Like federal law, Georgia law provides that an employee seeking benefits under the statute cannot be assessed fees or costs.

Employer policies regarding military leave

Employers are demonstrating a commitment to employee military service. Many employers are getting involved with the National Committee for Employer Support of the Guard and Reserve

(ESGR) and are signing Statements of Support for the National Guard and Reserve. ESGR is a committee of the Department of Defense that works to promote and sustain employer and community support for the National Guard and Reserve.

Employers should note that the Veterans Benefits Improvement Act of 2004 requires employers to provide their employees with notice of their rights under USERRA. The statute provides that the requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices. A copy of the required USERRA poster entitled "Your Rights Under USERRA" is available online at:

- www.dol.gov/vets/programs/userra/poster.htm.

Chapter 25

Workplace safety and health

Georgia does not have its own state program that ensures workplace safety and health. Rather, Georgia employers are covered by the federal Occupational Safety and Health Act (OSH Act). The federal OSH Act was implemented with the goal of reducing workplace injuries, illnesses and deaths. The OSH Act grants the Occupational Safety and Health Administration (OSHA), an agency of the federal government, the authority to create rules, standards and regulations governing workplace safety and health.

Although Georgia does not have its own state program, employers are still subject to certain state regulations that affect workplace safety and health. For example, in 2008, Georgia issued new state minimum fire safety standards and requirements for the prevention of loss of life and property from fire and explosions in facilities that have operations involving the manufacturing, processing, and/or handling of combustible dust. These rules require employee training, safety drills and procedures, evacuation plans, and mandatory registration and reporting at the Georgia Insurance Commissioner's website:

- www.gainsurance.org/safetymfg/home.aspx.

Also, if operating in other states, Georgia employers may be subject to those state OSHA programs.

Coverage

The OSH Act's broad coverage includes nearly all private-sector employers and their employees. However, certain employers and employees are exempt from coverage.

Employers

The OSH Act extends broad coverage to nearly all private-sector employers. This includes employers across various fields and industries, including religious employers to the extent that their workers are employed for a non-religious purpose.

The limited exemptions from OSHA coverage include:

- state and local government employers
- the self-employed

- farmers who do not employ workers outside of their immediate family.

Employees

The OSH Act's broad coverage extends to nearly all private-sector employees. This includes both executives and managers. However, in most circumstances, coverage does not extend to employees whose working conditions are regulated by other provisions of federal law, such as:

- mining workers
- certain truckers and transportation workers
- atomic energy workers.

Multi-employer workplace liability

In several industries, there are situations where multiple employers perform work or are otherwise affiliated with a single worksite. One common example of a multi-employer worksite would be a construction project where a general contactor and numerous subcontractors all work at the same worksite. To address safety and health violations on multi-employer worksites, OSHA, with the help of the federal courts, has developed the multi-employer worksite doctrine, which sets forth the circumstances under which more than one employer may be cited for a hazardous condition at a worksite that violates an OSHA standard.

OSHA recognizes four circumstances where an employer can be held liable under the multi-employer worksite doctrine:

- the employer causes the hazardous condition that violates the OSHA standard (creating employer)
- the employer's own employees are exposed to the hazard (exposing employer)
- the employer is engaged in a common undertaking on the same worksite as the exposing employer and is responsible for correcting a hazard (correcting employer)
- the employer has general supervisory authority over the worksite, by contract or by the exercise of control in practice, including the power to correct safety and health violations itself or to require others to correct them (controlling employer).

Of these four categories of employers who can be liable for an OSHA violation at a worksite, the requirements of a controlling employer (also referred to as the premises owner) have been the subject of the most discussion by OSHA and the courts. Significantly, the controlling employer has a lesser duty to exercise reasonable care than is required of an employer with respect to protecting its own employees. Various factors

affect how frequently and closely a controlling employer must inspect the worksite to meet its standard of reasonable care, including:

- the scale of the project
- the nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses
- the controlling employer's knowledge about the safety history and safety practices of the employer it controls and about that employer's level of expertise.

More frequent inspections are typically needed if the controlling employer knows that the other employer has a history of non-compliance, or if the controlling employer has never worked with the other employer and does not know its compliance history. Less frequent inspections are appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts. A high level of compliance by the other employer is an important indicator of effective safety and health efforts. Other important safeguards for controlling employers include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsite safety meetings and safety training.

Employers affiliated with a multi-employer worksite should take steps to limit their OSHA liability for injuries on the worksite. Suggested steps include the following:

- drafting unambiguous contract provisions that clearly allocate responsibility for safety and health compliance at the worksite
- investigating the safety and health history and competence of other employers at the worksite
- routinely inspecting the worksite to ensure OSHA compliance and immediately correcting any potential hazards
- implementing an effective system for promptly correcting hazards (designating a specific individual employed by the contractor to address and resolve safety issues)
- enforcing the contractor's compliance with safety and health requirements with an effective, graduated system of enforcement (a system that provides for warning, penalties, and, ultimately, termination of the contract for safety violations) and follow-up instructions.

Employer requirements and compliance

Covered employers must adhere to a number of general requirements and specific recordkeeping and reporting requirements in order to comply with the OSH Act.

General requirements

Employers are responsible for the following under the OSH Act:

- meeting the general duty responsibility to provide a workplace free from recognized hazards
- keeping workers informed about OSHA safety and health matters with which they are involved
- complying in a responsible manner with standards, rules, and regulations listed under the OSH Act
- familiarizing themselves with mandatory OSHA standards
- making copies of standards available to employees upon request
- evaluating workplace conditions
- minimizing or eliminating potential hazards
- cooperating with OSHA compliance officers
- not discriminating against employees who properly exercise their rights under the OSH Act
- reducing the number of citations within the prescribed period
- providing employees safe, properly maintained tools and equipment, including personal protective equipment, and making sure that employees use this protective equipment
- warning employees of potential hazards
- establishing and updating operating procedures and communicating these operating procedures to employees
- providing medical examinations when required
- providing the training required by OSHA standards
- complying with OSHA recordkeeping and reporting requirements (detailed below)
- posting the OSHA "It's The Law" poster at a prominent location within the workplace
- posting OSHA citations and notices that any safety or health hazard or violation has been corrected (abatement verification notices) at or near the worksite involved

- providing employees, former employees, and their representatives access to the Log of Work-Related Occupational Injuries and Illnesses
- providing employees and others access to employee medical records and exposure records.

Record keeping

All employers are required to keep records of occupational deaths, injuries and illnesses, and to make certain reports to OSHA. Smaller employers (with ten or fewer workers) and employers who have establishments in certain retail, service, finance, real estate, or insurance industries are not required to keep those records. However, smaller employers must report any occupational fatalities or catastrophes that occur in their establishments to OSHA, and they must participate in government surveys if they are asked to do so.

Reporting fatalities and multiple hospitalization incidents

Within eight hours of the death of an employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident, the employer must report the fatality or hospitalization by telephone to the nearest OSHA Area Office, or by calling the OSHA toll free central reporting number 1-800-321-OSHA. Note, however, that if the relevant office is closed or the employer is otherwise unable to speak to a person at the office, the employer must use OSHA's central reporting number to report the accident. The employer may not report the incident by leaving a message on an office's answering machine, faxing the office or sending an e-mail. If the employer does not learn of the incident right away, it must make the report within eight hours of the time the employer learns of the incident.

In some cases, a fatality or multiple hospitalizations may not occur until days after a work-related incident. However, employers do not have to report all injuries subsequent to a work-related incident, only those that occur within 30 days of the incident.

For each fatality or multiple hospitalization incident, the employer must provide OSHA with all the following information:

- the name of the company
- the location of the incident
- the time of the incident
- the number of fatalities or hospitalized employees
- the names of any injured employees

- the company contact person and his or her phone number
- a brief description of the incident.

Other recordkeeping and reporting requirements

Recordable injuries

In addition to reporting fatalities and multiple hospitalization incidents, the employer must also prepare and maintain records of "recordable" injuries and illnesses. An injury or illness is "recordable" and records must be kept if:

- the incident is work-related

  and

- the incident is a new case

  and

- the incident meets one of the following criteria:

  - the incident results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first-aid, or loss of consciousness

    or

  - the incident involves a significant injury or illness diagnosed by a physician or other licensed healthcare professional

    or

  - the incident is a needle stick injury or cut from a sharp object that is contaminated with another person's blood or other potentially infectious material

    or

  - the injured employee is medically removed under the medical surveillance requirements of an OSHA standard

    or

  - the employee suffers from hearing loss

    or

- the employee has been exposed to and is subsequently infected with tuberculosis within the workplace.

Within seven calendar days of receiving information that a recordable injury or illness has occurred, the employer must enter information regarding the incident on OSHA Form 300 (injury and illness log) and must complete OSHA Form 301 (incident report). At the end of the year, employers must review the injury and illness log to verify its accuracy and summarize it on OSHA Form 300A. The Form 300A must be certified by a company executive and posted for three months, from February 1 to April 30 of the following calendar year. Employers must retain all of these forms for **five years** following the calendar year to which they relate, and each of the forms can be obtained at:

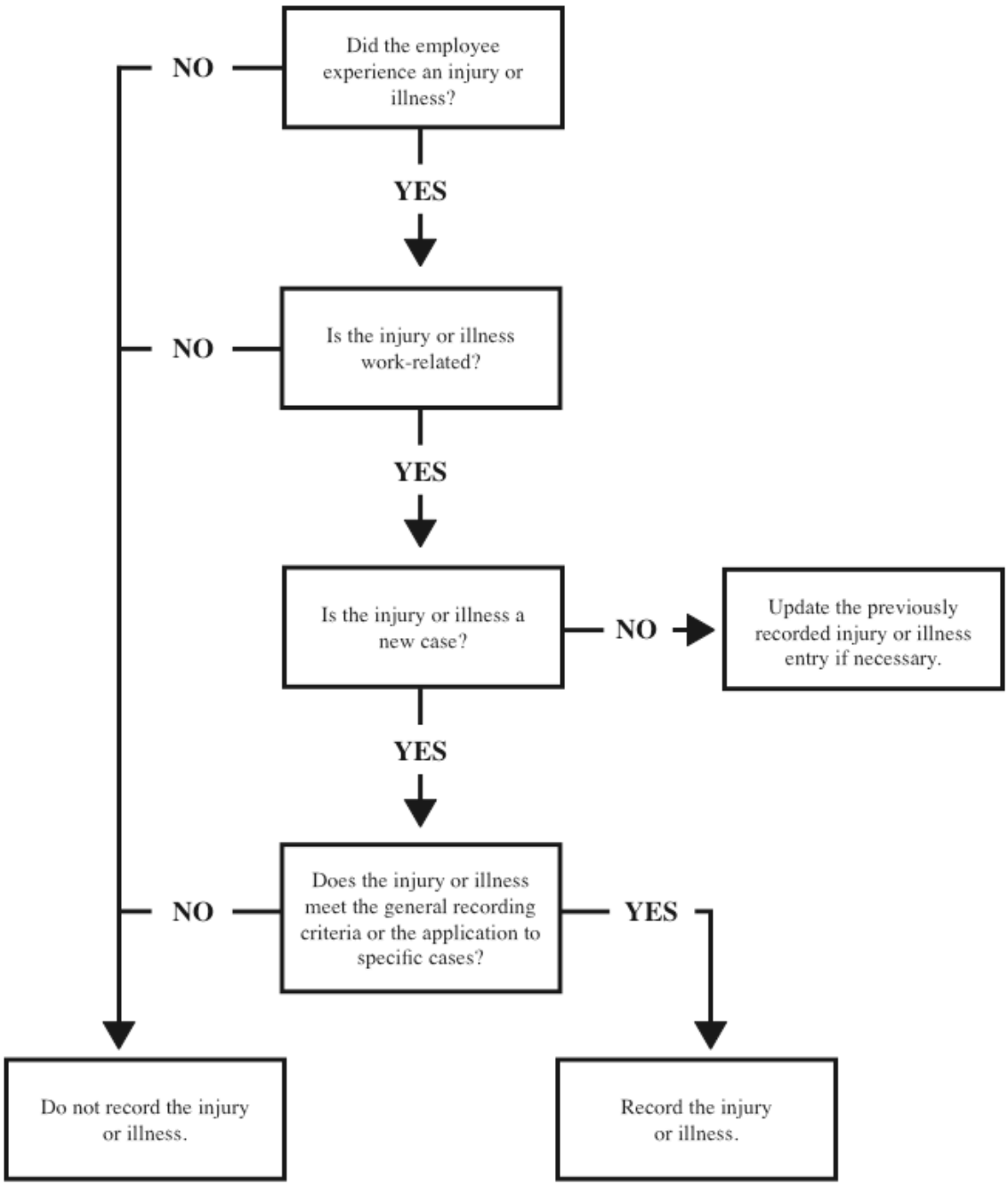
- www.osha.gov/pls/publications/ publication.html.

The flow-chart on the following page is useful for determining whether an injury is recordable.

Exposure to toxic materials

Records of exposure to potential toxins and related medical records must be kept for the duration of the person's employment, plus at least **30 years**. Employees exposed to potential toxins must be granted access to these records. All medical exams must be treated as confidential and kept separately from the employee's general personnel file.

Is an injury recordable?



Standards

OSHA issues safety and health standards for specific workplace hazards, which require employers to maintain conditions and practices appropriate to protect employees. Employers must familiarize themselves with applicable standards and ensure compliance with such standards. For example, OSHA has issued standards that require employers to provide proper personal protective equipment, with a few exceptions, to employees at no cost. The limited exceptions to this statute include ordinary safety-toed footwear, ordinary prescription safety eyewear, logging boots and ordinary clothing and weather-related gear. Importantly, where there are no specific standards, employers must still comply with the OSH Act's general duty clause.

Specific standards

OSHA has issued standards covering a multitude of workplace hazards. Although this list is not intended to be exhaustive, some workplace hazards to which OSHA has issued specific standards include:

- toxic substances
- harmful physical agents
- electrical hazards
- machine hazards
- fall protection
- workplace sanitation
- blood borne pathogens
- equipment, tool and machine guarding
- hazardous waste
- infectious diseases
- fire and explosion hazards.

General duty clause

The OSH Act's general duty clause requires employers to "furnish … a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees." Accordingly, employers must maintain safe, hazard free workplace conditions regardless of whether a specific standard applies. Additionally, even if an employer has not discovered a particular hazard, the hazard is considered "recognized" for the purposes of the general duty clause when its existence and means of correcting it are known in the employer's industry.

Variances

At the request of an employer, OSHA may grant permission to deviate from the requirements or time frame of a standard by issuing a variance. Variances may be temporary, permanent or experimental, depending on the circumstances. A temporary variance is designed to provide an employer time to come into compliance with the requirements of an OSHA standard subsequent to the effective date of the standard. A permanent variance authorizes an alternative to a requirement to an OSHA standard as long as the applicant's employee's are provided with employment and a safe and healthy workplace. An experimental variance may be issued when OSHA determines that an experiment designed to demonstrate or validate new and improved technology to protect employees.

Employers must meet specific requirements in order to ask OSHA for a variance. For example, where a temporary variance is sought from a newly-issued standard, the employer must demonstrate that it cannot fully comply with the effective date due to a shortage of materials, equipment or technical or professional personnel. Where a permanent variance is sought from the requirements of a standard, the employer must demonstrate that its alternatives provide employees with protection at least as effective as the protection provided by the standard.

Other implications of OSHA standards

In addition to OSHA liability, failure to comply with OSHA standards could be used as evidence of negligent or reckless conduct; therefore, exposing employers to civil liability and even criminal liability.

Inspections

OSHA compliance officers are authorized to conduct on-site inspections and interviews to determine whether an employer is in compliance with the OSH Act. During inspections, OSHA inspectors may privately question hourly employees, but may not insist on private interviews with management or supervisory personnel, whose remarks could be used against the company. Thus, management and supervisory personnel should be accompanied by a witness during any interviews with an OSHA inspector. Where employers do not cooperate with requests for interviews and/or records, OSHA may issue subpoenas to compel depositions and/or production of records.

Inspections typically occur without advance notice, but must take place at a reasonable time, in a reasonable manner and within reasonable time limits. Anyone who gives an employer advance notice of an OSHA inspection may be subject to criminal penalties. Additionally, employers have the right to require OSHA inspectors to obtain a search warrant before entering the workplace. However, search warrants are easily obtainable and may tip off inspectors to potential violations or lead to a more rigorous inspection.

OSHA inspections typically include four stages:

1. presentation of inspector credentials

2. opening conference explaining the reason for the inspection as well as the purpose, scope, and procedure of the inspection

3. inspection walk-around

4. closing conference discussing hazardous conditions and potential violations in the workplace as well as informing the employer of his rights and obligations.

Employers should prepare themselves for an OSHA inspection. Before an inspection takes place, the employer should have already decided whether or not to require a warrant and decided who to appoint to accompany the inspector on the walk-around.

Violations and penalties

Violations of the OSH Act subject employers to the risk of civil and criminal penalties. The amount of each penalty is proposed by OSHA and depends on the nature of the corresponding violation. Additionally, the Department of Justice may bring a criminal action against an employer in cases of willful violations leading to death and in cases of specific misconduct in dealing with OSHA. Employees are not subject to penalty for violations of the OSH Act. Rather, employers are responsible for ensuring employee compliance.

OSHA citations and penalties

OSHA is authorized to propose penalties for violations of standards, regulations, or of the general duty to provide a workplace free of recognized hazards. The amount of a penalty varies depending on the nature of the violation and may be reduced from the statutory maximum depending on the circumstances. Violations and the corresponding penalties fall into six general categories under the OSH Act.

1. **Other-than-serious**
   This category includes violations that probably would not cause death or serious physical harm but do have a direct relationship to job safety and health. Each other-than-serious violation may carry a penalty of up to $7,000.

2. **Serious**
   This category includes violations with a substantial probability of death or serious injury where the employer knew or should have known of the hazard. Each serious violation may carry a penalty of up to $7,000.

