



# HOT TOPICS IN EMPLOYMENT LAW

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**November 2, 2017**

# Disclaimer

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These presentations  
*do not* constitute legal  
advice.

Consult an attorney  
before relying on any  
statement(s) made  
during this seminar.





# When the ADA, FMLA and Workers' Compensation Intersect

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# Bermuda Triangle

- **ADA**
- **FMLA**
- **Workers' Compensation**



# Scenario #1



# Scenario #1



- A nurse, approaching retirement age, has returned to work following shoulder surgery for a rotator cuff tear.
- While working light-duty, she injures the same shoulder while squeezing the ball on a blood pressure cuff.
- She files a workers' compensation claim and your IME indicates this is a re-tear of the rotator cuff on the same shoulder in which she just had surgery.
- The claim is allowed; employee has surgery; and is written off work.

# Scenario #1, cont'd

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- She continues to request leave in one month increments with supporting MD notes and you have a suspicion she isn't coming back before her planned retirement date.
- She has used all of her FMLA time while recovering from the first, non-work-related shoulder surgery.
- She has zero days of sick/PTO time banked.
- Her social media accounts show she is clearly not disabled, i.e. trips, grandkids, gardening.

**WHAT DO YOU DO???**



# Scenario #2





# Scenario #2

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- Insurance adjuster falls from a ladder into a pile of dirt while inspecting a roof in California on his one year work anniversary.
- He suffers a broken ankle from the fall. Weeks later, he contracts valley fever, a respiratory disease common in California caused by inhaling fungus spores.
- He gets recurring lung infections requiring hospital stays for two weeks or more at a time followed by recovery at home.

# Scenario #2, cont'd

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- MD opines he can return to work in 8-10 weeks after the valley fever diagnosis and he seeks 3 extensions of 3 weeks/extension. Due to a bureaucratic SNAFU, he is not granted FMLA leave until the first extension.
- He files a workers' compensation claim for all of these conditions.
- The employee has exhausted STD and did not elect LTD. Employee has been out of work for more than 5 months when he requests an ADA accommodation of additional unpaid leave to recover.

# Scenario #2, cont'd

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- He works in a high volume claims center, though the team has been managing to redistribute his work amongst his co-workers for the past five months. However, this is impacting co-worker morale and retention.
- Manager wants to post his position and hire his replacement.

# Scenario #3



# Scenario #3



- Employee tells her supervisor that she suffers from PTSD.
- She is a milk lab tech who delivers/retrieves stored breast milk around the hospital.
- Her PTSD can be triggered by seeing uniformed personnel (cops/security guards). When triggered, she passes out without warning and has no notice of when it is going to happen.
- Before HR was even notified, she has passed out multiple times in: (a) the hospital, (b) the parking lot, and (c) her car while the car is in “park” but the motor was running.



# Scenario #3, cont'd

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- She has bruising/cuts but no broken bones or concussions from these incidents.
- She has attendance issues already, and she missed four days after one incident, but generally she just needs the rest of the shift off.
- Her supervisor loves her and says that she is doing a great job!
- Whenever employee passes out a “code blue” is called and she is assessed in the ER.

# Scenario #3, cont'd

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Employee has asked that:

- She not be required to be assessed in the ER since she gets charged for it each time and they have never found anything wrong with her; and
- The security guards don't walk her to her car.

**Let the discussion begin!!**

# Questions?



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# A Federal Tax Pitfall: Employee Misclassification

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# Importance of Compliance: Hot Topic for Audits

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- For exempt organizations, employment tax is the most frequent issue leading audit adjustments.
- Also a large concern for taxable entities due to dollar value of typical employment tax deposits.



# Importance of Compliance: Domino Effect of an Error

A reporting mistake or misclassification can have a domino effect on:

- Federal income tax withholding
- FICA
- State income/school district withholding
- Municipal withholding



Other issues can include workers' compensation and unemployment tax.