3. **Willful**
   This category includes violations that the employer intentionally and knowingly commits as well as violations committed with a plain indifference to the law. A violation is committed with plain indifference to the law where an employer is aware of a hazard but makes no reasonable efforts to eliminate the hazard. Each willful violation may carry a penalty of up to $70,000 with a minimum penalty of $5,000. Additionally, a willful violation resulting in the death of an employee may expose an employer to criminal liability.

4. **Repeated**
   This category includes violations when OSHA finds a substantially similar violation upon re-inspection. However, citations under contest may not form the basis for a subsequent repeated citation. Each repeated violation may carry a penalty of up to $70,000.

5. **Failure to correct cited violations**
   This category applies where employers fail to correct cited violations by the deadline (the abatement deadline). Each violation that an employer fails to correct may carry a penalty of up to $7,000 for each day beyond the abatement deadline that the violation is not corrected.

6. **Violating posting requirements**
   Violations of posting requirements may carry a penalty of up to $7,000.

Amount of penalty

OSHA may reduce the amount of a penalty depending on the circumstances. Additionally, OSHA will not propose a penalty in situations where the penalty is reduced to below $100.

The factors used by OSHA to reduce penalties are:

- the size of the employer's business
- the employer's good faith as determined by efforts to comply with the OSH Act, such as cooperation with OSHA personnel, quality of safety programs, and diligence in correcting hazards
- the employer's history of previous violations
- the gravity of the violation when the alleged violation is serious as determined by the number of employees exposed to the hazard, the frequency and duration of these exposures, and the risk of death or serious injury.

Criminal penalties

The OSH Act authorizes criminal penalties, including fines and jail time, for:

- willful violations leading to death
- falsifying records, reports or applications
- interfering with a compliance officer in the performance of his duties.

Criminal convictions under the OSH Act carry up to six months of imprisonment.

Contesting a citation

If an employer disagrees with some aspect of an OSHA citation, it can invoke an appeal process to challenge the citation by filing a "notice of contest" within 15 days from the date the employer receives the citation. There is no specific format for the notice of contest, but it must clearly identify the basis for contesting the citation. During the 15-day window, the employer can request an informal conference with the area director in an effort to reach a compromise on the citations before proceeding to litigation. If no compromise is reached (or if the employer decides to forego the informal conference), the employer must file the written notice of contest to commence the appeal process.

Alternately, if an employer generally agrees with the citation, but cannot meet the abatement deadline in the citation, the employer can file a petition for modification of abatement, which must be filed in writing with the area director no more than one working day after the original abatement date.

Once the notice of contest is filed, OSHA refers the matter to the Office of Solicitor for the U.S. Department of Labor and to the Occupational Safety and Health Review Commission (OSHRC) – the tribunal that adjudicates the contested citation. The case then proceeds through an administrative proceeding and, absent settlement, concludes with a hearing much like a trial, after which an administrative law judge (ALJ) decides the case. The ALJ's decision is subject to review by the Commission (if requested) and Commission rulings can be appealed to federal appellate courts.

Employer defenses

Employers may raise defenses to citations, penalties, abatement deadlines and methods of correcting violations. When challenging an alleged violation, the employer should raise all applicable defenses. The following list describes some of the defenses commonly asserted by employers in response to OSHA citations:

- **No violation**
  This defense applies when the employer has not violated the applicable standard, general duty or regulation alleged in a citation.

- **No hazard**
  This defense applies when a violation occurs but no hazard resulted from the violation. Accordingly, it applies in situations where either no employee was exposed to the condition or the employer reasonably had no knowledge of the violation.

- **De minimis violation**
  This defense applies when a violation occurs but the violation did not create a hazard or did not otherwise compromise the health and safety conditions of the workplace. Additionally, this defense applies to minor, technical violations of the OSH Act when the employer provided adequate alternative protections. There is no penalty for a de minimis violation.

- **Defenses related to the applicable standard**
  An employer may have a defense when the applicable standard violated was ambiguously worded, improperly issued or non-binding. When challenging the wording of a standard, the wording must be so ambiguous that a reasonable person would not know exactly what type of conduct the standard prohibits. Moreover, a standard is considered non-binding when it amounts to a mere suggestion rather than a requirement.

- **Feasibility of compliance**
  An employer may have a feasibility of compliance defense where a standard, regulation, or general duty cannot be met by known, available and feasible means of compliance. The feasibility of compliance defense also applies where the abatement deadline or method is unreasonable. However, defenses challenging the feasibility of compliance are generally difficult to establish. In order to assert this defense, an employer must demonstrate that it applied all alternative means of correction that are known and feasible. The employer must also demonstrate that it is not lagging behind industry-standards of compliance. The cost of compliance is not a feasibility defense except in extreme circumstances.

- **Employee misconduct**
  An employer may have a defense where non-compliance resulted from employee misconduct. In order to use this defense, the employer must establish that the employee did not follow previously established and enforced work rules or otherwise acted in an unpredictable, idiosyncratic manner. Additionally, the employee's misconduct must be reasonably unanticipated, meaning that the employer must have a record of disciplining previous violators. Ultimately, employers must demonstrate rigorous enforcement of safety rules and adequate employee safety training to assert the employee misconduct defense.

- **Miscellaneous defenses**
  Employers may have a defense where:

  - a citation was not issued within 180 days
  - a citation resulted from an illegal inspection, or OSHA's evidence of a violation is unconvincing or not credible
  - the employer cited did not create the hazard, had no power to correct it, or had no employees exposed to it
  - OSHA does not have jurisdiction over the condition cited.

Chapter 26

Workplace violence

Workplace violence is a problem of growing concern across America. A study by the *American Journal of Industrial Medicine* estimated that workplace homicide takes place at a rate of over 15 fatalities per week.

Incidents of workplace violence create potential liability exposure for employers. Employers may also suffer significant costs resulting from lost productivity. Thus, it is prudent for employers to take preventative steps to minimize the risk of violence in their place of work. This section outlines the various risks of liability presented by workplace violence and various strategies to minimize incidents of workplace violence.

OSHA and workplace violence

The Occupational Safety and Health Administration (OSHA), an agency of the federal government charged with ensuring workplace safety and health, has not issued any regulations specifically addressing workplace violence. Nevertheless, the agency considers workplace violence a recognized hazard and has issued guidelines aimed at reducing workplace violence. OSHA may rely on these guidelines to issue citations for incidents of workplace violence under its General Duty Clause, which is a catch-all provision under the Occupational Safety and Health Act (OSH Act) that holds employers accountable to provide a safe workplace for employees.

The following are some of these OSHA-issued guidelines aimed at minimizing violence in the workplace:

- **Management commitment and employee involvement**
  OSHA recommends a team-oriented approach incorporating both management and employees into committees aimed at identifying and minimizing risks of violence in the workplace. These committees should consult employees to identify security concerns, to report incidents of violence, and to recognize escalating situations. In addition, OSHA recommends debriefing and medical/psychological counseling for employees involved in violent incidents. OSHA further recommends that employers create a comprehensive written program to address workplace violence. Such a program should include a zero-tolerance policy for violence and threats, a no-retaliation policy, a procedure for reporting and documenting incidents, and security procedures.

- **Worksite analysis**
  OSHA recommends that employers undertake a thorough analysis of the risks of violence in their place of work. Suggested steps include analyzing prior incidents of violence,

contacting other employers within the industry, surveying employees, and conducting physical inspections of the premises. When conducting this type of analysis, employers should keep the following in mind: employers who choose to perform a worksite analysis may expose themselves to potential liability when information obtained through a worksite analysis is not acted upon by the employer.

- **Hazard prevention and control**
  Once hazards are identified, OSHA suggests that employers implement mechanisms to prevent and control workplace incidents. Specific hazard prevention and control mechanisms include the installation of alarms and other security devices, as well as administrative procedures for responding to incidents. Employers should implement both immediate response procedures to cool-off escalating situations carefully and long-term response procedures consisting of discipline and investigation.

- **Safety and health training**
  OSHA recommends that employers educate workers to the risks of workplace violence and the specific policies and procedures in place to minimize these risks.

- **Record keeping**
  Employers should maintain records of incidents of violence and compliance with violence reduction programs for five years from the calendar date to which these records relate.

Although OSHA has not issued regulations dealing specifically with workplace violence, some groups have urged the agency to create such regulations. Thus, OSHA may issue regulations specifically dealing with workplace violence in the near future.

Other potential legal issues arising out of workplace violence

In addition to OSHA, several issues could expose employers to liability for incidents of workplace violence. These include respondeat superior, negligent hiring, supervision or retention, workers' compensation, the Americans with Disabilities Act (ADA), and state privacy laws. These various theories are outlined below.

- **Respondeat superior**
  Under the theory of respondeat superior, employers are held liable for the actions of their employees in the scope of their employment. Accordingly, employers may be held liable for the violent actions of their employees to the extent that such violence is committed within the scope of the employer's business. For example, if an employer provides its employee with a weapon as part of his or her duties, and the employee improperly uses that weapon in the course of employment, the employer could be held liable.

- **Negligent hiring, supervision or retention**
  Employers may be held liable for the negligent hiring, supervision or retention of an employee with a tendency of violent behavior. In order for one of these theories to

apply, the employer must have either known or should have known about the individual's tendency to commit violence, yet hired the individual anyway, or (with respect to current supervisors or employees) allowed the individual to continue in his or her job thereby exposing other employees to potential injury or harm.

- **Workers' compensation**
  When a violent worker injures another worker, the injured worker is generally entitled to workers' compensation benefits under Georgia law. However, an employee is typically not entitled to workers' compensation benefits when he instigated the violent response that led to his injury. This scenario would increase an employer's exposure to civil liability because when an injury is compensable under workers' compensation law, the employee may not sue the employer under any other legal theory for the incident.

- **The ADA**
  The ADA prevents employers from screening potential employees based on the risk that a mental or physical impairment could cause the potential employee to become violent. Additionally, the ADA may require an employer to accommodate a violent employee until they become a direct threat to themselves or others. Before basing an employment decision on an employee's status as a "direct threat," however, keep in mind that proving an employee has become a direct threat, and therefore not protected by the ADA, is very difficult to do and cannot be based on unsupported stereotypes or assumptions about the employee.

- **Privacy laws**
  Privacy laws may limit employers from obtaining information related to whether an employee or potential employee poses a risk of workplace violence. For example, pre-employment psychological testing or background checks can trigger issues related to an individual's right to privacy.

Minimizing workplace violence

Prudent employers can strategically minimize incidents of workplace violence and the resulting liability by taking preventative action. Prior to hiring, employers should adequately screen potential employees for violent propensities to the extent permissible under the ADA and relevant privacy laws. After hiring, the employer should continue to monitor employees for violent propensities. Additionally, employers should educate all employees and supervisors on the risks of workplace violence, the employer's policies and procedures relating to workplace violence, and techniques to avoid or cool down violent situations. Employers should also implement and strictly and uniformly enforce a zero-tolerance policy with respect to workplace violence.

Chapter 27

Benefits

When Congress enacted the Employee Retirement Income Security Act (ERISA) in 1974, it wanted to balance two competing concerns:

- protecting employees who had been promised certain benefits by their employers
- giving employers a set of rules by which they could operate and maintain uniform employee benefit plans for numerous facilities without interference from varying state laws.

Therefore, while providing plan participants with certain causes of action to sue their employers in federal court if they are not provided the benefits they were promised and imposing certain disclosure obligations on employers that maintain "employee benefit plans" (as defined in the law), ERISA also provides nearly exclusive regulation of such plans. ERISA preempts state laws that attempt to regulate employee benefit plans, except certain laws that regulate insurance and the banking industry. Therefore, any claim that an employee may bring that relates to an employee benefit plan (other than the exceptions noted below), such as a claim for benefits or for breach of fiduciary duty, must be brought under ERISA.

What is an employee benefit plan

ERISA defines an employee benefit plan as either an employee welfare benefit plan or an employee pension benefit plan. An employee benefit plan under ERISA generally does not include, however:

- governmental plans
- church plans
- plans intended solely to comply with state laws (workers' compensation, unemployment compensation, disability, etc.)
- plans maintained outside the United States substantially for nonresident aliens
- unfunded excess benefit plans (plans maintained solely for the purpose of providing benefits for certain employees in excess of certain limitations on contributions and benefits imposed by the Internal Revenue Code and ERISA).

Employee welfare benefit plan

An employee welfare benefit plan includes the following plans maintained by an employer for the benefit of its employees or their beneficiaries:

- health plans
- life insurance plans
- disability plans
- accidental death and dismemberment benefit plans
- certain scholarship plans
- certain pre-paid legal service plans
- severance plans.

This list is not all-inclusive. Furthermore, the Department of Labor has issued regulations and guidelines that specifically exclude from the classification of employee welfare benefit plan certain arrangements that provide similar benefits to those provided by the arrangements listed above. For example, the Department of Labor has specifically excluded salary continuation programs that are paid out of the employer's general assets and are provided in connection with an employee's temporary disability despite the fact that disability plans are traditionally considered employee welfare plans.

At the time of printing of this Manual, President Obama had recently signed into law the Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA) (PPACA and HCERA collectively referred to herein as the Health Care Reform Act). The Health Care Reform Act provides extensive changes to the laws impacting health care plans, including mandatory employer-sponsored coverage starting in 2014. Immediate changes include:

- prohibition on pre-existing condition exclusions for children under the age of 19
- prohibition on maximum lifetime benefit limitations
- prohibition on certain annual benefit limitation
- required dependent coverage for children until the age of 26
- requirement of 60 day prior written notice to participants regarding material plan changes
- application of non-discrimination rules to fully insured health plans (similar to the rules previously applicable only to self-insured plans)

- certain additional mandated benefits. These changes become effective beginning with the first plan year beginning on or after September 23, 2010 or later. Employers should begin discussions with their insurance vendors and legal counsel as soon as possible in order to ensure timely compliance with the applicable provisions (including providing timely notice of changes in connection with open enrollment or otherwise). The changes required by the Health Care Reform Act will be described in greater detail in the 2011 **Georgia Human Resources Manual**.

This list is not all-inclusive. Furthermore, the Department of Labor has issued regulations and guidelines that except certain arrangements that include these benefits, such as salary continuation programs in the event a participant suffers a temporary disability.

Employee pension benefit plans

An employee pension benefit plan is a plan, fund or program that provides retirement income to employees or their beneficiaries, or results in a deferral of income by employees extending to the termination of employment or beyond. These plans include:

- **Defined benefit pension plans**
  These plans determine a participant's retirement benefit based on a specified formula. Common defined benefit plans are traditional retirement plans and cash balance plans. Under these plans, the employer maintains the risk of loss from the plan's investments.

- **Defined contribution pension plans**
  These plans provide participants with an account. The employer may invest the assets of the plans, but more typically, the employer gives participants the right to determine the investment options. Typical defined contribution plans include profit sharing plans, 401(k) plans, money purchase plans and SIMPLE plans.

What does ERISA require

ERISA imposes certain obligations on employers that sponsor an employee benefit plan, including:

- funding certain plans
- disclosing information to participants and beneficiaries
- reporting certain information concerning the plans to governmental authorities
- operating the plans under a fiduciary duty.

In addition, ERISA requires that employee benefit plans contain a number of provisions. These obligations are discussed below.

Funding obligations

Plan sponsors have the obligation to fund certain employee benefit plans. Employee pension benefit plan assets must be held in trust for the benefit of the participants and beneficiaries in order to pay the benefits when they come due. An informal promise to pay an employee when he retires may subject the employer to ERISA's funding as well as other ERISA requirements. In addition, defined benefit pension plans and certain defined contribution plans must meet minimum funding levels to pay participants or their beneficiaries the retirement benefits promised to them under the plan. Most welfare benefit plans are not subject to ERISA's funding requirements, although ERISA requires that assets intended to fund benefits must be contained in trust.

Disclosure obligations

All plans subject to ERISA must be in writing. An employee benefit plan that is not in writing (such as an informal promise to pay retirement benefits) is still subject to ERISA, however. ERISA requires the plan sponsor to maintain a plan document and to explain the plan to participants in a summary plan description. These summary plan descriptions are generally a summary of the plan and must be drafted in a manner calculated to be understood by the average plan participant. Summary plan descriptions also must contain certain provisions, including a statement of ERISA rights and claims review procedures. Summary plan descriptions are more than a summary of plan terms, however. They are typically the only document a participant receives that describes the benefits, and some courts have determined that a participant can sue based on the terms of the summary plan description, even if the terms conflict with the plan document. For this reason, great care should be taken in drafting summary plan descriptions.

If a participant requests documents used by the employer to operate the plan, they must be provided within 30 days of the request. Failure to provide the documents within this time period could result in a fine of up to $110 per day.

There are numerous other disclosures that may be required for various employee benefit plans, including, for example, notices regarding blackout periods, summary annual reports, and COBRA notices.

Reporting obligations

Most ERISA plans are required to file a Form 5500 with IRS. Excepted from this filing requirement are unfunded or fully insured plans (or a combination) with less than 100 participants. Failure to file a Form 5500 could result in the imposition of a penalty of up to $1,100 per day. Sponsors of ERISA plans may take advantage of the Department of Labor's Delinquent Filer Voluntary Correction Program to reduce the penalty for failure to timely file a Form 5500.

There are additional reporting obligations that may be required (including, for example, certain reporting obligations to the Pension Benefit Guaranty Corporation).

Fiduciary duty

Under ERISA, any individual who exercises discretion in the administration of an employee benefit plan or the assets of the plan is a fiduciary, and must comply with the statute's fiduciary responsibility provisions. Fiduciaries must perform their duties solely in the interests of the participants and beneficiaries. Fiduciaries can be personally liable for losses to a plan.

What rights ERISA gives employees

ERISA gives participants or beneficiaries the right to sue the employer or the plan for benefits due to them under the plan's terms and for penalties for the plan administrator's failure to provide requested documents or required notices. Participants may also sue for breach of fiduciary duty. Lawsuits under ERISA must be brought in federal court. ERISA does not give a participant a right to a jury trial, so most cases are decided by a judge.