# Employment Taxes: Simple in Theory...



## Employees

- Reporting on Form W-2
- Subject to withholding
- Employer pays employer portion of FICA

## Independent Contractors

- Reporting on Form 1099
- Not subject to withholding
- Contractor responsible for income tax and self-employment tax

# Employment Taxes: Complex in Application



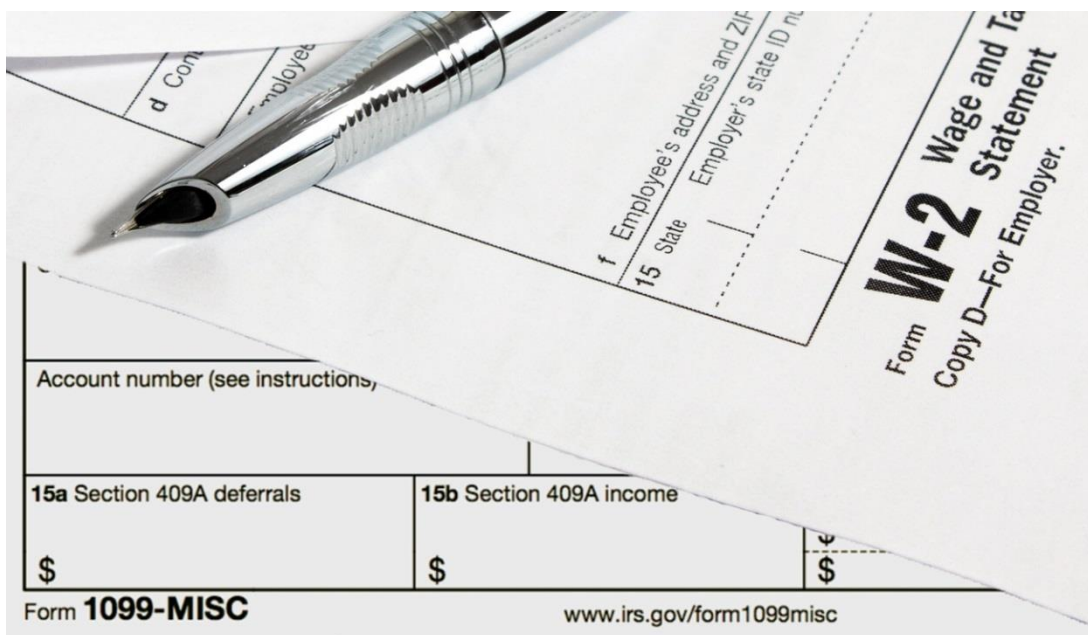
## Classifying Employees

- No bright-line rule for employee/contractor distinction.
- Classification depends on the application of 21 factors assessing the level of control exercised by employer/contractor.
- Certain jobs subject to additional factors (e.g., physicians).
- IRS has a bias towards employment status and position-specific approaches (e.g., medical directors).

# Employment Taxes: Complex in Application

## Context Matters

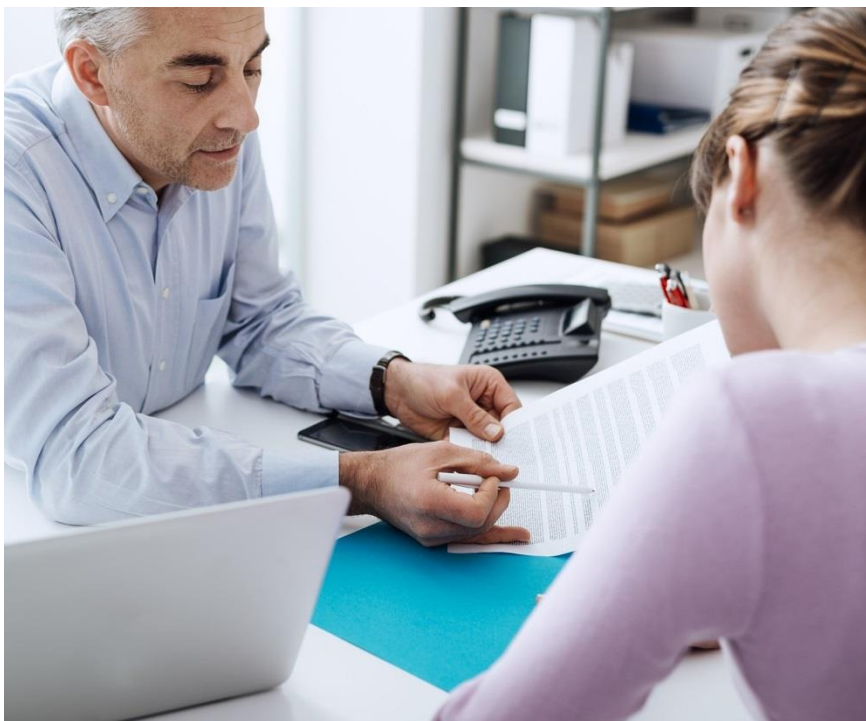
- Settlement payments to ex-employee:  
W-2 or 1099?



# Key to Employment Taxes

## Be Proactive

- Classify employees correctly to avoid errors.
- Correct errors preemptively before audit.
- When audited, seek counsel for help supporting current classifications.





# Corrections

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## Correction Programs vs. Audits

- A misclassification is generally much cheaper to correct voluntarily.
  - ✓ IRS VCSP
- Relief is more limited on audit, but still available.
  - ✓ IRC Section 3509

# Audits

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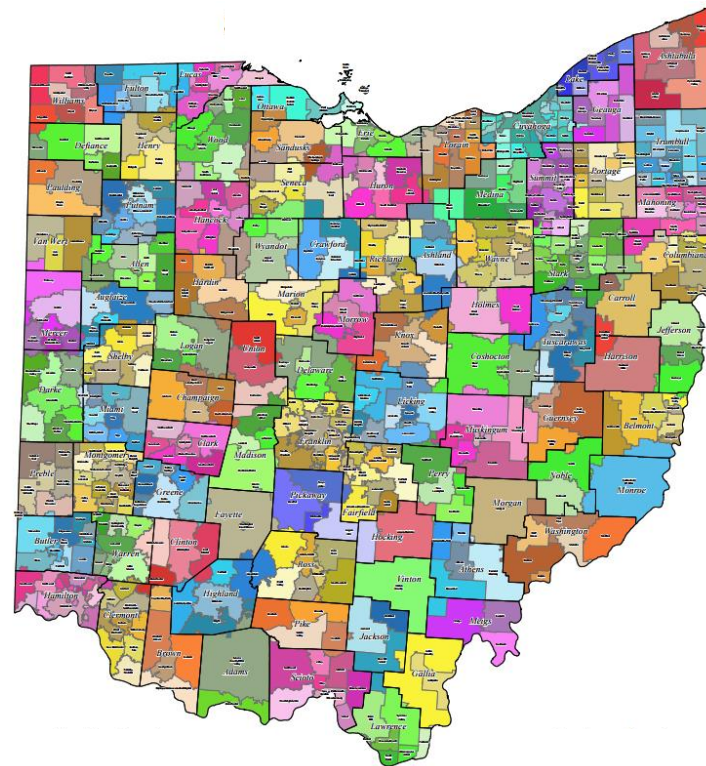
## Approaching an Audit

- IRS reflexively tries to reclassify independent contractors as employees.
- Agents are also not always aware of the complexities surrounding proper classification.
- Counsel may be able successfully rebut reclassification, position the organization for 530 relief, or obtain penalty reductions.

# Municipal Income Taxes

## Continued Local Administration

- Ohio municipalities continue to administer withholding tax.
- Beware of increased aggressiveness by localities – both inside and outside of Ohio.
- Consult counsel if a municipality appears to take an unreasonable position.



# Questions?



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# The Dos and Dont's of Hiring and Onboarding

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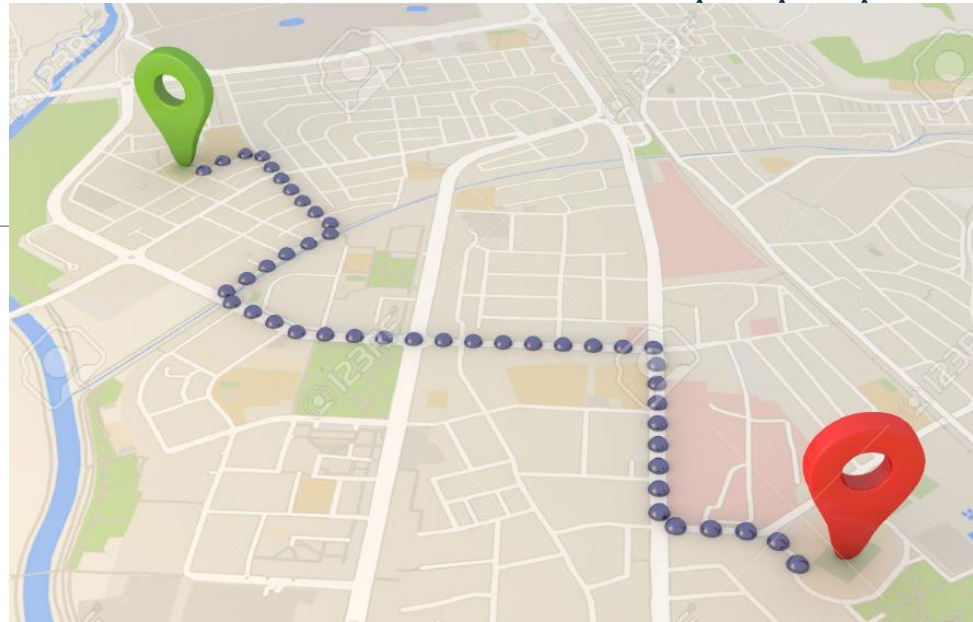
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- Legal overview
- Steps in the hiring process
  - ✓ Applications
  - ✓ Background Checks
  - ✓ Interviews
- Industry-specific considerations