ERISA's requirements

Most of the requirements for employee benefit plans are governed by the Internal Revenue Code. Aside from the tax consequences for failure to comply with the Code, ERISA imposes certain requirements that if not complied with could create a cause of action against the plan, employer and/or fiduciaries. These requirements include:

- minimum participation by employees for pension plans
- vesting of employer contributions and funding requirements for certain pension plans
- COBRA and HIPAA requirements for group health plans. (See also Chapter 30, **Health care continuation** and Chapter 31, **HIPAA**).

Insured welfare benefit plans must also comply with state insurance laws.

Furthermore, an important provision of ERISA is that pension benefits may not be assigned or transferred other than to the participant or a beneficiary. The exceptions to this rule are if the IRS garnishes the plan account or a qualified domestic relations order (QDRO) is submitted. Not all state court divorce orders that award pension benefits to the non-participating spouse meet the QDRO requirements and, until these orders are revised to meet the requirements, a distribution should not be allowed. Only state court orders that comply with the IRS and ERISA rules for QDROs will allow such a distribution. Generally, in order to be a QDRO, the domestic relations order must be a judgment from a court, signed by a judge, which relates to child support, alimony payments or marital property rights under state domestic relations law. Furthermore, it must specify certain things, including:

- the name of the plan to which the order relates
- the number of payments or period to which the order applies

- the amount or percentage of the participant's benefit to which the payee is entitled
- other various requirements.

Also, the order cannot require the plan to make payments in a form or a manner for which the plan does not provide. It is important that employers be sure that court orders specifically comply with the QDRO rules before allowing a distribution from a qualified pension plan.

The Internal Revenue Code also imposes strict requirements on employee benefit plans that are similar in many ways to the ERISA requirements. Failure to satisfy the Internal Revenue Code's requirements may result in adverse tax consequences.

Where to go for more information

This chapter is intended as a brief overview of some of the requirements and obligations ERISA imposes on employers. It is by no means exhaustive. If you need additional information, you may wish to visit:

- www.dol.gov/ebsa

or consult an ERISA attorney. For IRS requirements visit:

- www.irs.gov.

Chapter 28

Workers' compensation

Georgia's workers' compensation law is a system of liability without fault that provides compensation to employees injured on the job. While Georgia requires employers of three or more employees to provide prompt medical and disability benefits to workers injured or killed on the job, workers' compensation serves as an exclusive remedy for workers injured in the scope of their employment, thus shielding employers from liability for on-the-job injuries.

This chapter outlines Georgia's workers' compensation laws. This discussion begins by outlining the scope of workers' compensation coverage with attention to specific coverage issues. Next, it discusses benefits afforded to workers injured on the job. Third, it highlights the administrative system in place under the State Board of Workers' Compensation. Finally, this chapter addresses employers' responsibilities and techniques to minimize costs.

Coverage

Who is covered

Employers covered

All employers regularly employing three or more persons are required under the Georgia Workers' Compensation Act (the Act) to provide workers' compensation coverage. This requirement covers:

- individuals
- small businesses
- corporations
- government bodies.

Additionally, workers' compensation laws apply to non-profit business corporations the same as profit-making entities.

Employees covered

The Act defines "employee" broadly. This definition includes both full-time and part-time employees under either a written or implied employment contract.

Also, minors are included in this definition even though they may be employed in violation of child labor laws.

Despite the Act's broad definition of "employee," certain types of workers (such as independent contractors, workers whose employment is not in the usual course of business of the employer, real estate agents and railroad workers) are excluded from the definition of "employee."

Independent contractors

Independent contractors are not employees under the Act and are not afforded workers' compensation coverage. However, the distinction between an employee and an independent contractor turns on a case-by-case inquiry rather than the actual language of the arrangement. An employer cannot bypass responsibilities under the workers' compensation laws simply by designating a worker as an independent contractor. Accordingly, the Act defines an independent contractor as a person whom:

1. is a party to a contract, written or implied, which intends to create an independent contractor relationship

   and

2. has the right to exercise control over the time, manner and method of the work to be performed

   and

3. is paid on a set price per job or a per unit basis, rather than on a salary or hourly basis.

Applying this test, **all three factors must be met** in order for a worker to qualify as an independent contractor. Otherwise, a worker shall be considered an employee and therefore entitled to workers' compensation benefits.

Employees of principle contractors or subcontractors

The Act protects employees of principle contractors, intermediate contractors or subcontractors from situations where employers may attempt to avoid workers' compensation liability through fraudulent subcontracting schemes. Accordingly, an employee injured while working for a subcontractor may seek compensation from the principle contractor, an intermediate contractor, or the subcontractor. For example, where a construction company hires an electrician to wire a home, an employee of the electrician injured while working on the home may seek compensation from the electrician (the immediate employer) or the construction

company (the principle). In such a situation, the principle or intermediate contractor is said to be the "statutory employer" of the subcontractor's employee. Additionally, the statutory employer doctrine affords the principle the protection of immunity from tort liability owed to injured subcontractor employees.

Two factors govern whether a principle will be required to pay compensation for injuries to a subcontractor's employees:

1. The injury must occur either on or about the premises where the principle subcontracted to have work performed, or on premises otherwise controlled or managed by the principle.

2. An injured worker must first seek compensation from the immediate employer. Where the immediate employer cannot pay, the worker can then seek compensation from the principle or an intermediate contractor. In situations where a principle or intermediate contractor pays workers' compensation, these costs are recoverable from the worker's immediate employer.

Joint employers and borrowed employees

Questions sometimes arise regarding coverage of employees in the joint service of multiple employers or borrowed from other employers. In the case of a worker injured while working for multiple employers, each employer must contribute to the employee's workers' compensation payments. The level of contribution of each employer is based on the proportion of the employee's wage paid by that employer. However, employers may agree to allocate the payment of compensation differently.

Borrowed employees may recover workers' compensation from either their general employer or their borrowing employer. In order to be considered a borrowed employee, the borrowing employer must have complete and exclusive control over the employee, including the right to discharge the employee.

Illegal employment

Most illegal employment relationships are still subject to workers' compensation coverage. Accordingly, minors employed in violation of child labor laws are subject to the same protections as other employees. Likewise, illegal aliens are entitled to workers' compensation benefits to the same extent as other employees. Coverage can even extend to illegal aliens who present fraudulent documents to secure employment.

Coverage elections

- **Partners and sole proprietors**
  A partner or sole proprietor of a business may elect to include himself as an employee under the workers' compensation insurance of the business. This election entitles him to workers' compensation employee benefits but also subjects him to employee responsibilities under the scheme. In order to elect coverage, the partner or sole proprietor must meet two requirements. First, he must be actively engaged in the operation of the business. Second, he must notify the insurer of this election to be included.

- **Farm laborers**
  Farm laborers are not covered. However, employers of farm labors may elect coverage by providing written notice to the State Board of Workers' Compensation (the Board). Once coverage is elected, an employer of farm laborers may not discontinue coverage without first providing notice to the Board and each affected employee.

Coverage exemptions

- **Corporate officers**
  Corporate officers and members of a limited liability company (LLC) are generally considered employees of the company and therefore covered by workers' compensation. However, up to five corporate officers or members of a limited liability company may elect to exempt themselves from coverage. In order to elect exemption, the person seeking the exemption must notify the insurer. If the company is self-insured, then the person must notify the Board. With a corporate officer, such notice must include the name and office of the officer seeking exemption. With a member of a limited liability company, such notice must include the member's name. Such exemptions can be revoked at any time by directing similar notice to the insurer or the Board.

- **Real estate agents**
  Licensed real estate salespersons and associate brokers are not covered by workers' compensation provided that the salesperson has a written contract of employment specifying that he or she will perform all services as an independent contractor.

- **Employees engaging in conduct outside the usual course of business**
  Workers engaging in conduct outside of the usual course of business of the employer are not employees under the Act. The

Act does not apply to employees who typically engage in the usual business of the employer, who are injured while engaging in conduct outside the usual course of the employer's business.

- **Other specific exemptions:**
  - railroad common carrier workers
  - Forestry Commission airplane pilots
  - domestic servants
  - sports officials.

Types of injuries covered

Any injury, illness or death arising out of and in the course of employment is compensable under Georgia workers' compensation law. However, significant questions exist as to what types of injuries fall within the category. The following sections discuss the scope of coverage regarding common situations leading to injury.

Accidents arising out of and in the course of employment

In order for an injury to fall within workers' compensation coverage, the accident must arise out of and in the course of employment. Whether an accident arises out of and in the course of employment depends on the facts and circumstances of the particular injury. Additionally, courts typically interpret this requirement liberally.

Under this definition, accidents must meet two requirements before an injury will be covered. First, the injury must fall within the scope of employment risk. This means that accidents arising from purely personal risks unrelated to the employment, such as epilepsy, are generally not covered. Also, accidents arising from neutral risks, such as stray bullets, are generally not covered. A strong work connection must be demonstrated in order for such injuries to be covered. Second, the time, place and circumstance of the accident must be connected to work. This requirement is easily met where the accident is loosely connected to work. Nonetheless, accidents occurring on breaks or on personal deviations from work travel may not satisfy this essential connection.

Keeping in mind that the outcome of each situation could vary depending on the unique circumstances, below are some common issues concerning whether an accident arises out of and in the course of employment.

- **Acts of God**
  Although historically not considered compensable, most injuries arising from acts of God, such as lightning strikes, are now usually compensable. As an example, an employee injured by a tree falling on his car while

driving in the course of his employment would likely suffer a compensable injury.

- **Assault**
  An employee injured in an assault will generally be covered where the assault is work-related. However, where the employee is assaulted at work for personal reasons unrelated to the employment, such as a fight over a romantic encounter, the assault will typically not arise out of and in the course of employment. Also, injury resulting from an assault where the injured employee is the aggressor will typically not be covered.

- **Emergencies**
  Coverage typically extends to workers injured while attempting to rescue themselves or others in an emergency situation.

- **Exposure to elements**
  Injuries resulting from exposure to the elements, such as heat stroke, are typically covered.

- **Heart attacks**
  Although heart attacks are generally considered personal risks and therefore not covered, heart attacks resulting from strenuous employment conditions may fall within coverage. In such cases, the employee must demonstrate that the work is sufficiently strenuous that it likely contributed to the attack. Additionally, a heart attack may not be a compensable injury where it occurs several hours after the worker leaves work.

- **Hernias**
  Hernias are treated differently from other types of injuries under the Act. In hernia cases, the Act requires all of the following:

  - an injury resulting in a hernia

    and

  - the hernia appeared suddenly

    and

  - the hernia was accompanied by pain

    and

  - the hernia immediately followed an accident

    and

- the hernia did not exist prior to the accident for which compensation is claimed.

Additionally, the Act requires all workers seeking benefits from injuries related to hernias to undergo surgical treatment. If an employee refuses to undergo this treatment, then the Act does not allow compensation during this refusal period unless the Board determines that the operation would be unsafe.

- **Horseplay**
  Generally, injuries arising from horseplay or practical jokes where the claimant was either the instigator or a participant are not compensable.

- **Falls and mishaps related to purely personal conditions**
  Generally, accidents resulting from purely personal conditions, such as epilepsy, are not covered. However, these injuries may be compensable where conditions at work led to a greater injury than otherwise would have occurred. For example, an employee may suffer a compensable injury where a seizure at work leads him to cut himself on a sharp edge during a fall caused by the seizure.

- **Weapons brought into the workplace**
  Injuries resulting from weapons or other dangerous objects brought into the workplace by employees are typically not compensable when such objects are unrelated to the nature of the work.

- **Traveling to and from work**
  Generally, injuries occurring while an employee is traveling to or from work are not compensable. However, these injuries may be compensable where:

  - the employer furnishes transportation

    or

  - the employee is performing an act for the employer, such as running an errand on the way to work

    or

  - the employee is on call and the employer covers transportation costs

    or

  - the alleged injuries occurred while the employee is walking to or from parking facilities provided by the employer.

- **Breaks**
  Most accidents occurring during scheduled breaks where the employee is free to use the break time for his own affairs are not covered. This is true even if the injury occurs on the employer's premises. However, an injury occurring on a break where the employee is subject to the employer's control or performing tasks for the employer may be compensable. This includes picking up lunch for the employer while on break. In addition, injuries occurring on the employee's return to work may be compensable under certain circumstances.

- **Premises and parking lots**
  Generally, accidents and injuries occurring in parking lots or premises used for entrance and exit to work are compensable.

- **Recreational and social activities**
  Typically, accidents occurring at employer-sponsored recreational or social activities are not covered. However, such injuries may be compensable where the employer benefits from these activities and there is an express or implied requirement of participation.

- **Injuries resulting from travel**
  Travel risks, such as automobile accidents, are typically covered where the duties of the employment require travel. However, injuries occurring during the employee's personal deviations from work trips are not compensable unless the employee is resuming his assigned duties.

Occupational diseases

Occupational diseases are diseases arising from distinctive features of the particular trade, occupation or process to which the employee is exposed. In contrast, ordinary diseases of life are not considered occupational diseases. The Act specifies that partial loss of hearing due to noise is not an occupational disease. Also, psychiatric, psychological and heart and vascular diseases are not considered occupational diseases unless they arise from a separate occupational disease. An employee seeking compensation for an occupational disease must demonstrate each of the following:

- a direct causal connection between the conditions under which the work is performed and the disease

  and

- the disease followed as a natural consequence of exposure by reason of the employment

  and

- the disease is not of a character to which the employee may have had substantial exposure outside of the employment

  and

- the disease is not an ordinary disease of life to which the general public is exposed

  and

- the disease appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.

Injuries occurring out-of-state

Two issues arise in situations where employees are injured while working outside the State of Georgia. The first issue is whether such a claim can be filed in Georgia. Under the Act, an employee injured out-of-state can file a claim in Georgia only where three circumstances are met:

1. the contract for employment was entered into in Georgia

   and

2. either the employer's place of business or the employee's residence is in Georgia

   and

3. the employment contract was not expressly made for employment out-of-state.

The second issue dealing with workers injured out of state is the effect of workers' compensation awards by other states. Because employees may file workers' compensation claims in more than one state, any benefits an employee receives from other states will offset benefits received in Georgia.

Actions by the employee or a third person that could prohibit recovery

In some circumstances, an employee's actions or the actions of a third person leading to an injury may prevent coverage of the injury. Several issues that frequently arise in this area are discussed below.

- **Violation of law**
  An employee's willful violation of a penal law may prevent compensation. In such cases the employer must prove that the employee's violation of law was willful and that it caused the injury in order to avoid the workers' right to

compensation. Accidental, unconscious, or involuntary violations of law by the employee will not prevent recovery.

- **Willful misconduct**
  An employee's willful misconduct that leads to injury can prevent compensation for the employee's injury. Willful misconduct includes intentionally self-inflicted injuries, injuries arising out of attempts to injure others, and the failure or refusal to use a safety appliance. In order to avoid paying compensation, the employer must demonstrate that the employee's misconduct was willful and therefore not merely accidental, careless or involuntary.

- **Drug or alcohol use**
  An injury due to the employee's intoxication by alcohol, marijuana or any other controlled substance is typically not compensable. However, the employee may still recover if the substance was used in accordance with a physician's prescription.

- **Intent by third person to injure**
  Various situations arise in which an employee is injured by an intentional act of another. Generally, where a co-worker attacks an employee for purely personal reasons, such an injury does not fall within the scope of coverage. However, if the injured employee did not provoke the assailant, the resulting injury may be covered. Additionally, an injury resulting from an intentional act of a customer could fall within coverage.

Benefits

Benefits payable to injured workers under Georgia workers' compensation law include medical, rehabilitation, income, and death benefits. These benefits are paid to injured employees or their surviving dependents. This section will briefly discuss the different types of benefits to which injured workers are entitled.

- **Disability benefits**
  Disability benefits vary based on the type of disability and the type of injury. Disabilities may be temporary or permanent and partial or total.

  - **Temporary total disability benefits**
    These benefits arise when an injured worker is unable to return to work for a specified period of time. An employee with temporary total disability receives two-thirds of the employee's average weekly wage at the time of the injury. These benefits extend for the entire period of the disability to a maximum of 400 weeks. Although Georgia's workers' compensation law does not expressly contemplate payment of benefits for permanent total disabilities, temporary total disability benefits are unlimited in duration if the injury is considered catastrophic. Catastrophic injuries may include severe paralysis, amputation, traumatic brain

injuries, blindness or other severe injuries which prevent an employee from working in any job.

- **Temporary partial disability benefits**
  These benefits arise when an injured worker can return to work after an accident but only at a lower-paying job. An employee with temporary partial disability benefits receives two-thirds of the wage differential between the higher- and lower-paying jobs for a maximum of 350 weeks.

- **Permanent partial disability benefits**
  These benefits arise when a worker suffers a permanent disability, such as loss of limb. Payment here depends on the type of injury and the percentage of the partial disability, which is determined by a physician.

- **Death benefits**
  Death benefits are payable to the deceased employee's dependants at a rate of two-thirds the deceased employee's wage. Maximum death benefits depend on the circumstances as specified in the Georgia workers' compensation statutes. Additionally, these benefits include up to $7,500 in funeral expenses.

- **Lump-sum and advance payments**
  After receiving benefits for at least 26 weeks, an employee or dependent may submit an application to the Board to receive a lump-sum payment. The Board will allow such lump-sum payments to prevent situations of extreme hardship or when such a payment is essential to the rehabilitation of the worker. The value of a lump-sum payment is equal to the present value of all future payments at a seven percent annual interest rate. Additionally, the Board may direct the employer to make advance payments under similar circumstances.

- **Subsequent Injury Trust Fund**
  Georgia has established a Subsequent Injury Trust Fund to encourage the hiring of disabled workers. Under the Act, employers of disabled workers who sustain a subsequent injury may apply to the Fund to recover part of the benefits paid to the worker. In order to receive payment from the Fund, the employer must have been aware of the worker's disability at the time of hire. Additionally, the injury must have either resulted from or become worse because of the pre-existing injury.

- **Offsetting benefits**
  For any week in which an employee collects workers' compensation benefits for a temporary partial or temporary total disability, the employee is disqualified from receiving unemployment compensation benefits. In addition, the Social Security Act also provides that there is a reduction in Social Security benefits for workers' compensation received.

- **Termination of benefits**
  If an employee refuses employment that is suitable to his abilities, the employee is not entitled to future benefits. However, if the refused employment is at a lower wage, the employee may still be entitled to benefits based on the wage differential.

The administrative system

State Board of Workers' Compensation

The authority to administer the Act rests with the State Board of Workers' Compensation. The Board consists of three members appointed to four-year terms by the governor. The Board is authorized to issue policies, rules and regulations for the administration of the Act. Additionally, the Board is responsible for training and educating workers and employers within the State of Georgia.

Reporting claims for injury

Upon an injury, the employee is required to give oral or written notice to the employer of his injury. Such notice may be given by either the employee or his representative. This notice must be in writing and signed if the injury occurred more than 30 days prior to the employee's communication to the employer. Moreover, written notice must state the name and address of the employee; the time, place, and nature of the accident; and the cause of the injury.

Hearings and appeals

Parties disputing workers' compensation claims or the payment of benefits may apply to the Board for a hearing. Injured workers, employers and insurers are all authorized to request a hearing. Hearings take place before an administrative law judge who is authorized to determine all questions of law and fact and to issue decisions resolving these issues. Any party may appeal to the Appellate Division of the Board for review of an unfavorable decision. Appeals of a decision by the Appellate Division of the Board may then proceed through the state court system.

Statute of limitations

Generally, an employee must file a claim for denied benefits with the Board within one year of the date of injury. However, this period is extended if the employer furnishes remedial treatment or pays weekly benefits. Accordingly, the employee must file a claim within one year of the date of the last remedial treatment or within two years of the date of the last payment of weekly benefits. Claims for compensation for an employee's death must be filed within one year of the death.

Fraud

The Board's Enforcement Unit investigates allegations of workers' compensation fraud and may assess fines up to $10,000 for violations.

Payment of compensation

The Act specifies the required method of payment of compensation in situations where the employer does not contest liability. Here, the person entitled to payment must be paid periodically, promptly and directly. The details of this required method are outlined below.

- **Method of payment**
  Payments must be in cash, negotiable instrument, or, upon agreement, electronic funds transfer.

- **Starting date**
  The first payment is due on the 21st day after the employer has knowledge of the injury. Subsequent payments must be made in weekly installments unless otherwise authorized by the Board.

- **Date of payment**
  Payments mailed from within the State of Georgia are considered paid when mailed. Payments mailed from outside the State of Georgia are considered paid when mailed three days prior to the due date.

- **Late payments**
  When payments are not made by the due date, 15% will be added to the accrued income benefits. If payment is not made within 20 days, 20% will be added to the accrued income benefits. However, late payments may be excused by the Board where conditions beyond the employer's control led to the late payment.

- **Final payment**
  The employer must notify the Board that final payment has been made within 30 days of the final payment.

Responsibilities of employers

Selecting coverage

Every employer with three or more workers must insure payment of benefits to injured workers. This may be accomplished by securing a policy of insurance or through self-insurance.

- **Insurance policy requirements**
  Insurance policies must be the standard workers' compensation policy of insurance. Additionally, such policies must contain a provision that the premium will be promptly paid and that notice to the employer is notice to the insurer.

- **Self-insuring**
  Employers must apply to the Board in order to self-insure. This application requires a $500 application fee paid to the Georgia Self-Insurers Guaranty Trust

Fund. If an application is accepted, the employer must then post a surety bond or issue a letter of credit for an amount based on the size and nature of the employer.

- **Failure to obtain coverage**
  Violations of the duty to provide coverage could lead to a fine ranging from $500 to $5,000 per occurrence.

Employment process

The Americans with Disabilities Act (ADA) prohibits an employer from inquiring about the existence, nature or severity of an applicant's disability, including workers' compensation history. However, a prospective employer may inquire about the applicant's ability to perform specific job functions under the ADA. Upon hiring, the ADA requires the employer to make a reasonable accommodation to an employee's known disability if the employee is otherwise able to perform the essential functions of the job.

Postings and other worker education

Employers are required to post three notices in a conspicuous location in the workplace. Employers must post:

1. a notice of compliance with the workers' compensation laws

   and

2. the State Board of Workers' Compensation Bill of Rights for the Injured Worker

   and

3. the insurance company's name or a certificate of self-insurance.

Generally, it is considered a good practice to educate workers beyond required notice postings. Handbooks about the workers' compensation program are available from the Board. Additional techniques to educate workers include the education of managers and supervisors and the use of employee training videos.

Upon an accident

Once an injury is discovered, an employer must file the appropriate form with its insurer's claims office. Additionally, injuries involving seven or more days of lost work time must be reported to the State Board of Workers' Compensation within 21 days of discovery of the injury.

Challenging a claim

In order to challenge a claim, the employer must file the appropriate form with the Board within 21 days of knowledge of the injury or death. This form must state the name of the

claimant, the name of the employer, the date of the alleged injury or death, and the grounds for the challenge.

After the beginning of payment of compensation, an employer may challenge the right to compensation upon a change of condition, newly discovered evidence, or within 60 days of the due date of the first payment.

After the employee returns to work

The ADA does not require an employer to create a position for an employee injured on the job who can no longer perform the essential functions of his job. Nevertheless, employers may find it a good business practice to create meaningful employment capacities for injured employees while they are restricted from performing their normal jobs due to an on-the-job injury.

Controlling costs

Drug testing

Employers who implement a drug-free workplace program that meets the requirements of Georgia law qualify for a premium discount under the employer's workers' compensation insurance policy. In order to qualify, the drug-testing program must include a written policy statement, substance abuse testing, employee education, supervisor training, and confidentiality.

Medical costs

The Board permits employers to select medical treatment from:

- a traditional panel of physicians

  or

- a conformed panel of physicians

  or

- a managed care organization.

This allows employers the flexibility of selecting medical professionals suited to their needs and cost restrictions. Additionally, it is a good idea to review medical bills to ensure that all charges are reasonable and conform to the fee schedule.

Where to go for more information

- **Georgia State Board of Workers' Compensation**
  www.sbwc.georgia.gov

Chapter 29

Unemployment insurance

The Georgia Employment Security Law (ESL) provides temporary compensation to those workers meeting the eligibility requirements of Georgia law. Virtually all Georgia employers are required by law to pay contributions in the form of a tax to the State Unemployment Trust Fund (the Trust). Monies from this fund are used to pay unemployment benefits to eligible employees. Most Georgia employers liable for Georgia unemployment taxes are also liable for the federal unemployment tax.

In accordance with the provisions of the ESL, Georgia's unemployment compensation program is administered by the Department of Labor (DOL). The Unemployment Insurance Division of the DOL is responsible for processing unemployment insurance claims and appeals, determining employer tax rates and liability, and processing employers' quarterly reports and tax payments.

An employer's contribution to the Trust is based on experience ratings which relate employer taxes to the cost of providing unemployment benefits to its employees. Employers who have fewer employees receiving unemployment benefits are subject to lower rates. It is to the employer's benefit to contest those claims that are without merit.

Covered employers

All employers doing business in Georgia are subject to the provisions of the ESL. However, not all employers are subject to the taxing provisions of the ESL. Tax liability is determined by the type and nature of the business, the number of workers employed, and the amount of wages paid for services in employment.

Employers subject to Georgia's unemployment tax

An employer is automatically liable for unemployment tax in Georgia if it:

- acquires the organization, trade or business, or substantially all (90% or more) of the assets of another which, at the time of such acquisition, was a liable employer

  or

- is liable to the federal government for Federal Unemployment Tax (FUTA)

or

- is a state or local government organization or an instrumentality of a state or local government.

Private employers

A private employer is liable for Georgia's unemployment tax if it:

- paid, during any calendar quarter, wages of $1,500 or more for service in employment

  or

- employed at least one individual, regardless of whether it is the same individual employed each day, for some portion of a day in each of 20 different calendar weeks, whether or not the weeks were consecutive.

Domestic servants

An employer that provided domestic service performed in a private home, local club or chapter of a college fraternity or sorority is liable if it paid $1,000 or more in wages in any calendar quarter.

Agricultural workers

An employer providing agricultural labor is liable if it:

- paid, during any calendar quarter, compensation in cash of $20,000 or more

  or

- had ten or more individuals employed, regardless of whether they were employed at the same time, for some portion of a day in each of 20 different calendar weeks in a calendar year.

Nonprofit organizations

In order to be treated as a nonprofit organization, the organization must have been issued a 501(c)(3) exemption letter by the Internal Revenue Service. A nonprofit organization is liable if the organization had, within either the current or preceding calendar year, four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not the weeks were consecutive and regardless of whether the individuals were employed at the same time. Notably, all officers who perform services are included in the employee count. If no officers perform services, at least one officer must be included in the count, whether they receive compensation or not.

Once any of these conditions are met, the employer is required to report the total payroll for the entire year, by quarter, and pay the appropriate amount of taxes.

Independent contractors

The ESL provides that services performed by an individual for wages are to be considered employment subject to unemployment tax unless and until it is shown that **either**:

- the individual has been and will continue to be free from control or direction over the performance of such services, both under contract of service and in fact

  and

- the individual is customarily engaged in an independently established trade, occupation, profession or business

  or, in the alternative,

- the individual and the services performed for wages are the subject of an SS-8 determination by the Internal Revenue Service, which decided against employee status. An SS-8 determination establishes which party (employer or worker) is liable to pay federal employment taxes and income tax withholding

Only one of the alternative tests above must be satisfied in order to establish an exemption.

An independent contractor may not waive, release or lessen their rights to benefits or any other rights under the ESL. If there is direction and control by the prime contractor, and not merely a requirement that the end result be reached within a reasonable time, or if the individual's work is done solely with the prime contractor, the individual is considered an employee for purposes of the ESL.

Exemptions

The following types of employment are not subject to Georgia's unemployment tax:

- services performed by an employer in the operation of his or her own business
- father, mother, spouse or minor children younger than age 21 of the individual owner of a company
- partners, if the business is operated under the partnership
- government workers who:
  - are elected officials or officials in non-tenured major policymaking advisory positions which require less than eight hours of work a week
  - members of a legislative body or the judiciary

    - members of the state National Guard or Air National Guard except when called to federal duty

- workers hired for casual labor not in the usual course of the employer's trade or business, unless the cash remuneration is $50,000 or more and the individual is regularly employed to perform such services
- patients performing services for a hospital
- student nurses working at a hospital or nurses' training school
- services performed while working at a hospital or a clinical training program for a period of one year by an individual immediately following the completion of a four-year course in medical school chartered or approved pursuant to state law
- newspaper carriers under 18 years of age
- insurance agents or solicitors, if their total wages are based solely on commission
- students, if the employment is a recognized part of a program which combines academic instruction with work experience
- employees of a church or religious order, or certain church-related schools
- inmates in a state prison or other state correctional institution
- certain independent contract carriers of publishers or distributors of printed materials
- real estate sales agents, if their total wages are based solely on commission.

Termination of liability

An employer may request to terminate its liability if it no longer meets liability requirements under the ESL. The employer's request must be submitted in writing to the Department of Labor prior to April 30th following the year during which the liability requirements were no longer met. However, an employer who becomes liable by reason of voluntary election may not terminate unless two full years have passed since election of coverage.

Unemployment tax rate and liability

Employers covered under the ESL are required to pay tax on the first $8,500 of earnings paid to each individual employee during the calendar year. These taxes are deposited in the Trust and monies from the fund are used to pay unemployment benefits to eligible employees. Each year all active employers are mailed a Tax Rate Notice, form DOL-626, showing the tax rate for the following year.

Newly covered employers

Newly covered employers must pay contributions at a rate of 2.7% of wages paid by the employer during each calendar year until the employer is eligible for a rate calculation based on the employer's "experience rating." As of the June 30th computation date, any contributory employer who has at least 12 quarters (36 months) of chargeability for unemployment insurance claim purposes may be eligible for an individually computed contribution rate based on the status of the employer's reserve account.

Experience rating and rate computations

Taxes are computed based on the employers "experience rating." The experience rating system relates employer taxes to the cost of providing unemployment benefits to their employees. Employers whose unemployment experience costs are less receive lower rates, while employers whose experience indicates greater costs are assigned higher rates. Employers therefore benefit by contesting unemployment claims which have no merit.

The employer's balance also affects the calculation of the employer's rate. Employer's with a positive balance (the amount of taxes paid has exceeded the amount paid out as benefits) will be assigned lower rates than employers with negative balances (the amount of benefits paid has exceeded the amount of taxes paid). The minimum and maximum rates assignable for each type of account are set by the legislature each year.

The employer's tax rate is computed on June 30th each year, based on the status of the employer's account as of that date. The tax rate is computed by subtracting cumulative benefits charged to the employer from cumulative taxes paid by the employer and then dividing the difference by the employer's three-year average annual payroll. The calculated average is applied to the rate tables provided in the ESL. The computed rate applies to taxable wages paid during the calendar year immediately following the computation date. Employers are mailed an "Employer Tax Rate Notice" in late December each year.

Even employers with a 0.0% tax rate are still required to complete and file the Employer's Quarterly Tax and Wage Report – Parts I and II. Penalty charges apply if the reports are not filed by the due date. Failure to complete reports on or before a required due date will subject an employer to a penalty of $20, or .05 percent of the gross payroll, whichever is greater, for each month or fraction of a month such report remains delinquent.

Employer duty to retain documents and information

The ESL requires employers to maintain (four years from the date payments were due and/or paid to the employee) records on all employees including the employee's:

- name and Social Security number

- date of hire, rehire, or return to work
- date and reason for separation (if applicable)
- state or states in which the services are performed
- period covered by the payroll record
- total wages paid to each employee during each calendar quarter showing:
    - cash compensation
    - cash value of other compensation
    - expenses incurred by each employee for which deduction from wages is claimed.

The ESL requires employers to make these records available to authorized representatives of the DOL upon request at any time and as often as deemed necessary by the DOL.

Employee eligibility for benefits

An employee is eligible for unemployment benefits if they are not **disqualified** (see page 354, **Disqualification from benefits** section below for more information on disqualification) and the employee files a claim with the DOL demonstrating the following monetary and non-monetary requirements.

Monetary requirements

- The claimant earned qualifying wages in at least two of the four quarters in the base period of the claim (the base period is the first four of the last five calendar quarters completed at the time the claimant files a claim).

  and

- The claimant had, for four quarters, wages equal to or exceeding one and one-half times the high quarter wages in the claimant's base period.

  and

- The claimant must have earned at least $1,134 in the two highest quarters of the base period.

  and

- The claimant earned base period wages with a covered employer.

Non-monetary requirements

- The claimant is totally or partially unemployed through no fault of their own. Examples include, but are not limited to, situations where:
    - the employee was laid off due to lack of work

      or
    - the employer reduced the employee's hours due to lack of work

      or
    - the employee was fired without work-related misconduct

      or
    - the employee quit for a good work-related reason.
- The claimant is physically able to do some type of work.
- The claimant is available for work.
- The claimant is actively seeking full-time, continuous work.

Layoffs and mass separations

Employees volunteering for a layoff are considered unemployed due to lack of work when the employer has accepted them from a list of volunteers for a layoff caused by lack of work. However, to be eligible, the employee must remain with the employer while work is available and until the agreed upon termination date.

A mass separation occurs when 25 or more workers employed in one establishment are separated on the same day for the same reason, and the separation is permanent or for an indefinite period of at least seven or more days. In cases of mass separation, employers are required, within 48 hours, to furnish the DOL's nearest field service office form DOL-402, Mass Separation Notice in duplicate, and a copy of form DOL-402A, Continuation Sheet, providing the information requested on each of these forms.

Calculation of benefits

The claimants weekly benefit amount is computed by dividing the claimant's two highest quarters of wages paid in the base period by 42. The base period is the first four of the last five completed calendar quarters immediately preceding the effective date of the claim for unemployment benefits. Wages must have been paid in at least two quarters of the base period and total wages in the base period must equal or exceed 150 percent of the highest quarter base period wages.

For claims that fail to establish entitlement to benefits due to failure to meet the 150 percent requirement, an alternative base period may be used. The alternative base period is the last four completed calendar quarters immediately preceding the effective date of a claim for unemployment benefits.

For claims filed on or after July 1, 2008 the minimum weekly benefit amount is $44 per week and the maximum weekly benefit amount is $330 per week.

Benefits paid to the employee are charged to the claimant's most recent and separating employer, provided the employer has paid wages at least ten times the claimant's weekly benefit amount and the separation was under allowable conditions as defined by the ESL. Employers cannot be charged more than the amount of wages that the employer paid the claimant and the employer only pays for the period of unemployment attributable to the separation from its employ.

Disqualification from benefits

A claimant may be disqualified from receiving benefits for the following reasons:

- **Voluntarily quitting**
  An individual who leaves their most recent employment voluntarily and without good cause connected with the work itself will be disqualified for benefits for the duration of the unemployment period. The burden of proof is on the employee to show good cause connected with work for voluntarily quitting his or her employment. In order to re-qualify, the claimant must work and earn insured wages for services in employment equal to at least ten times the established weekly benefit amount of the claim and then be separated due to no fault of their own.

- **Discharge or suspension**
  A claimant may be disqualified from receiving benefits as a result of a discharge or suspension from work with the employee's most recent employer due to failure to obey orders, rules or instructions, or failure to perform duties for which the claimant was employed. The burden of proof is on the employer to show just cause for the discharge or suspension. Notably, inability to perform the job duties alone is not a disqualifying reason. There must be some fault chargeable to the claimant for failure to attain required proficiency. Under these circumstances, the claimant will be disqualified for the duration of the employment period. In order to re-qualify, the claimant must work and earn insured wages for services in employment equal to at least ten times the established weekly benefit amount of the claim and then be separated due to no fault of their own.

- **Intentional conduct**
  If it is determined that the claimant engaged in intentional conduct on the premises of the employer or while on the job that results in physical assault or bodily injury to the employer, fellow employees, customers, patients, bystanders or the eventual consumer of products, the claimant will be disqualified from receiving benefits until he or she secure employment and earns insured wages equal to at least 12 times the weekly benefit amount. The claimant will be similarly disqualified for intentional conduct that results in

the employee being discharged for theft of property, goods or money valued at $100 or less.