# Title VII

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- Ensures equal opportunity protection
- Prohibits job discrimination based on race, color, religion, sex (including pregnancy) and national origin in recruitment; hiring; transfers; benefits; promotion; salary; disciplinary action and termination.



# Other Federal Laws

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**ADA/ADAAA:** prohibits employment discrimination against qualified individuals with disabilities.

**GINA:** prohibits discrimination on the basis of genetic information.

**ADEA:** protects individuals 40 years or older.

# Ohio – O.R.C. § 4112.02

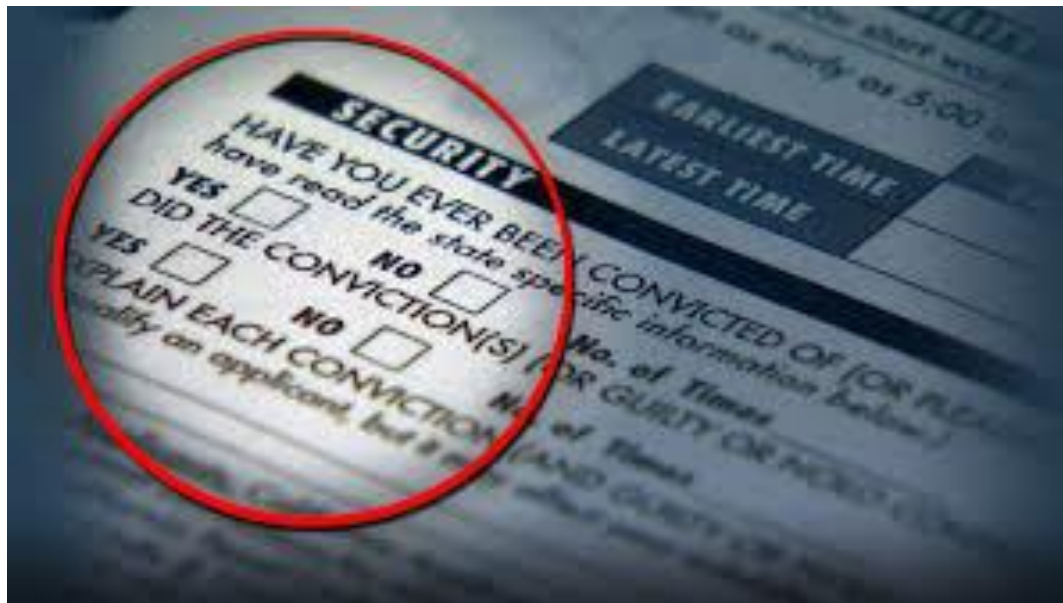


It shall be an unlawful discriminatory practice...

(A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

# Applications – “The Box”

**Query:** Include or don't include “the box” on your application forms?



# Ohio Banned “The Box”, Sort of...



- **Public employers** cannot ask about felony criminal convictions **on the job application.**  
(H.B. 56 – effective: March 23, 2016)
- Includes state, county, township, municipal corporation, or any other body corporate and politic responsible for government activities in a geographic area smaller than that of the state.
- Exception for charter cities?



# Criminal Convictions

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**Q: Are public employers prohibited from asking?**

**A:** No. Can ask later in the hiring process. Inquiry is only prohibited on the job application.

Employer should develop a procedure regarding how, and when, it will make the inquiry, and follow it consistently.

# Arrests/Convictions

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**Q: Other than ban-the-box laws, any other concerns for employers in considering arrests and convictions?**

**A: 2012 EEOC Enforcement Guidance**

# EEOC Says:



- Prior convictions may result in unintentional race discrimination.
- An arrest is not job-related and consistent with business necessity.
  - ✓ Arrest does not establish that criminal conduct has occurred.
  - ✓ Presumption of innocence until proven guilty.
- Arrest  $\neq$  conviction.
- Employers must show that conviction data is “job-related and consistent with **business necessity**.”