If it is determined that the claimant engaged in intentional conduct which results in property loss or damage amounting to $2,000 or more or intentional conduct that results in the employee being discharged for theft of property or goods or money valued over $100, or for sabotage or embezzlement, the claimant will be disqualified until they secure employment and earn insured wages equal to at least 16 times the weekly benefit amount.

- **Refusal of job or referral**
  A claimant must have good cause for refusing suitable work or a referral to suitable work after filing a claim. Some of the factors considered in determining whether or not work is suitable are the individual's:

  - health
  - safety
  - morals
  - physical fitness
  - prior training
  - experience
  - prior earnings
  - length of unemployment
  - prospects for securing work in the claimant's occupational skill
  - the distance to available work from the place of residence.

  No work will be considered suitable and benefits will not be denied under the law to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

  - the position offered is vacant due directly to a strike, lockout or other labor dispute
  - if the wages, hours or other conditions of the work offered are less favorable to the individual than those prevailing for similar work in the area
  - if the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

- **Labor dispute**
  If it is determined that a claimant is participating in, financing, or directly interested in a labor dispute, the claimant will be ineligible for benefits for the duration of the labor dispute.

- **Workers' compensation**
  A claimant who is receiving workers' compensation for temporary partial or temporary total disability under the compensation law of any state (or under a similar federal law) is not entitled to unemployment benefits.

- **Claimant-trainee quit/discharge**
  A claimant who is attending an agency-approved training course and voluntarily quits attending such course without good cause will be disqualified from receiving benefits. In order to re-qualify, the claimant must work and earn insured wages for services in employment equal to at least ten times the established weekly benefit amount of the claim and then be separated due to no fault of his or her own.

- **Educational workers**
  Claimants who earn wages for educational institutions will not receive benefits if services were performed in the prior period, term or year and there is reasonable assurance that the individual will perform such services in the next period, term or year.

- **Claimants receiving benefits from other states**
  A claimant who is receiving unemployment benefits from another state or territory of the United States is ineligible to receive Georgia unemployment benefits.

Processing and payment of claims

Claims for unemployment benefits are made by filing a claim through the Georgia Department of Labor, Division of Unemployment Insurance. The claimant may claim benefits at any Georgia Department of Labor Career Center (state unemployment office). The state unemployment office will request information from the claimant's most recent employer and make an initial determination as to the claimant's eligibility to receive benefits. If a quit or discharge issue is involved, a fact-finding interview is scheduled to take place at least seven days from the date of the filing of the claim.

Predetermination interviews are informal proceedings conducted by claims examiners, in most cases by telephone. The claim examiner gathers information about the separation upon which they will base the determination. It is beneficial to the employer to provide the claim examiner any written documentation which supports the separation, including but not limited to, warnings, reprimands, performance appraisals, attendance records or any other documents which support the separation.

Determinations are typically made within 14 to 21 days from the date the claimant files a claim and if benefits are awarded, the claimant's first check will be mailed on the same day as the written decision. The maximum number of weeks allowed for any claim is 26 weeks.

Appeals

If the claimant is awarded benefits, the employer may file an appeal by writing or faxing a letter to the field service office where the claim originated or to the appeal section in Atlanta. The appeal will be considered to have been timely filed if it is received in the Georgia DOL office within the 15-day time limit, or if it was mailed within that time frame. Any timely written statement signed by the employer or a designated representative stating dissatisfaction with the written determination will initiate an appeal to an administrative hearing officer.

Levels of appeal

The first level of the appeal is before an administrative hearing officer. A tape recording is made of testimony given under oath from parties and witnesses at the hearing. Evidence is considered and the result is issued in a written decision by the administrative hearing officer. The decision will affirm, reverse or modify the prior determination.

The second level of the appeal is to the Board of Review (Board), a three-member panel appointed by the governor. An appeal to the Board of a decision issued by an administrative hearing officer must be made in writing to the department within 15 days of the official date of notification of the first level decision. The Board does not hear testimony but reviews the transcript from the first level hearing and issues a written decision.

Within 15 days after the Board's decision has become final, a party may appeal by filing a petition in the superior court of the county where the claimant was last employed. If the individual was last employed in another state, the appeal must be filed in Fulton County, Georgia.

Fighting unemployment claims and controlling UI costs

Because an employer's experience rating and corresponding tax rate is increased whenever a former employee receives benefits, it is to the employer's advantage to contest those unemployment claims that are without merit. Furthermore, an employer may also use the process of contesting the claimant's unemployment claim as a means of gathering information which could be extremely valuable in the defense of any discrimination charge or lawsuit against the employer. Indeed, the testimony given by the employee, before the administrative hearing office, may often serve as an invaluable tool in diminishing the credibility of the employee if such testimony conflicts with later deposition testimony.

In addition to contesting unsupported unemployment insurance claims, employers may take the following steps to control unemployment insurance costs, including:

- document voluntary resignations and quits through signed statements by the employee

- document any misconduct which led to the employee's termination
- gather signed statements from supervisors and other employees who may have witnessed the misconduct which lead to the employee's termination
- conduct exit interviews
- challenge those unemployment claims that are without merit
- monitor unemployment claims and tax rate calculations.

Where to go for more information

For additional information on unemployment laws in Georgia, fighting claims, and other related information, visit the Georgia Department of Labor's website at:

- www.dol.state.ga.us.

Claims information may be obtained by calling:

- (404) 232-3025.

Chapter 30

Health care continuation

COBRA

The Consolidated Omnibus Budget Reconciliation Act (COBRA) is a federal law which requires that most employers extend group health plan privileges to employees who would otherwise lose coverage.

Coverage

All employers who maintain a group health plan are subject to COBRA rules unless:

- The employer employed fewer than 20 employees (counting full-time and part-time) on at least 50% of its typical business days during the previous calendar year. Part-time employees are counted as partial employees. Also, for purposes of the 20 employee threshold, employees of all companies that are in a controlled group with the employer must be counted.

  or

- The employer is a governmental entity or a religious organization. (However, governmental employers may be subject to similar rules under the Public Health Services Act.)

COBRA applies to only group health care plans, including the following:

- medical
- dental
- vision
- prescription drugs
- health maintenance organizations
- healthcare flexible spending accounts (these plans are subject to special limitations under the COBRA rules).

Disability income plans and life insurance plans are not included. However, individual health insurance policies (such as voluntary cancer policies) can be subject to COBRA if:

- the employer provides contributions for any portion of the premium payments

  or

- premiums are established on a group basis

  or

- there is other employer involvement (including the payment of premiums through a cafeteria plan).

COBRA rights must be offered for each separate plan sponsored by the same employer.

Employees and dependents eligible for COBRA coverage

Any employee who is covered by a group health plan on the day before a qualifying event (explained below) is known as a "qualified beneficiary" covered by COBRA, unless that employee was terminated for gross misconduct.

Qualified beneficiaries also include the employee's dependent children and spouse if they are covered under the plan on the day before a qualifying event, unless the covered employee was terminated for gross misconduct. Children born or adopted by the covered employee during a COBRA continuation period are also qualified beneficiaries.

Other dependents acquired during the COBRA continuation period may be added to the COBRA coverage, but do not gain the status of qualified beneficiaries. An individual who marries a qualified beneficiary on or after the date of the qualifying event, or a newborn or adopted child of a qualified beneficiary (other than the covered employee) are not qualified beneficiaries.

Qualifying events

Qualifying events under COBRA are events which cause a loss of coverage under the health plan. A qualifying event occurs when a covered employee, his/her spouse or dependent children lose coverage under the plan because:

- the employee's hours of employment are reduced

  or

- the employee's employment ends for any reason other than his or her gross misconduct

  or

- the employee dies

  or

- the employee becomes entitled to Medicare benefits

  or

- the employee becomes divorced or legally separated from his or her spouse

  or

- the employee's child stops being eligible for coverage under the Plan as a dependent child.

If an employer offers retiree medical benefits under its group health plan, the employer's filing for bankruptcy is also a qualifying event with respect to affected retiree participants if there is a substantial elimination of coverage that occurs within 12 months before or after the date the bankruptcy proceeding begins.

These are qualifying events only if the event causes a covered employee or his or her covered dependents to lose coverage under the health plan. A loss of coverage includes a change or decrease in benefits offered or an increase in the premiums or contributions required to be paid by the employee or his/her dependents.

> **Note**
> A plan with more than 20 participants cannot terminate an active employee's coverage because he becomes entitled to Medicare, so for most plans an employee's entitlement to Medicare is not a qualifying event.

The COBRA continuation coverage period generally starts on the day after the date of the qualifying event even if coverage is actually lost at a later date. Alternatively, a health plan may specifically provide that the continuation coverage period will begin as of the date of the loss of coverage. The qualifying event also triggers a duty on the part of both the employer and plan administrator to notify the qualified beneficiary that COBRA continuation coverage privileges are available. The qualified beneficiary has a 60-day election period (measured from either the date on which the plan administrator provides the COBRA election notice or the date on which coverage is actually lost, whichever is later) to elect COBRA continuation coverage (see page 364, **COBRA notices** for further details). Certain workers who lose their jobs due to the effects of international trade and who qualify for trade adjustment assistance under the Trade Act of 2002 may be entitled to a second chance to elect COBRA. In addition, certain workers (and their spouses and dependents) who lose their jobs due to an involuntary termination of employment between September 1, 2008, and December 31, 2009, and who lose coverage as a result may be entitled to a second chance to elect COBRA.

FMLA leave

A leave approved under the Family and Medical Leave Act (FMLA) does not count as a qualifying event because the employer is required to allow the employee (and dependents) to continue health coverage during the leave. However, a qualifying event occurs on the last day of the FMLA leave if the employee:

- is covered under the plan on the day before FMLA leave begins

  and

- does not return to work at the end of the FMLA leave

  and

- in the absence of COBRA coverage, will lose health care coverage.

If an employee meets these requirements, the last day of his or her FMLA leave will be considered the COBRA qualifying event (from which COBRA notice requirements and the length of COBRA coverage are measured) even if the employee allowed coverage to lapse or the employee declined to continue coverage altogether during his or her FMLA leave. Some state and local laws may require employees to receive coverage for a longer period of time than that required under the FMLA. However, even if this is the case, the qualifying event will still be the last day of the FMLA leave.

If an employee fails to return to work following FMLA leave, the employer may require reimbursement of any health plan premiums paid by the employer on the employee's behalf during the leave. However, regardless of an employer's right to reimbursement for such premiums, the employer may not condition the employee's right to COBRA coverage following FMLA leave upon such reimbursement.

COBRA coverage periods

The maximum coverage periods under COBRA are:

- 18 months if the qualifying event is the termination of employment of the employee or a reduction in hours

- 29 months if at any time within the first 60 days of COBRA coverage, one of the qualified beneficiaries is determined to be disabled by the Social Security Administration. The employee or qualified beneficiary must notify the plan administrator before the end of the initial 18-month COBRA period and within 60 days of the Social Security Administration determination

- 24 months for certain members of the military (and their spouse and dependents) when they are called to active duty (see page 368, **Continuation of health insurance benefits under USERRA** for more information)

- 36 months for all other qualifying events.

If a second qualifying event, such as death or divorce, occurs during the time an 18-month or 29-month continuation period is in effect, the maximum coverage period generally is extended to a 36-month continuation period.

However, a special rule applies to most health care flexible spending account plans. These plans are generally required to offer COBRA coverage only until the end of the plan year in which the qualifying event occurs.

Paying for COBRA coverage

Generally, qualified beneficiaries must pay the entire cost of COBRA coverage. The premium charged may not exceed 102% of the cost (including both the employee and employer-paid portions) attributable to similarly situated active employees. For the additional 11 months of extended COBRA coverage due to a disability determined by the Social Security Administration, the premium charged may not exceed 150% of the total premium paid with respect to an active employee.

The qualified beneficiary must pay the initial COBRA premium within 45 days of making the COBRA election. The initial premium paid must include the amount necessary for coverage retroactive to the date of the qualifying event. From that point forward, each premium must be paid according to the payment schedule required by the health plan and within the grace period (which must be at least 30 days from the due date) allowed for receipt of premiums.

Termination of COBRA coverage

The period for COBRA coverage will end if:

- the employer stops providing group health benefits to all of its employees (if the employer is part of an affiliated control group, all members of the group must stop providing group health benefits)

  or

- required premiums are not paid within the grace period (which must be at least 30 days from the due date under the plan)

  or

- the qualified beneficiary becomes covered under another group health plan not subject to a preexisting exclusion or limitation, or becomes entitled to Medicare, after electing COBRA coverage

  or

- the qualified beneficiary is determined to be no longer disabled during the disability extension period

  or

- the qualified beneficiary engages in fraud or other conduct that justifies termination of active employee coverage

  or

- the maximum period for COBRA coverage is reached.

COBRA notices

Under COBRA, four written notices are required to be provided by the plan administrator:

1. **General notice**
   A "general notice" of COBRA rights and obligations must be sent to employees and their covered spouses within 90 days of the beginning of health plan coverage for the employee or his/her spouse.

2. **Continuation coverage election notice**
   A "continuation coverage election notice" must be given to each employee or beneficiary by the plan administrator within 14 days after the plan administrator receives notice from the employer or the employee or his or her spouse of the occurrence of a qualifying event. (The employer must notify the plan administrator within 30 days of certain qualifying events.) It is important to note that each qualified beneficiary has a separate election right and the notices must be sent so that they reach each qualified beneficiary. A notice sent to the employee or employee's spouse is sufficient notice for dependent children residing with the individual to whom such notice was sent.

3. **Unavailability of COBRA coverage notice**
   A notice of "unavailability of COBRA coverage" must be provided by the plan administrator within 30 days of receipt of a request for COBRA coverage from an individual, if the plan administrator determines that the individual is not eligible for coverage.

4. **Termination of continuation coverage**
   As soon as practicable after a plan administrator determines that COBRA coverage is being terminated before the end of the maximum coverage period, a notice of "termination of continuation coverage" must be provided to each qualified beneficiary explaining why the coverage is being terminated.

In general, all required notices must be sent by first class, certified or registered United States mail, addressed to the employee and spouse (if both are covered under the health

plan) at the last known home address. Other methods of delivery, such as electronic delivery or hand delivery may be permissible in certain cases. Plans must keep complete and accurate records of all notices required by COBRA.

In addition to the notices that must be provided by the plan administrator, covered employees, covered dependents and qualified beneficiaries must also notify the plan administrator of certain events (generally, within 60 days), such as:

- divorce
- legal separation
- a child ceasing to be a dependent
- the occurrence of a second qualifying event
- a determination of disability by the Social Security Administration, or cessation of such disability.

The plan must establish reasonable procedures to be followed by individuals when notifying the plan administrator of such events.

Penalties

The Department of Labor, on behalf of participants, may assess a fine of up to $110 per day for a COBRA notice violation, accruing until the notice is issued. Each notice failure carries its own fine, so fines can become significant. Failure to comply with the requirements of COBRA can also result in other remedies for affected qualified beneficiaries. Additionally, an excise tax may be assessed by the Internal Revenue Service against an employer for failure to comply with any of COBRA's provisions. The excise tax generally is equal to $100 per day for each failure per covered beneficiary. The Internal Revenue Service is given the authority to increase the excise tax in certain circumstances or waive or lower the excise if the failure to comply is due to "reasonable" cause.

Continuation of health insurance coverage under Georgia law

Continuation of coverage for employees not eligible for COBRA

Georgia law provides for continuation of health insurance benefits for employees of small employers not covered by federal COBRA. These rules apply to health insurance benefits provided under a health and accident policy, but do not apply to a self-insured health plan maintained by an employer who is subject to ERISA.

Employers subject to Georgia continuation coverage laws

Georgia law requires insurance carriers who provide group health insurance to employees of any employer in the state who employs fewer than 20 employees (and therefore, not subject to the federal COBRA provisions) to provide continuation coverage.

Employees eligible for Georgia continuation coverage

All employees losing coverage under the group health plan who have been continuously covered under the plan for six months and are not otherwise covered by COBRA are generally covered, unless the employee was terminated for cause or failure to pay premiums. Upon the termination of coverage, continuation coverage must be provided for the employee and his or her spouse and dependent children who were covered under the plan on the day before the coverage was terminated.

Premium payment

The premium to be paid by the employee for continuation coverage must be the same rate for active employees covered under the plan. However, the premium for continuation coverage shall also include the portion of the premium paid by the former employer if the former employer does not pay it.

Period of continuation

The employee and his eligible dependents are entitled to continue their coverage under the group health plan for the portion of the month remaining after regular coverage terminates as well as for an additional three months.

Upon the termination of coverage after the additional three months, the employee and his eligible dependents are eligible to convert their coverage under the group health plan into individual health policies.

Continuation of coverage (age 60 and over)

Georgia law also provides for the continuation of health insurance benefits for employees and their dependents if the employee is age 60 or over and has exhausted COBRA or Georgia continuation coverage benefits. These rules apply to health insurance benefits provided under a health and accident policy, but do not apply to a self-insured health plan maintained by an employer who is subject to ERISA.

Employees eligible for additional continuation coverage

If an employee and his eligible dependents have exhausted their federal COBRA and Georgia continuation coverage benefits described above, that employee and his eligible

dependents may be eligible for additional benefits if he is age 60 or older. To be eligible for these additional continuation rights:

- the employee must have been covered under a group health plan with at least 20 or more employees

  and

- the employee was at least age 60 or older on the date on which COBRA or Georgia continuation coverage benefits began under the group health plan.

If the employee meets these requirements, the employee and his or her eligible dependents and spouse are eligible to continue health insurance for the period described below.

The employee is **not** eligible for coverage if his or her:

- employment was terminated voluntarily for non-health related reasons

  or

- employment was terminated for reasons that would cause a forfeiture of unemployment benefits

  or

- coverage was terminated because the employee failed to pay the required premiums

  or

- discontinued coverage is replaced with similar coverage

  or

- employer terminated the group health plan in its entirety or with respect to the class of employees to which the employee belonged.