# Business Necessity



*Green v. Missouri Pacific Railroad* (8th Cir., 1975):

- ✓ The nature/gravity of the crime;
- ✓ The time elapsed since the conviction/release from prison; and,
- ✓ The nature of the job/position sought.

Employer should provide an opportunity for an  
**“individualized assessment.”**

Blanket “no hire policies” for felony convictions prohibited,  
except in limited positions required by federal statute.

# Convictions

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## **EEOC guidance**

- Is not controlling on courts' interpretation of Title VII, but
- Courts and litigants may refer to EEOC's interpretations for guidance.

# Background Checks

Use to investigate potential convictions.

The **Fair Credit Reporting Act (FCRA)** governs the collection, dissemination, and use of an applicant's or employee's credit, criminal background, motor vehicle driving record, and other similar information.



# FCRA



- Must comply when **third party utilized** for consumer report.
- FCRA's basic requirements:
  1. Notice
  2. Authorization
  3. Pre-adverse action disclosure
  4. Adverse action notice
  5. Certification

# FCRA: Notice



Must be provided to applicant/employee before obtaining consumer report.

Notice must:

- ✓ Be clear and conspicuous;
- ✓ Be in writing;
- ✓ Disclose that the employer may obtain a consumer report and may use that information to make an employment decision; and
- ✓ Be separate from other documents.

# FCRA: Authorization



- Employer must obtain written authorization from the applicant/employee.
- Separate document from application

15 U.S.C. § 1681(b)(2)(A)

# FCRA: Pre-Adverse Action Disclosure



- Applies when employer decides to take adverse action based on information in consumer report.
- Must include copies of:
  - ✓ Consumer report, and
  - ✓ “A Summary of Your Rights Under the Fair Credit Reporting Act”
    - Available on Consumer Financial Protection Bureau website
- Must be issued within a reasonable amount of time



# What is a “reasonable” amount of time?



- Not defined. Generally means applicant/employee must have meaningful opportunity to review report and address inaccuracies.
- Federal Trade Commission: five (5) days

# FCRA: Adverse Action

- Applicant/employee must receive:
  - ✓ Notice of the adverse action;
  - ✓ Name, address, and toll free number of the CRA that furnished the report;
  - ✓ A statement that the CRA did not make the decision to take the adverse action;
  - ✓ Notice of the applicant/employee's right to obtain a free copy of the consumer report from CRA within 60 days;
  - ✓ Notice of the applicant/employee's right to dispute the accuracy/completeness of report information

# FCRA: Certification

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- Employer must certify that it:
  - ✓ Has a “permissible purpose” for obtaining the report;
  - ✓ Notified the applicant/employee and obtained the requisite written authorization;
  - ✓ Will not use consumer report information in violation of any law; and
  - ✓ Provided applicant/employee with the consumer report and FCRA Summary of Rights if it takes adverse action based on the report.

# FCRA: Violations

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- “Negligent” violation
  - ✓ Actual damages sustained by the applicant/employee
  - ✓ Reasonable attorneys’ fees and costs
- “Willful” violation
  - ✓ Actual damages or statutory damages, \$100 - \$1,000
  - ✓ Punitive damages
  - ✓ Attorneys’ fees and costs

## Sources of potential liability in connection with obtaining consumer reports:

1. EEOC enforcement activity
2. Class action lawsuits
3. Comparable state law enforcement



# BCI Fingerprinting

- Healthcare providers (e.g., home health, hospice)
- School employees
- Child care providers
- Private investigators
- Security guards



# BCI Fingerprinting

- Conditional employment while waiting for results.
- Disqualifying offenses
  - ✓ Automatic
  - ✓ Rehabilitation





# Negligent Hiring

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**Q: Why do these?**

**A: To avoid negligent hiring claims**

# Negligent Hiring Liability

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- Unfit employee is hired;
- Employer fails to make reasonable inquiry into the background, or a reasonable inquiry would have led to rejection;
- The employer knew or should have known the candidate's conduct with others created a risk of harm; and
- Employer failed to conduct a background check that would have led to rejection of the candidate, and, while employed, employee harms another person.

# Interviews



With increasing pressure from EEOC,  
it is more important than ever to conduct an  
appropriate interview and selection process.

# Interviews: General Practices

Inquiries **must be** job-related.