Additionally, if the employee dies or divorces his or her current spouse, the surviving spouse or divorced spouse (and any dependent children) may elect to continue his/her health coverage if the surviving spouse or divorced spouse is age 60 or older at the time of the employee's death or divorce. The divorced or surviving spouse is entitled to coverage for the period described below.

Premium payment

The premium to be paid by the employee and his or her eligible dependents, (or surviving or divorced spouse) for continuation coverage cannot be greater than 120% of the total cost of coverage provided to the employee if the employee was still currently employed.

Period of continuation

Continuation coverage must continue until:

- the termination of insurance coverage for non-payment of the premium

  or

- the date the employee (or his eligible dependents or surviving or divorced spouse) become covered under another group health plan

  or

- the date the employee (or eligible dependents or surviving or divorced spouse) becomes entitled to federal Medicare coverage

  or

- the date the employer terminates coverage for all employees.

Continuation of health insurance benefits under USERRA

The Uniformed Services Employment and Reemployment Rights Act (USERRA) requires a group health plan to continue health insurance coverage under the plan for employees serving in the uniformed services who will lose coverage as a result of active military service to the extent required by USERRA. USERRA also permits such an employee to elect coverage for his/her dependents if the employee's dependents will lose coverage under a group health plan as a result of the employee's active duty service. If an employee is serving in the uniformed services for no more than 31 days, coverage shall continue as if he were in active service with the employer.

If the absence is for a period longer than 31 days, the employee has the right to continue coverage for up to 24 months or until the date after the employee is required to, but fails to, apply for a return to active employment as required under USERRA (if earlier). As a plan design feature, many plans provide that continuation coverage under USERRA and COBRA will begin on the same date and will thus run concurrently.

Temporary COBRA subsidy

The American Recovery and Reinvestment Act of 2009 (ARRA) includes a 65% subsidy of COBRA premiums for individuals who:

- have been involuntarily terminated between September 1, 2008, and May 31, 2010

  and

- lose coverage as a result of such termination

  and

- do not exceed certain income thresholds. An eligible individual who elects COBRA coverage will only be required to pay 35% of the applicable cost.

The remaining 65% must be paid by the employer and the federal government will reimburse the employer via a payroll tax credit. The subsidy may continue for up to fifteen months after the first day of the first month for which the subsidy applies, but it will end earlier if the individual becomes eligible for other group health coverage or at the end of the maximum COBRA coverage period. For otherwise eligible individuals with adjusted gross income between $125,000 and $145,000 ($250,000 and $290,000 for joint filers) the subsidy is reduced proportionately. The entire subsidy is unavailable or, if received, must be repaid, if the adjusted gross income exceeds $145,000 ($290,000 for joint filers).

Employers must provide certain notices of the availability of the subsidy to any individual who becomes eligible for COBRA for any reason between September 1, 2008, and May 31, 2010.

As explained above, COBRA does not apply to employers with fewer than 20 employees. Accordingly, the ARRA subsidy does not extend to employees of smaller employers. In response, Georgia has also adopted a subsidy program similar to the program outlined in ARRA for employees of small employers not covered by federal COBRA. Georgia's program applies to all group plans and contracts that were in effect on September 1, 2008. The subsidy is available for participants who would be eligible for ARRA if subject to federal COBRA and who were involuntarily terminated between September 1, 2008 and May 31, 2010. The participant must also have been continuously covered under the group health plan for at least six months immediately prior to the termination to be eligible for state continuation coverage at the time of termination.

Under the subsidy, eligible individuals receive nine months of continued coverage and receive a 65% premium subsidy similar to the subsidy offered under ARRA. Accordingly, eligible individuals who elect COBRA will be treated as paying the full cost of the premium if the individual pays 35% of the applicable cost.

The subsidy will continue for the portion of the month remaining at termination plus nine additional months upon payment of the premium to the insurer. At the time this Manual went

to print, the Georgia legislature had extended the subsidy period to 15 months but the proposed change had not yet been approved by the Governor. An eligible individual can elect continuation of his or her coverage or the coverage of his or her dependents at any time between May 5, 2009 and 60 days after receiving notice from his or her insurer of the right to participate in a second election period for state continuation benefits.

All the rights outlined in the Georgia subsidy program will automatically end when ARRA expires.

As the economic downturn continues, Congress may extend the COBRA assistance offered under ARRA. The progress of these extensions and their potential effect on Georgia law should be monitored by employers.

Self-reporting excise taxes

Employers failing to meet the requirements of COBRA are subject to certain excise taxes under the Internal Revenue Code. Beginning in 2010, employers must report the excise tax arising from such failures on IRS Form 8929. The excise tax must be paid upon submitting the Form 8929. Generally, the employer is responsible for paying the excise tax and submitting the Form 8929. However, in some instances, that responsibility may fall on a third party or insurer. For failures relating to COBRA, the excise tax and the Form 8928 are due on or before the due date for filing the entity's federal income tax return.

Where to go for more information

This chapter is intended as a brief overview of the health care continuation requirements under federal and Georgia law. It is by no means exhaustive. If you need additional information, you may wish to consult the following or with an attorney:

- www.dol.gov/ebsa/compliance
- U.S. Department of Labor's Employee Benefits Security Administration (EBSA)
  National Office (877) 889-5627

  Atlanta Regional Office
  61 Forsyth Street, S.W.
  Suite 7B54
  Atlanta, GA 30303
  (404) 562-2156

Chapter 31

HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) has a significant impact on the medical coverage provided by employer-sponsored group health plans. Among other provisions, HIPAA:

- requires a group health plan to limit exclusions based upon preexisting conditions
- prohibits such plans from denying coverage to individuals or charging higher premiums based on health status, medical history or certain other factors
- guarantees renewability of coverage to certain individuals
- requires a group health plan to provide for the privacy and security of plan participants' individually identifiable health information.

Employers who violate HIPAA's portability, privacy or security provisions may face fines and/or lawsuits for failing to meet these requirements.

For purposes of HIPAA's requirements, health insurance coverage means benefits for medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or HMO contract offered by a health insurance issuer. It does not, however, include certain "excepted benefits" such as:

- accident-only coverage
- disability income insurance
- liability insurance, including general liability insurance and automobile liability insurance
- workers' compensation or similar insurance
- automobile medical payment insurance
- credit-only insurance (for example, mortgage insurance)
- coverage for on-site medical clinics.

Certain limited scope dental and vision benefits or long term care benefits are also excepted benefits, if they are provided under a separate policy, certificate, or contract of insurance, or are otherwise not an integral part of the plan. Also, health flexible spending accounts ordinarily are exempt from HIPAA, as are health savings accounts.

HIPAA requirements also generally do not apply to governmental plans or to a group health plan for any year in which the plan has only one employee-participant on the first day of the plan year.

Health insurance portability

HIPAA provides protection to individuals who are changing jobs and/or health coverage by restricting the ability of the new group health plan to limit coverage for prior medical conditions or other health status factors.

Limitations on imposing preexisting condition exclusions

Many group health plans limit or exclude benefits for expenses incurred as a result of pre-existing conditions. A preexisting condition is any condition that was present before the effective date of coverage under the group health plan. Under HIPAA, a group health plan (or a health insurance issuer offering group health insurance coverage) may impose such an exclusion only under the following limitations:

1. **Six-month look-back rule**
   First, a pre-existing condition exclusion (PCE) may be imposed only for a preexisting condition, which is defined as a medical condition for which medical advice, diagnosis, care or treatment was recommended or received within the six month period prior to the enrollment date.

   Medical care or treatment includes taking a prescribed drug during the look-back period, even if prescribed more than six months before the enrollment date. Genetic information alone, without diagnosis of a specific related condition, cannot be treated as a preexisting condition.

   and

2. **Twelve-month look-forward rule**
   Second, the group health plan may not limit benefits for a pre-existing condition for a period longer than the 12-month period after the enrollment date. There is an exception to this limitation for individuals who do not enroll in the plan when they are first eligible to enroll or during a special enrollment period (as discussed below.) These individuals are considered to be “late enrollees” and the plan may impose its PCE for up to 18 months with respect to late enrollees.

   and

3. **Reduction of exclusion period by creditable coverage**
   Finally, the period of the PCE must be reduced to the extent the individual has prior creditable coverage under another plan. However, prior periods of creditable coverage generally do not count toward reducing the PCE period if the individual experienced a break in coverage of 63 days or more.

A group health plan cannot impose any PCE relating to pregnancy as a preexisting condition. Also, a group health plan's PCE may not apply to a newborn or adopted child if that child has creditable coverage by the 30th day following his/her birth, adoption or placement for adoption and the child is subsequently enrolled in the group health plan without a significant break in coverage.

and

4. **Beginning January 1, 2011, group health plans may no longer impose pre-existing condition limitations on children under age 19**
   Under the Patient Protection and Affordable Care Act, group health plans may no longer impose pre-existing condition limitations on children under age 19. Group health plans should be amended in this regard on or before December 31, 2010 for a January 1, 2011 implementation date.

Notice requirements

In order to impose a PCE, a group health plan must provide, as part of its enrollment materials, a written notice explaining the existence, length and terms of the PCE. The notice must explain that creditable coverage will reduce the length of the PCE, that the individual has the right to demonstrate creditable coverage, and that the individual has the right to request a certificate of creditable coverage from his/her prior plan. The notice must also state that the current plan will assist in obtaining the certificate, if necessary. The notice must include a contact person (with telephone number or address) for assistance or additional information in obtaining a certificate.

Creditable coverage

In general, creditable coverage means health coverage provided to an individual under programs such as:

- a group health plan
- another group or individual health insurance policy
- Medicare or Medicaid
- Chapter 55 of Title 10 of the United States Code (medical coverage for members of the uniformed services)
- a public health plan (as defined in regulations)
- State Children's Health Insurance Program.

A period of creditable coverage is not counted if there is a break in coverage of at least 63 days (other than any applicable waiting period) between the end of the creditable coverage period and the participant's or beneficiary's enrollment date under the new group health plan. There is an exception when there is a break in coverage of at least 63

days with a subsequent COBRA election for certain individuals eligible for subsidized COBRA coverage pursuant to the American Recovery and Reinvestment Act of 2009 (ARRA) (as discussed in Chapter 30, **Health care continuation**).

Calculation of periods of creditable coverage

A group health plan may count periods of creditable coverage without regard to the specific benefits provided under such coverage. Alternatively, the group health plan may count the periods of creditable coverage for certain types of benefits (such as mental health, prescription drugs or dental care).

Certificates of creditable coverage

In general, an individual proves that he/she had prior creditable coverage by presenting to his/her new group health plan a certificate of creditable coverage from the old plan.

A group health plan must furnish a plan participant, without charge, with a certificate of coverage *(*see page 373) on each of the following occasions:

- Automatically, at the time a plan participant ceases to be covered under the plan (or would cease to be covered if not for continuation coverage under COBRA or applicable state law). The certificate generally must be provided to the participant at a time consistent with notices required under COBRA. For a participant not entitled to elect COBRA coverage, the certificate must be provided within a reasonable period of time after coverage ends. The group health plan must also provide a certificate automatically to any qualified beneficiary at the end of his or her COBRA coverage period.

- Additionally, a certificate must be provided to a plan participant upon request within 24 months of the loss of coverage.

The summary plan description provided to plan participants and beneficiaries must include an explanation of the procedures to be followed to obtain a certificate.

Self-insured group health plans bear the responsibility for providing the certificates. If the plan is a fully-insured group health plan, the health insurer will normally fulfill these obligations. However, the plan sponsor must verify with the health insurer that the certificates are being provided as required.

Form and content of the certificate

The certificate of creditable coverage must be in written form and contain specific information. A copy of the model certificate published by the Department of Labor is attached at the end of this chapter. No written certificate is required if:

- the individual requests that the certificate be sent to another plan or issuer instead of the individual

or

- the plan or issuer that would otherwise receive the certificate agrees to accept the information through means other than a written certificate (that is, by telephone)

  or

- the receiving plan or issuer receives such information from the sending plan or issuer in such form within the required time period.

Rules related to certification

- A plan may provide a single certificate for a participant and the participant's dependents, if the period of coverage is identical for each individual. However, if plan coverage information is different for each family member, such information must be separated on the certificate with each set of information clearly indicated for the applicable family members.

- The certificate must be sent by first-class mail to the participant's last known address. If a dependent's last known address is different from the participant's last known address, a separate certificate must be mailed to the dependent's last known address.

- If the individual entitled to receive a certificate designates another individual or entity to receive the certificate, the certificate may be provided to that designated individual or entity.

Demonstrating creditable coverage through other means

If the accuracy of a certificate is in question or a certificate of creditable coverage is not available, an individual may demonstrate creditable coverage (and any waiting periods) through the presentation of documents or other means. The plan may not consider an individual's inability to obtain a certificate to be evidence of the absence of creditable coverage. Documents that may establish creditable coverage in the absence of a certificate include:

- explanations of benefit claims

  or

- pay stubs showing payroll deduction for health coverage

  or

- a health insurance identification card

or

- records from medical care providers indicating health coverage.

The plan must take into account all information that it receives on behalf of an individual. The plan must make a determination, based upon the relevant facts and circumstances, whether the individual has creditable coverage and is entitled to offset all or a portion of any PCE period.

A plan shall treat the individual as having furnished a certificate if he or she:

- attests to the period of creditable coverage

  and

- presents relevant supporting evidence of some creditable coverage during the period

  and

- cooperates with the plan's efforts to verify the individual's coverage. (Cooperating with the plan includes, among other things, providing a written authorization for the plan to request a certificate on the individual's behalf.)

Notification of preexisting condition exclusion periods

A plan seeking to impose a PCE is required to disclose to the individual, in writing, its determination of any PCE period that applies to the individual as well as the basis for such determination (including the source and substance of any information on which the plan relied). In addition, the plan is required to provide the individual with a written explanation of any appeal procedures established by the plan and with a reasonable opportunity to submit additional evidence of creditable coverage.

Special enrollment periods

As a general rule, a group health plan can limit the times when an individual can enroll in the plan. However, HIPAA requires group health plans to establish special enrollment periods in certain circumstances. As noted above, an individual who enrolls for coverage in a group health plan after the first period in which he/she is eligible to enroll generally can be subject to an 18-month PCE as a "late enrollee." However, any individual who enrolls in a group health plan during one of the special enrollment periods set forth below is not considered a "late enrollee" and is, therefore, subject only to a 12-month PCE period.

Eligibility for premium assistance subsidy

States may provide premium assistance to low-income children if the child is eligible for the Children's Health Insurance Program (CHIP), which is a federal program designed to provide health insurance coverage to children whose families are not eligible for Medicaid but cannot afford private health insurance. Under HIPAA, if an employee or the employee's dependent becomes eligible for state premium assistance under Medicaid or CHIP, the plan must provide a special enrollment period. The employee or dependent must request coverage within 60 days of becoming eligible for premium assistance.

Individuals losing Medicaid or CHIP coverage

A group health plan must permit an eligible employee and/or dependent to enroll for coverage under the plan if the employee or the dependent is covered under a state Medicaid or CHIP program and such coverage is terminated as a result of loss of eligibility for such coverage. The employee must request coverage under the group health plan no later than 60 days after the date of termination of such coverage.

Individuals losing other coverage

A group health plan must permit an eligible employee and/or dependent to enroll for coverage under the plan **if each of the following conditions are met**:

- The employee or dependent was covered by a group health plan or had other health insurance when the coverage was previously offered.
- The employee stated in writing at such time that enrollment was declined because of coverage under another group health plan or other health insurance coverage (if the plan sponsor required such a statement and provided notice of such requirement).
- The previous coverage:
    - was COBRA coverage that has now been exhausted

      or

    - was not COBRA coverage but was terminated as a result of loss of eligibility for such coverage or because employer contributions toward such coverage were terminated.

  Loss of eligibility does not include loss of coverage for failure to pay premiums or termination of coverage for cause (filing fraudulent claims under the plan, intentional misrepresentation of facts related to coverage, etc.). However, an individual reaching a lifetime maximum limit on benefits is a loss of eligibility that may trigger special enrollment.

- The employee or eligible dependent requests to be enrolled in the new coverage no later than 30 days after the prior coverage ceases (a special enrollment period). Enrollment must become effective not later than the first day of the first calendar month beginning after the date the completed enrollment request is received.

Acquiring new dependents

HIPAA also requires a group health plan to permit a special enrollment period when an employee acquires a new dependent through marriage, birth or adoption. In general, if an eligible individual gains a dependent through marriage, birth, adoption or placement for adoption, the group health plan must permit the individual, the new spouse and any new dependent, to enroll in the plan. The individual generally must notify the plan of the special enrollment event within 30 days in order to be eligible for special enrollment. Coverage shall become effective on the following dates:

- in the case of marriage, not later than the first day of the first month beginning after the date the completed request for enrollment is received
- in the case of a dependent's birth, as of the date of such birth
- in the case of a dependent's adoption or placement for adoption, the date of such adoption or placement for adoption.

Notice of special enrollment rights

On or before the time an employee is offered the opportunity to enroll in a group health plan, the plan is required to provide the employee with a description of the HIPAA special enrollment rules. Language for a sample notice has been provided by the Department of Labor.

Notice of Special Enrollment Rights – Sample

If you are declining enrollment for yourself or your dependents (including your spouse) because of other health insurance or group health plan coverage, you may be able to enroll yourself and your dependents in this plan if you or your dependents lose eligibility for that other coverage (or if the employer stops contributing towards your or your dependents' other coverage).

However, you must request enrollment within [insert "30 days" or any longer period that applies under the plan] after you or your dependents' other coverage ends (or after the employer stops contributing toward the other coverage).

In addition, if you have a new dependent as a result of marriage, birth, adoption or placement for adoption, you may be able to enroll yourself and your dependents. However, you must request enrollment within [insert "30 days" or any longer period that applies under the plan] after the marriage, birth, adoption, or placement for adoption.

To request special enrollment or obtain more information, contact [insert the name, title, telephone number, and any additional contact information of the appropriate plan representative].