- Avoid
  - ✓ Promises
  - ✓ Subjective requirements
  - ✓ Casual inquiries into protected categories
- Off-limits
  - ✓ Medical conditions, hospitalizations, disabilities
  - ✓ Prescriptions
  - ✓ Past drug addiction or alcoholism
  - ✓ Workers' compensation claims



# ADA Issues



Discrimination against an otherwise  
“**qualified individual** with a disability”  
because of that disability in  
**job application, hiring,** and other  
terms and conditions of employment is  
**prohibited.**

# ADA: Reasonable Accommodation

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- Any modification an employer can do that will:
  - ✓ Enable an individual to apply for a job;
  - ✓ Make the workplace accessible to the disabled person; or
  - ✓ Permit this person to perform the essential functions of the job.

# ADA: Reasonable Accommodation



## Examples: Hiring Process

- Provide
  - ✓ Written materials in accessible formats  
e.g. large print, braille, audio
  - ✓ Readers or sign language interpreters
  - ✓ Accessible locations for recruitment, interviews, tests
  - ✓ Equipment or devices (or modify)
- Adjustments or modifications of application policies and procedures

# ADA: Medical Inquiries

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- **Prohibited:** Pre-employment medical examinations and inquiries.
- **Permitted:** After a *conditional offer* of employment is made if:
  - ✓ Results kept separate from other personnel records.
  - ✓ All employees hired into this position are subject to the same examination and inquiries.



# ADA: Medical Inquiries



## Not OK:

- ✓ Do you have a disability that would interfere with your ability to perform this job?
- ✓ Have you ever been treated for mental health problems?
- ✓ Why do you require handicapped parking?

# ADA: Medical Inquiries



**OK:**

- ✓ How are you?
- ✓ Are you feeling okay?
- ✓ Can you perform the essential functions of this position, with or without a reasonable accommodation?

# ADA: Medical Inquiries



What if applicant volunteers the information?

**Q: Can you perform X job function?**

**A: I have multiple sclerosis.**

**Not OK:** How debilitating is your MS? Do you expect your condition to get worse?

**OK:** What I'd like to focus on are this position's requirements. Can you do X?

# Restrictive Covenants

**Ask first!**

- Non-compete agreements
- Non-solicitation agreements
- Confidentiality agreements



Get a copy **before** you hire!

# Restrictive Covenants

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- Why should new employer care?
  - ✓ Tortious interference with contract
  - ✓ Tortious interference with business relationships
  - ✓ Misappropriation of trade secrets

# Restrictive Covenants

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## Strategies to avoid liability:

- Consult with counsel
  - ✓ Understand the restrictions
  - ✓ Is it enforceable?
  - ✓ What is your risk tolerance?
- Tailor the position to avoid violating agreement.
- Do not obtain or use confidential information from former employer.

# Hiring Decisions

**Q: Any upside to hiring applicants with convictions?**

**A: Tax credits; bond program.**



# Work Opportunity Tax Credit Program



## Federal tax incentive program

- For hiring individuals who:
  - ✓ Have been convicted of a felony; AND
  - ✓ Are hired within one year after conviction or release from prison.
- Tax credit up to \$2,400/hire, depending on wage level and hours worked.





# Federal Bond Program



- Fidelity bonds (business insurance policy) issued to employers who hire a job applicant with “risk” factor in personal background (e.g., felony ex-offender).
- Bond protects employer in case of monetary or property loss due to employee dishonesty.
- Effective six months with a \$5,000 coverage amount.

# Bond Program



- Eligibility Criteria
  - ✓ Ex-offender's criminal history is verifiable;
  - ✓ Ex-offender is not self-employed or on a personal service contract;
  - ✓ Full-time or part-time work, payroll taxes are deducted;
  - ✓ Ex-offender receives job offer and employer schedules start date.
- Applications
  - ✓ Employer must send details regarding ex-offender and offer to Ohio Department of Rehabilitation & Correction.
  - ✓ Bond is provided to employers for free once the employer applies for the bond.

# Questions?



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# ACA, AHCA and TBD: The Status of Health Care Reform

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# ACA Repeal & Replace

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- Focus during 2016 campaign was on repeal of the ACA.
- Because GOP “controls” both houses of Congress and the White House, repeal was viewed as likely.
- But it quickly became apparent that repeal without a replacement was not feasible.
- After repeated efforts to repeal and replace, the issue now appears dead for 2017 without bipartisan support, which is unlikely.
  - ✓ September 30 was deadline for passing a bill in the Senate with a simple majority vote.
  - ✓ American Health Care Act passed in U.S. House 217-213.
  - ✓ Better Care Reconciliation Act failed in U.S. Senate 49-51.
  - ✓ Graham-Cassidy proposal never brought to a vote (3 R senators publically stated they would vote no, though Cassidy trying to revive for 2018).

# Importance to Employers

- Employers are subject to the following:
  - ✓ Employer shared responsibility & penalty
  - ✓ 1094/1095 reporting requirements
- Cadillac Tax and other fees
- Insurer losses and instability in the individual insurance market increase costs for all markets, including group.
- Stable Individual Insurance Market
  - ✓ Concerns regarding more uninsured Americans (extended family and friends access to health care coverage)
  - ✓ Part-time employees
  - ✓ Early retirees
  - ✓ Cost shift to all purchasers



# Why so difficult?

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- Complexity: The ACA is a long and complex law that did far more than just create the exchanges and provide subsidies to lower income individuals to purchase health insurance.
- Dissension: There is no common vision within the GOP on what should replace the ACA.
- Entitlement: Now that people have had access to insurance on the exchange with subsidies, it's more difficult to take that away.



# Controversial Provisions

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- Exchanges
- Essential Health Benefits
- Preventive care with no OOP
- No Lifetime or Annual Limits on benefits
- Individual Subsidy
- Individual Mandate and related Penalty
- Employer Mandate and related Tax
- Insurance Premium Tax
- Medical Device Tax
- Cadillac Plan Tax
- Medicaid Expansion

# Other Provisions

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While these provisions are far less controversial, they are making repeal more difficult because more moderate members of the GOP want to keep these in place:

- Coverage to age 26
- No pre-existing condition limitations

# Real Issue

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The current insurance market is not sustainable

- Insurance premiums have been increasing
  - ✓ Drives the cost of subsidies higher
  - ✓ Makes coverage unaffordable for those who do not qualify for a subsidy, which is people with incomes over 400% of the FPL.
- Insurance company losses are increasing
  - ✓ Insurers are pulling out of the exchanges/individual markets
  - ✓ Many counties have only one carrier on the exchange

# Premium Increases: Employer Based Plans



In contrast, employer-based plans remain stable

- Approximately 49% of Americans are covered under employer based plans; only 3.7% are covered under federal exchanges
- KFF Employer Health Survey, 2016
  - ✓ 3% increase in premiums in 2016
- Mercer National Survey of Employer-Sponsored Health Plans, 2017
  - ✓ 4.3% expected increase in 2018, which highest since 2011
- Aggregate cost increases for employer based plans (KFF Survey)
  - ✓ 2001-2006: 63%
  - ✓ 2006-2011: 31%
  - ✓ 2011-2016: 20%

# Premium Increases: Exchanges



## May 23, 2017 HHS Report:

- Average premiums in 39 states on federal exchange increased 105% from 2013 to 2017.
- Ohio premiums increased 86% during same period.

## August 10, 2017 KFF Report:

- Based on initial filings, the change in benchmark silver premiums will likely range from -5% to 49% from 2017 to 2018 across 21 major cities surveyed.
- The difference in premium subsidies in these same 21 cities will be between -13% to 239%.

# Root Causes

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- Adverse Selection
  - ✓ The system is based on the assumption that **everyone** will have coverage.
  - ✓ The individual mandate, even if enforced, is not strong enough to force everyone to buy coverage.
  - ✓ Those who are buying coverage tend to be sicker or older.
  - ✓ Age 26 rule for employer plans removes some younger people from buying exchange coverage.
- Mandated Benefits
  - ✓ Everyone must buy a plan with essential health benefits and no coverage limits.
  - ✓ The only way to reduce the cost of coverage is to buy a plan with higher deductibles.

# Ongoing Efforts

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- There are a number of bipartisan proposals that attempt to “fix” rather than completely repeal
  - ✓ Bipartisan governors’ proposal
  - ✓ Bipartisan caucus proposal
  - ✓ Other bipartisan proposals
- President is talking to Democrats to see if he can gain support for a compromise.
- Executive Orders/regulations which nibble away at the edges.