Additionally, each employer that maintains a group health plan in a state that provides premium assistance for the purchase of coverage under a group health plan must provide a written notice informing each employee of current opportunities for the subsidies under Medicaid or CHIP. The Department of Labor (DOL) and the Department of Health and Human Services (HHS) intend to publish model notices in 2010.

Prohibition against discrimination based on health status

Eligibility for coverage

A group health plan cannot establish eligibility rules that discriminate against any individual with respect to coverage or continued coverage or premium amounts based on any of the following factors:

- health status
- medical condition (including both physical and mental illness)
- claims experience
- receipt of health care
- medical history
- genetic information
- evidence of insurability
- disability.

These requirements, however, do not prevent a group health plan from limiting the amount, level, extent, or nature of the benefits provided as long as such limitations do not discriminate among similarly-situated individuals. For example, a group health plan could choose not to cover experimental medical procedures or choose

to limit the benefits for experimental medical procedures, provided this limitation applies equally to all similarly situated individuals.

Premiums

A group health plan cannot require an individual to pay a higher premium on the basis of any health-related factor which may apply to the individual. However, the plan may charge different premiums for different classes of employees (such as full-time and part-time employees), as long as the different classes are based on bona-fide distinctions not related to health factors.

A group health plan may offer premium discounts, rebates, and adjustments to deductibles or co-payments in exchange for adherence to health promotion and disease prevention programs as part of a wellness program. These types of programs include weight-loss programs and programs aimed at helping individuals stop smoking. If these incentives are contingent on particular results (such as specified blood pressure levels, refraining from smoking), then a number of restrictions apply.

Penalties for noncompliance

In addition to possible exposure to a participant lawsuit, HIPAA imposes a tax on group health plans which fail to meet the requirements of the law.

Amount of the tax

An employer whose group health plan fails to meet the requirements (or the plan, in the case of a multiple employer plan) faces a penalty tax of $100 for each day of the noncompliance period for each affected individual. The noncompliance period begins on the date the failure occurs and ends on the date of correction.

Limitations on amount of the tax

- No tax is imposed during any period if the IRS determines that the employer or insurer was not aware that the health plan was not in compliance, and could not have discovered the non-compliance by the exercise of reasonable diligence.

- No tax is imposed if the failure is due to reasonable cause and is corrected within 30 days of the date it is (or should have been) discovered.

- For unintentional failures, the tax is capped at the lesser of $500,000 or 10% of the amount paid or incurred by the employer during the preceding tax year for group health plans (or for multiple employer plans, the lesser of $500,000 or ten percent of the amount paid by the trust to provide medical care during such taxable year).

- In the case of a group health plan of a small employer (generally, an employer that employs an average of more than two but fewer than 50 employees) that provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed on the employer on any failure that is solely because of the health insurance coverage offered by such insurer.

- The IRS has the discretion to reduce the amount of a tax penalty if it finds the penalty to be excessive in relation to the failure and if the failure is due to reasonable cause, and not willful neglect.

Privacy of health information

In addition to the regulation of health insurance portability and non-discrimination rules, HIPAA provides for the protection of participants' medical records and other individually identifiable health information that is created, received or maintained by the group health plan (PHI). The privacy regulations under HIPAA (Privacy Rule) apply to health plans, health care providers, and health care clearinghouses (collectively, Covered Entities). Business Associates (as defined below) may be subject to certain requirements of the Privacy Rule if they enter into a Business Associate agreement with the Covered Entity. The privacy regulations under HIPAA require compliance with the following issues.

Limits on use of personal medical information

The Privacy Rule sets limits on how a Covered Entity may use PHI. To ensure that the covered entity's activities are not unduly hampered, activities for treatment, payment and health care operations (TPO Activities) are exempted from certain aspects of the Privacy Rule. For instance, a group health plan does not need to obtain the participant's authorization prior to the use of his/her PHI for TPO Activities, but may use or share only the minimum amount of protected information needed for a particular purpose and generally may only disclose it to entities that are also subject to HIPAA's privacy requirements, either by law or by regulation. For example, a treating physician may send a copy of a patient's medical records to a specialist that will be treating the patient. This disclosure would not violate the Privacy Rule since it constitutes an activity for treatment. However, the treating physician should only send the minimum amount of protected health information needed for the specialist to treat the patient. In most other situations, the plan cannot use or disclose the PHI unless the plan participant signs a specific authorization permitting the use or disclosure.

Access to medical records

Plan participants generally have the right to see and obtain copies of their medical and claim records and request corrections if they identify errors and mistakes. Access to these records must generally be provided within 30 days and the covered entity may charge plan participants for the cost of copying and sending the records. If the

participant identifies errors and requests the records be changed, the plan must comply. Business Associates must cooperate in making this information available to the individuals.

Notice of privacy practices

A Covered Entity must provide a notice to its plan participants explaining how the plan intends to use their private health information as well as the participants' rights under the Privacy Rule. Plan participants also have the right to ask a Covered Entity to restrict the use or disclosure of their information beyond the practices included in the notice, but the Covered Entity is not required to comply with such requests unless the disclosure is to a health plan for purposes of carrying out payment or health care operations and the PHI pertains solely to a health care item or service for which the health care provider involved has been paid out of pocket in full.

Confidential communications

Under the Privacy Rule, a plan participant must be permitted to request to receive confidential communications of his PHI by alternative means or at alternative locations, if the individual states that the disclosure of the information could endanger the individual. A Covered Entity is required to comply with such a request if the Covered Entity can reasonably accommodate such a request.

Public responsibilities

In limited circumstances, the Privacy Rule permits (but does not require) a Covered Entity to disclose limited amounts of PHI for specific public responsibilities. These permitted disclosures include:

- those required by law
- emergency circumstances
- identification of the body of a deceased person or the cause of death
- public health needs
- judicial and administrative proceedings
- limited law enforcement activities
- activities related to national defense and security.

Complaints

Plan participants may file formal complaints regarding the privacy practices of a Covered Entity. Such complaints can be made directly to the group health plan or to the HHS Office for Civil Rights (OCR), which is charged with investigating complaints and enforcing the Privacy Rule.

Written privacy procedures

The Privacy Rule requires that a Covered Entity have written privacy procedures, including a description of the members of the Covered Entity's workforce that have access to protected information, how it will be used and when it may be disclosed. A Covered Entity must implement policies and procedures with respect to PHI that are designed to comply with the Privacy Rule. The Covered Entity's policies and procedures must take into account the size of the Covered Entity and the types of activities in which the group health plan engages. The Covered Entity must also ensure that its policies and procedures are revised regularly to reflect changes in the law and in the entity's privacy practices.

Employee training and privacy officer

A group health plan is required to designate an individual as the privacy official who will be responsible for developing the privacy policies and procedures for the group health plan. The privacy official is also responsible for receiving complaints from plan participants and beneficiaries as well as providing further information regarding the group health plan's notice of privacy practices. In addition to designating a privacy official, a group health plan must provide adequate training of their employees in the plan's privacy policies and procedures. For newly hired members of the plan's workforce, training must be completed within a reasonable time period after their hiring.

Adequate separation

A group health plan must ensure that its plan documents provide for adequate separation between the group health plan and the plan sponsor. Specifically, the plan documents must identify the members of the group health plan's workforce (either by name or class) that can receive access to PHI, including the workforce members who receive PHI for TPO Activities, or for other matters relating to the group health plan in the ordinary course of business. Additionally, the workforce members' access to PHI must be restricted to the plan administration functions performed for the plans by their plan sponsors. Finally, the plan documents must provide for the means to resolve any issues arising from workforce members' (who have access to PHI) non-compliance with the plan's policies and procedures or with the Privacy Rule.

Business associates

Covered Entities and Business Associates are required to enter into contracts establishing the permitted and required uses and disclosures of such information by the Business Associate, including not permitting the Business Associate to use or disclose PHI in a manner that would violate the Privacy Rule. Business Associates have an affirmative obligation to meet the requirements outlined in the Business Associate agreement and will be subject to HIPAA penalties for non-compliance. Accordingly, Business Associates are subject to certain requirements of the HIPAA Privacy Rule by virtue of their adherence to the provisions in the Business Associate agreement.

- A business associate is defined as any entity which on behalf of a group health plan performs or assists in the performance of functions that involve the use of PHI such as claims processing or administration, data analysis and/or transmissions, billing, benefit management, utilization reviews or quality assurance. Furthermore, if an entity provides legal, accounting, consulting, management, administrative or financial services for a group health plan in any other capacity other than as an employee of the group health plan, where the provision of such service involves the use of PHI, such entity is treated as a business associate subject to the requirements of the Privacy Rule.

- The contract must also provide that the business associate agrees, among other things, to:

    - Not use or further disclose the information other than as permitted or required by the contract or as required by law.

    - Use appropriate safeguards to prevent use or disclosure of the information other than as provided for by its contract.

    - Report to the group health plan any use or disclosure of the information not provided for by its contract of which it becomes aware.

    - Ensure that any agents, including a subcontractor, to whom it provides PHI received from, or created or received by the business associate on behalf of, the group health plan agrees to the same restrictions and conditions that apply to the business associate with respect to such information.

    - At the termination of the contract, if feasible, return or destroy all PHI received from, or created or received by the business associate on behalf of, the group health plan that the business associate still maintains in any form. Additionally, the business associate shall not retain any copies of the PHI. If return or destruction of the PHI is not feasible, the protections of the contract should be extended to the information and further uses and disclosures of the information should be limited to those purposes that make the return or destruction of the information infeasible.

    - Terminate the contract if Covered Entity materially breaches its terms. If termination is not feasible, report the problem to the Secretary of HHS.

Documentation

A Covered Entity must maintain all documentation (including policies, procedures and required notices) required by the Privacy Rule for a period of six years from the date of its creation or the date when it last was in effect, if later, unless the information is maintained as an electronic health record, in which case the information must only be

maintained for three years. Such documentation must be made available to the workforce members responsible for implementing the Covered Entity's policies and procedures.

Exemption from the privacy rule requirements

An employer who sponsors a group health plan is not subject to the requirements of the privacy standards if benefits are provided under the plan solely through an insurance contract with a health insurance issuer or an HMO and the employer does not create or receive PHI with the exception of summary health information or enrollment information. An employer who sponsors a group health plan that meets this exception is only required to refrain from retaliatory or intimidating acts against individuals who exercise their privacy rights. A group health plan is also prohibited from requiring or requesting waivers of individual rights.

Penalties

An entity that fails to comply with the Privacy Rule is subject to a number of penalties. Penalties will vary depending on the date the violation occurred. For violations occurring before February 18, 2009, civil penalties will be $100 per violation not to exceed $25,000 for identical violations during a calendar year. For violations occurring on or after February 18, 2009 civil penalties are based on a tiered system. For unknowing violations, civil penalties for a calendar year are at least $100 per violation, not to exceed $50,000. For violations due to reasonable cause, civil penalties for a calendar year are at least $1,000 per violation, not to exceed $50,000. For violations due to willful neglect that were corrected during the 30-day period beginning on the date the person liable knew or should have known that the violation occurred, the civil penalty is at least $10,000 per violation, not to exceed $50,000. If such violation due to willful neglect is not corrected in the above 30-day period, the penalty increases to at least $50,000 not to exceed $1,500,000 in a calendar year. The penalty for identical violations during a calendar year cannot exceed $1,500,000. Criminal penalties range from $50,000 in fines and one year in prison up to $250,000 in fines and 10 years in jail.

Maintaining the security of health information

HIPAA's security regulations require Covered Entities and Business Associates to protect the confidentiality, integrity, and availability of PHI when it is stored, maintained, or transmitted electronically. Covered Entities and Business Associates must maintain reasonable and appropriate administrative, physical, and technical safeguards to protect the confidentiality, integrity, and availability of individually identifiable health information that is created, received or maintained by the health plan electronically (Electronic PHI) against any reasonably anticipated risks.

Requirements of the security regulations

The security regulations provide 36 implementation specifications, which are further divided into two types:

- 14 required specifications
- 22 addressable specifications.

The required specifications are critical and must be implemented. The addressable specifications may be implemented after the Covered Entity or the Business Associate has performed the following analysis:

- If the Covered Entity or Business Associate determines that an addressable specification is reasonable and appropriate, the specification must be implemented.
- If the Covered Entity or Business Associate determines that the addressable specification is not reasonable and appropriate, but the overall standard can be met without implementing an alternative security measure, the Covered Entity or Business Associate must document the decision to not implement the addressable specification, the reasons why implementing the specification is not reasonable and appropriate, and how the plan intends to meet the security standard.
- If the Covered Entity or Business Associate determines that the addressable specification is not reasonable and appropriate, but the overall standard can be met with the adoption of an additional security measure, the plan must document the reasons why implementing the specification is not reasonable and appropriate. Additionally, the plan must implement and document the alternative security measure which will satisfy the addressable specification.

Administrative safeguards

The regulations' administrative safeguards require Covered Entities and Business Associates to have documented policies and procedures for managing day-to-day operations, the conduct and access of workforce members to Electronic PHI, and the selection, development, and use of security controls. The specific standards are as follows:

- **Security management process**
  An overall requirement to implement policies and procedures to prevent, detect, contain and correct security violations.
- **Assigned security responsibility**
  A single individual must be designated as having overall responsibility for the security of an entity's Electronic PHI.

- **Workforce security**
  Policies, procedures and processes must be developed and implemented that ensure only properly authorized workforce members have access to Electronic PHI.

- **Information access management**
  Policies, procedures, and processes must be developed and implemented for authorizing, establishing, and modifying access to Electronic PHI.

- **Security awareness and training**
  A security awareness and training program for an entity's entire workforce must be developed and implemented.

- **Security incident procedures**
  Policies, procedures and processes must be developed and implemented for reporting, responding to, and managing security incidents.

- **Contingency plan**
  Policies, procedures and processes must be developed and implemented for responding to a disaster or emergency that damages information systems containing Electronic PHI.

- **Evaluation**
  Covered Entities and Business Associates must perform periodic technical and non-technical evaluations that determine the extent to which its security policies, procedures and processes meet the ongoing requirements of the security regulations.

- **Business associate contracts and other arrangements**
  Covered Entities, when dealing with Business Associates that create, receive, maintain or transmit Electronic PHI on the Covered Entity's behalf, must develop and implement contracts that ensure the Business Associate will appropriately safeguard the information. Business Associates also have a reciprocal obligation to enter into such contracts and abide by the contract's terms.

Physical safeguards

The physical safeguards are a series of requirements meant to protect an entity's electronic information systems and Electronic PHI from unauthorized physical access. Covered Entities and Business Associates must limit physical access while permitting properly authorized access. The specific standards are:

- **Facility access controls**
  An overall requirement to implement policies, procedures and processes that limit physical access to electronic information systems while ensuring that properly-authorized access is allowed.

- **Workstation use**
  Policies and procedures must be developed and implemented that specify appropriate use of workstations and the characteristics of the physical environment of workstations that can access Electronic PHI.

- **Workstation security**
  An entity must implement physical safeguards for all workstations that can access Electronic PHI in order to limit access to only authorized users.

- **Device and media controls**
  Policies, procedures and processes must be developed and implemented for the receipt and removal of hardware and electronic media that contain Electronic PHI into and out of a group health plan, and the movement of those items within a group health plan.

Technical safeguards

The technical safeguards include several requirements for using technology to protect Electronic PHI, particularly controlling access to it. The specific standards are:

- **Access control**
  Policies, procedures, and processes must be developed and implemented for electronic information systems that contain Electronic PHI to only allow access to persons or software programs that have appropriate access rights.

- **Audit controls**
  Mechanisms must be implemented to record and examine activity in information systems that contain or use Electronic PHI.

- **Integrity**
  Policies, procedures and processes must be developed and implemented that protect Electronic PHI from improper modification or destruction.

- **Person or entity authentication**
  Policies, procedures and processes must be developed and implemented that verify persons or entities seeking access to Electronic PHI are who or what they claim to be.

- **Transmission security**
  Policies, procedures and processes must be developed and implemented that prevent unauthorized access to Electronic PHI that is being transmitted over an electronic communications network (for example, the Internet).

Documentation

All policies and procedures must be written and documented. Covered Entities and Business Associates must maintain all documentation (including risk assessments, policies and procedures) required by the security regulations for a period of six years from the date of its creation or the date when it last was in effect, whichever is later. Such documentation must be made available to the workforce members responsible for implementing the policies and procedures. Additionally, Covered Entities and Business Associates must periodically review such documentation and revise and update it as needed to ensure the confidentiality, integrity and availability of Electronic PHI.

Penalties

The penalties for failing to comply with the security regulations are similar to the penalties for failing to comply with the Privacy Rule. Specifically, civil penalties are based on the tiered system discussed previously and range from $100 per violation, up to $1,500,000 per year for each requirement violated. Criminal penalties range from $50,000 in fines and one year in prison up to $250,000 in fines and 10 years in jail.

Prohibition on sale of electronic PHI

Covered Entities and Business Associates are not permitted, either directly or indirectly, to receive payment in exchange for any PHI unless the Covered Entity obtains from the individual a valid authorization that includes a specification of whether the PHI can be further exchanged for payment by the entity receiving PHI of that individual. The prohibition does not apply if:

- the purpose of the exchange is for certain public health activities (i.e. preventing or controlling disease)
- the purpose of the exchange is for research and the price charged reflects the cost of preparing and transmitting the data
- the purpose of the exchange is for the treatment of the individual
- the purpose of the exchange is for a healthcare operation
- the purpose of the exchange is for payment by a Covered Entity to a Business Associate for activities involving the exchange of PHI on behalf of the Covered Entity pursuant to the Business Associate contract
- the purpose of the exchange is to provide an individual with a copy of his or her PHI.

Breach notification

Covered Entities and Business Associates also have certain notification requirements they must meet under the HITECH Act in the event of a breach of unsecured PHI. Unsecured PHI is PHI that is not secured through the use of a technology or methodology specified by HHS. Under these notification requirements, Covered Entities must alert each individual whose unsecured PHI is reasonably believed to have been breached, and Business Associates must alert Covered Entities of the same types of breaches and the individuals the breaches affect. All notices must occur within 60 days after the breach is discovered.