# Possible Areas of Agreement

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- Funding for individual premium subsidies
- More authority/flexibility for states
- Allow use of premium subsidies off exchanges
- Allow use of premium subsidies for COBRA
- Repeal or delay medical device tax and health insurance premium tax
- Repeal or delay Cadillac Tax



# Cost-Sharing Reduction Payments



- October 12th – president stated federal government will end cost-sharing reduction payments (CSRs)
  - ✓ Impacts middle class (more than 400% of federal poverty level)
  - ✓ Lower incomes less affected because they still qualify for government subsidies (tax credits).
  - ✓ CBO says cutting the \$7 billion in CSRs will actually cost the federal government \$200 billion over 10 years (due to increasing tax credits to offset increases in premiums).
- Alexander/Murray Bipartisan Agreement on CSRs
  - ✓ October 18th – Trump supportive
  - ✓ October 19th – Trump against

# Complications

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- Tax reform at top of 2018 congressional agenda.
- Balanced budget is also a priority for some members of GOP.
- Many of the areas of potential compromise involve the repeal of revenue producing provisions.
- Funding premium subsidies is expensive.
- Medicaid expansion funding will also be an issue.

# Where from here?

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- Complete repeal dead for 2017 and probably beyond.
- Repeal and replace in 2017 probably dead.
- Poor prognosis for repeal and replace in 2018.
- Modest changes to “fix” some of the worst problems possible.
- The current system crashing and burning is still a possibility.

# Questions?



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# After Charlottesville: Creating inclusive environments and avoiding employment claims

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# Disclaimer

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- Not intended to provide legal advice.
- Not intended to endorse or to provide a platform for anyone to endorse any political party, position or purpose.

# Agenda

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- What's going on in the world?
- Legal considerations
  - ✓ 1st Amendment
  - ✓ State law protection for off-duty conduct
  - ✓ Title VII
  - ✓ National Labor Relations Act (NLRA)
- Employer responses
- Strategies for limiting exposure and rebounding from workplace tensions

# Events Spilling into the Workplace

- Faced with emotionally, politically charged issues:
  - ✓ Charlottesville
  - ✓ NFL Protests
  - ✓ Immigration Reform
- More individuals (across the political spectrum) appear interested in getting involved in advocacy and activism (including via social media).





# Legal Considerations

## 1<sup>st</sup> Amendment – Freedom of Speech

- Only provides protections to public employees for matters of public concern



# State Law Protections



- Some states prohibit both public and private employers from taking adverse action against employees because of off-duty political activity.
  - ✓ No law in Ohio.
  - ✓ Exceptions in most states for conduct that materially conflicts with the employer's business activities.

# Title VII



- Prohibits employers from discriminating against employees on the basis of sex, race, color, national origin and religion.
- Attempts to compare and contrast different forms of protest can = allegations of discrimination.
- However, employees who **advocate** violence, **engage in** violence or **threaten** violence are unlikely to find legal recourse.

# National Labor Relations Act (NLRA)



- Employees of union and non-union employers have a legal right to discuss terms and conditions of employment.
- Political discussions can touch upon workplace concerns.
- Only protected when it is not disruptive/not on working time.
- Social media – hot area for the NLRB
  - ✓ Update handbooks and policies



# Employer Responses

- Tim Cook, Apple CEO, provided a public statement in response to Charlottesville.
- Employers sent internal emails to employees after Charlottesville.
- Where do you draw the line? How do you respond when the issues are less clear cut? What are the legal risks of responding?





# Beyond Updating Policies & Training



Investing resources into cultural competency and inclusion

*At Procter & Gamble, driving diversity & inclusion is foundational to how we work. We aspire to be as diverse as the people who use our products; the more we reflect the diversity of our consumers, the better equipped we are to understand and serve them. Openly bringing together differences in life experiences generates creativity, profound human understanding, and multi-dimensional decision-making, a winning formula for reaching outstanding results.*



# Company Perspective



In 2016, the Company took on gender bias in a bid to change the meaning of the phrase “like a girl” from an insult to a compliment. <https://www.youtube.com/watch?v=XjJQBjWYDTs>

Earlier this year, Procter & Gamble tackled the topic of racial bias head-on with its ad, “The Talk.” Designed to spur discussions, the ad depicts African-American parents across generations discussing race and discrimination with their children. <https://www.youtube.com/watch?v=ovY6yjTe1LE>



# Company Perspective



- As counsel for P&G, what is your perspective on these ads?
- Recognizing that these issues (highlighted in the ads and current events) are intertwined with identity and experiences inside and outside of the workplace, have these ads led to internal dialogue with employees at P&G? If so, please describe.
- As employment counsel, what are strategies for managing disagreement or resistance to even engaging in these discussions?



# Thank you!



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# Q & A



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