Method of notice

Individuals must be notified of a breach by first-class mail to their last known address. Notice can be completed by electronic mail upon the individual's request. If a lack of contact information precludes direct, written notification, a substitute form of notice, such as notice by telephone, can be used. If there are ten or more individuals for whom there is insufficient contact information, notice of the breach should be posted on the entity's website or with a major print or broadcast media, including a major media outlet in the geographic area where the affected individuals are likely to reside. These notices must include a toll-free telephone number where individuals can learn more about whether their unsecured PHI was breached.

Media notice

If a breach is reasonably believed to involve more than 500 residents of a state or jurisdiction, the notice of breach must be provided to prominent media outlets serving that state or jurisdiction.

Notice to Secretary of HHS

Covered Entities and Business Associates must maintain an annual log of all breaches of unsecured PHI and submit the log to the Secretary of HHS each year. However, if a breach is thought to involve more than 500 individuals, the entity must notify the Secretary of HHS immediately. The Secretary of HHS will make available on its website a list that identifies each entity involved in a breach that affects more than 500 individuals. The HHS published breach notice forms on its website at:

- http://transparency.cit.nih.gov/breach/index.cfm.

Content of notice

The notice provided to individuals regarding the breach must contain the following:

- a brief description of what happened, including the date of the breach and the date of the discovery of the breach, if known

and

- a description of the types of unsecured protected health information that were involved in the breach (such as full name, Social Security number, date of birth, home address, account number, or disability code)

  and

- the steps individuals should take to protect themselves from potential harm resulting from the breach

  and

- a brief description of what the covered entity involved is doing to investigate the breach, to mitigate losses, and to protect against any further breaches

  and

- contact procedures for individuals to ask questions or learn additional information, which shall include a toll-free telephone number, an e-mail address, website, or postal address.

Self-reporting excise taxes

Employers failing to meet the requirements of HIPAA are subject to certain excise taxes under the Internal Revenue Code. Beginning in 2010, employers must report the excise tax arising from such failures on IRS Form 8929 and pay the excise tax when submitting the form. Generally, the employer is responsible for paying the excise tax and submitting the Form 8929. For failures relating to HIPAA, the excise tax and the Form 8928 are due on or before the due date for filing the entity's federal income tax return.

Where to go for more information

This chapter is intended as a brief overview of the HIPAA requirements under federal law. It is by no means exhaustive. If you need additional information, you may consult the following or with an attorney.

- **Employee Benefits Security Administration (EBSA), Department of Labor**
  - www.dol.gov/ebsa
  - Toll-free 1-866-444-EBSA (3272)
- **Department of Health and Human Services**
  - www.dhhs.gov/ocr/hipaa

- The U.S. Department of Health and Human Services
  200 Independence Avenue, S.W.
  Washington, D.C. 20201
  Telephone: 202-619-0257
  Toll Free: 1-877-696-6775

Appendix A

Recordkeeping requirements

Various federal and state statutes require employers to keep employee applications and other employment information for a specified period of time.

The person charged with the administration of personnel files and applications is responsible for insuring that the required information is retained in conformity with the following guidelines:

Georgia law

Type of records	Retention period	Coverage
Payroll information including employee names, addresses, hours, and wages.	One year.	Every employer of eight or more employees.
Payroll information regarding the type and amount of remuneration paid to employees (for employer state income tax purposes).	Four years from the due date of the tax to which the records relate, or the date the tax is paid, whichever is later.	Applies to all employers required to deduct and withhold employee state payroll taxes.
State income tax withholding forms.	Four years from the due date of the tax to which the records relate, or the date the tax is paid, whichever is later.	Applies to all employers required to deduct and withhold employee state payroll taxes.
Name and last known address of employees with unclaimed wages.	Ten years after wages are deemed abandoned	Every Georgia employer.
Records of all injuries sustained by employees.	Not specified.	All employers covered by Georgia workers' compensation law.
Employment certificates of eligibility for minor employees.	Until the minor reaches age 18, graduates high school, or receives equivalent of high school diploma.	Any person, firm, or corporation that employs a minor.

FLSA – Fair Labor Standards Act

Type of records	Retention period	Coverage
Payroll records for each employee including full name, identification number, home address, date of birth if under the age of 19, sex, occupation, day and time workweek begins, hours worked each day and week, total daily or weekly earnings, overtime compensation, basis of overtime computation, total additions to or deductions from wages, total wages for each pay period, date of payment, and the pay period covered by the payment.	Three years from last date of entry for employers covered by the FLSA.	All employers covered by the FLSA (one employee).
Individual employment contracts, collective bargaining agreements, plans, trusts, certificates, and required notices.	Three years from last effective date.	All employers covered by the FLSA.
Sales and purchase records, by total dollar volume, weekly, month, or quarterly.	Three years.	All employers covered by the FLSA.
Supplementary basic records – including worksheets showing daily starting and stopping time of employees, wage rate schedules, and work time schedules.	Two years.	All employers covered by the FLSA.
Order, shipping, and billing records.	Two years.	All employers covered by the FLSA.
Records of additions to and deductions from each individual employee's wages; all employee purchase orders; all records used in determining amount and computation of addition or reduction.	Two years.	All employers covered by the FLSA.
Any certificates of age (if applicable). Employer may be required to keep different or additional wage and hour records on employees in certain specialized occupations and on employees who may be otherwise exempt from the FLSA.	Until termination of employment.	All employers covered by the FLSA or child labor laws (at least one employee).

Title VII of the 1964 Civil Rights Act ADA – Americans with Disabilities Act

Type of records	Retention period	Coverage
Any personnel or employment records, including application forms that an employer makes or keeps and records related to hiring, promotions, demotions, transfers, layoffs, terminations, rates of pay, selections to training programs, etc.	One year from the time the record is made or the personnel action is taken, whichever is later.	Employers covered by Title VII (15 or more employees in each of 20 consecutive calendar weeks of the current or preceding year).
All personnel records relevant to a charge filed with or actions brought by the EEOC.	Until final disposition of the charge or action.	Employers covered by Title VII.
EEO-1 report filed with the EEOC.	While current.	Employers covered by Title VII with 100 or more employees.

ADEA – Age Discrimination in Employment Act

Type of records	Retention period	Coverage
Payroll records containing each employee's name, address, date of birth, occupation, rate of pay, and compensation earned each week.	Three years.	Employers covered by the ADEA (20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year).
Any personnel records that an employer makes and that are related to: • job applications and inquiries • promotions, transfers, selections for training, layoffs, recalls, discharges • job orders submitted to employment agencies or unions for the recruitment of employees	One year; or 90 days for applicants for temporary jobs.	Employers covered by ADEA.

Type of records	Retention period	Coverage
• test papers • results of physical exams • any advertisements of notices of job opportunities.		
Employee benefit plans, and seniority and merit systems.	One year after termination of plan.	Employers covered by the ADEA.

EPA – Equal Pay Act

Type of records	Retention period	Coverage
Any records that an employer makes that relate to the payment of wages, evaluations, job wage rates, job descriptions, merit systems, seniority, agreements, or other collective bargaining matters that explain the basis for payment of a wage differential to employees of the opposite sex.	Two years.	Employers covered by the FLSA.
All records required to be kept by the FLSA.	Three years.	Employers covered by the FLSA.

FMLA – Family and Medical Leave Act

Type of records	Retention period	Coverage
Basic payroll and identifying employee data, rate or basis of pay and terms of compensation, daily and weekly hours worked per pay period, additions to or deductions from wages, and total compensation paid; Dates FMLA leave is taken by eligible employees (that information may come from time records or employees' requests for leave; leave must be designated in	Three years.	Employers employing 50 or more employees each working day during 20 or more workweeks in the current or preceding calendar year.

Type of records	Retention period	Coverage
records as FMLA leave and may not include leave required under state law or an employer plan that isn't also covered by the FMLA); The hours of leave if it's taken by eligible employees in increments of less than one full day; Copies of written employee notices of leave furnished to you under the FMLA and copies of all general and specific written notices you give employees as required under the FMLA and its regulations; Any documents describing employee benefits or personnel policies and practices covering paid and unpaid leaves; Premium payments of employee benefits; Records of any dispute between you and an eligible employee over the designation of leave as FMLA leave, including any written statement from either of you covering the reasons for the designation and for the disagreement.		

OSHA – Occupational Safety and Health Act

Type of records	Retention period	Coverage
A log and summary of all recordable occupational injuries and illnesses for each establishment (OSHA Form 200) and a supplementary record (OSHA Form 101).	Five years.	Private sector employers covered by the Occupational Safety and Health Act with 11 or more full- or part-time employees.
Employee exposure records on toxic substances and harmful physical agents (including	30 years.	All employers covered by the Occupational Safety and

Type of records	Retention period	Coverage
environmental and biological monitoring information and material safety data sheets).		Health Act.
Employee medical records (including medical histories; examinations and test results; medical opinions and diagnoses; description of treatment and prescriptions; and employee complaints).	Duration of employment plus 30 years.	All employers covered by the Occupational Safety and Health Act.

IRCA – Immigration Reform and Control Act of 1986

Type of records	Retention period	Coverage
Form I-9	Three years after the date of hire; or one year after date the employment is terminated, whichever is later.	Employers employing persons to perform labor or services in return for wages or other pay.

Appendix B

Posting requirements

Numerous state and federal laws require employers to post notices in the workplace in a location where they are accessible to employees. Failure to post such notices is itself a violation of the particular law.

Federal posters

The following postings are required by federal law. Many posters are available via the Internet at www.dol.gov/compliance/topics/posters.htm.

1. **Your Rights Under the Fair Labor Standards Act (Federal Minimum Wage)**
   Poster provided by the U.S. Department of Labor Wage and Hour Division. For more information call:

   866-487-2365

2. **Family and Medical leave Act of 1993**
   Poster provided by the U.S. Department of Labor Wage and Hour Division. For more information call:

   866-487-2365

3. **Employee Polygraph Protection Act**
   Poster provided by the U.S. Department of Labor Wage and Hour Division. For more information call:

   866-487-2365

4. **Job Safety and Health Protection**
   Poster provided by the Occupational Safety and Health Administration (OSHA). For more information call:

   800-321-6742

5. **Equal Employment Opportunity is the Law**
   Poster provided by the Equal Employment Opportunity Commission (EEOC). For more information call:

   800-669-3362

6. **Uniformed Services Employment and Reemployment Rights Act (USERRA)** Poster provided by the U.S. Department of Labor. For more information, visit:

   www.dol.gov/vets/.

Georgia posters

The following additional postings are required by state law in Georgia and are available on the Georgia Department of Labor's website at www.dol.state.ga.us/em/required_posters.htm.

1. **Georgia Unemployment Insurance for Employees Notice**
2. **Georgia No Unemployment Insurance Payments While on Vacation Poster**
3. **Georgia Equal Pay for Equal Work Posting Notice**
4. **Notice of Compliance with Georgia Workers' Compensation Law**
5. **Georgia State Board of Workers' Compensation Bill of Rights for the Injured Worker**

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workers' compensation

American Chamber of Commerce Resources

HR Library

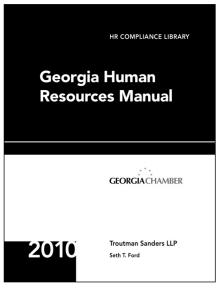
Helping You Stay In Compliance

GEORGIA CHAMBER

What to do. How to do it. And a little bit of why.

There were many changes to the employment law landscape last year, but unless you have a live feed to lawmakers, it's impossible to find all the information in one place. You could spend hours searching the Internet for answers, but your time is too valuable. We can make your job easier. Everything you need is contained in the **Georgia HR Library**. And because the manuals were written by the attorneys at Troutman Sanders LLP, Sutherland Asbill & Brennan LLP, and Holland & Knight LLP, you'll know they are credible, authoritative, and – best of all – Georgia specific.

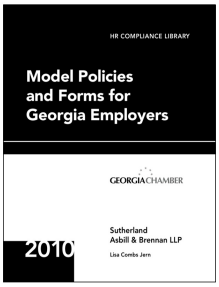
In addition to the comprehensive indexes, all three publications include free digital downloads. Download the books to your computer desktop and find answers to your questions without ever turning a page, and personalize and print policies and forms in seconds (instead of hours). Everything you need is at your fingertips!



2010 Georgia Human Resources Manual

- 31 chapters
- 458 pages
- 21 pages of index entries

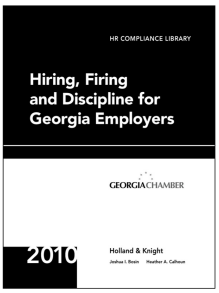
The **Georgia Human Resources Manual** is an HR manager's dream come true, covering the entire employment cycle from pre-hire through post-termination. Written in plain English, you'll find chapters on recruiting and hiring, job descriptions, discrimination in employment, discipline, employee benefits, family and medical leave, unemployment compensation, independent contractors, and MORE! Bonus FREE digital download allows you to search the entire book on your computer. Written by attorneys at Troutman Sanders LLP.



2010 Model Policies and Forms for Georgia Employers

- 14 chapters
- 408 pages
- 12 pages of index entries

This publication helps you create a policy handbook, a key piece in conveying your expectations to your employees. In it you'll find both required and recommended policy samples so creating your own comprehensive handbook will be a snap. The free digital download includes copies of the samples so you can easily personalize them to fit your company's specific needs. It also contains all the required forms you need to complete paperwork, such as new hire reporting forms, I-9, and job application forms. Written by attorneys at Sutherland Asbill & Brennan LLP.



2010 Hiring, Firing and Discipline for Georgia Employers

- 14 chapters
- 181 pages
- 9 pages of index entries

This book is designed to help you avoid the many pitfalls that await employers in three of the most treacherous areas of the employment cycle: hiring, firing and discipline. Get an in-depth look at the do's and don'ts and find the answers you need! In addition to the laws you must comply with, you'll also find key tips that will help you manage your employees on a day-to-day basis. Includes chapters on: pre-employment issues, background checks, new hire reporting, employment contracts, interviews, layoffs and MORE! Written by attorneys at Holland & Knight LLP.

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Why wait for your books to arrive when you can have them right now? The digital versions include all the information as the books, but without all the paper! Get your questions answered and print policies and forms with a click of a button!

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Save money.

When you have the answers you need, you significantly **minimize the likelihood of suffering** from a costly employment lawsuit.

Save your sanity.

You can rest easy knowing this information is written by the cream of the crop **Georgia labor lawyers**. No more wondering if the old policy is still good and delaying action because you're unsure of what to do or how to do it.

Additional publications are detailed on the following page.

Our federal compliance publications provide an in-focus look.

Some areas of labor law are cut and dry. File this, do that and you're all set. But a few other areas are incredibly detailed and you need an in-depth look to really gain understanding. To help you understand the laws, we've compiled the following publications that will get you to the information you need to make a decision and get back to work.

Wages and Hours – An Employer's Guide

- **21 chapters**
- **179 pages**
- **8 pages of index entries**

The Department of Labor estimates that nearly 70% of employers are in violation of the Fair Labor and Standards Act (FLSA). With fines and penalties, small errors in wage and hour administration can snowball quickly into embarrassing and expensive situations for your company. Includes chapters on covered and exempt employees, deductions from pay, determining work time, Equal Pay Act, enforcement, state wage and hour laws, FLSA recordkeeping requirements and MORE! Written by attorneys at Squire Sanders & Dempsey LLP.

A Guide to FMLA and ADA

- **23 chapters**
- **224 pages**
- **12 pages of index entries**

The first changes to the ADA in fifteen years went into effect last year and more have been made since then. Are you up to date? Violations of the Americans with Disabilities Act and the Family and Medical Leave Act can have serious implications for business owners if not handled appropriately. This guide breaks apart these two topics so you understand who qualifies, reasons for leave, reasonable accommodation, length of leave, notifications and documentation, enforcement, and much MORE! Written by attorneys at Ford & Harrison LLP.

Employee Benefits – An Employer's Guide

- **13 chapters**
- **202 pages**
- **13 pages of index entries**

Most of the publications on employee benefits are too general or basic to be helpful or are written for people who are already familiar with basic tax and labor law principles and the specialized terminology unique to employee benefits laws. This resource fills the gap, providing you with information you can use. Start with the opening chapter which covers basic information on employee benefits and then move on to the chapters devoted to particular types of common benefit arrangements. Get informed and remain competitive! Written by attorneys at Ogletree Deakins PC.

Employment Verification – An Employer's Guide to Immigration, I-9, and E-Verify

- **14 chapters**
- **115 pages**
- **4 pages of index entries**

The Immigration Reform and Control Act of 1986 (IRCA) imposes harsh penalties on employers for hiring aliens without proper work authorization and for failing to verify employment authorization for all employees. Enforcement of these immigration laws has never been greater and this appears to be part of the trend to increase worksite enforcement. Stay in compliance and out of trouble! Includes chapters on IRCA, anti-discrimination under IRCA, no-match letters, form I-9, Social Security Number Verification Service, inspections, E-Verify and MORE! Written by attorneys at Ballard Spahr LLP.

Our weekly e-newsletter will keep you up-to-date all year long

Unfortunately, labor laws don't all change at once. Changes are made throughout the year, so that's why we created *HR Update*, our weekly e-newsletter that has the information you need to make the tough decisions - all year long. No logging in or passwords to remember, you'll simply receive an email once a week so you won't miss the important stuff. A year long subscription is included with the purchase of any publication in the HR Library!

What our customers are saying about HR Update:

This newsletter has helped me stay on track. I feel like this newsletter is another HR employee in my department sharing vital information. – *Tamara Benkoski, Human Resources Manager, Bear Creek Mountain Resort*

HR Update has an uncanny way of touching on the most critical and timely issues that I am actually dealing with at the time. Our managers were just recently having a discussion on social media and some of the problems that came along with it and your article on the topic gave us some concise working points and the article touched on some areas that we had not considered. – *C. Brian Bacon, PHR, Human Resources, David A. Nice Builders, Inc.*

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A Guide to FMLA and ADA		$60	
Employee Benefits – An Employer's Guide		$60	
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