Employment Law Updates

www.holifieldlaw.com

Sarah R. Johnson, Esq.
Holifield Janich Rachal Ferrera, PLLC
11907 Kingston Pike, Ste. 201
Knoxville, TN 37934
sjohnson@holifieldlaw.com
Phone: (865) 566-0115
Fax: (865) 566-0119

Sarah R. Johnson, Esq.

- Employment Law and Litigation
- Business/Corporate Law
  - Transactional
  - Litigation
  - Taxation
- Estate Planning and Estate Administration
- Real Estate Law
- Construction Law

I-9 COMPLIANCE: Trump Cracking Down

- Trump's immigration agenda includes a plan to hire an additional 10,000 ICE officers
  - increase in workplace audits and site visits
  - may reinstitute raids of employers
- Push to require more employers to sign up for E-Verify
  - assists employers in determining whether an employee has work authorization
  - may open employers to new risks for discrimination claims by data mining the information submitted

I-9 COMPLIANCE: Best Practices

- Don’t use an outdated form.
- Be consistent with every I-9 form.
- Don't use the I-9 as a screening tool.
- Make sure that the I-9 is completed immediately upon employment beginning.
- Don't treat international employees differently.
- Give employees the choice of what documents to present.

I-9 COMPLIANCE: Best Practices

- Don't ask for specific documents and don't over document.
- Make sure the form is completely filled out.
- Use common sense.
- Keep I-9s (and any copied documents) separate from personnel files and in compliance with retention rules.
- Implement regular training with HR employees and make sure that the way you have always done it is a complete and consistent practice of compliance.

ICE Homeland Security Investigations' (HSI) Numbers

- 3,510 worksite investigations;
- 2,282 I-9 audits;
- 594 criminal worksite-related arrests;
- 610 administrative worksite-related arrests.
- Fiscal year 2017 Comparison: HSI opened less than half the number of worksite investigations, almost 1,000 less I-9 audits, and far fewer criminal and administrative arrests

Retaining Form I-9

To calculate how long to keep an employee's Form I-9, enter the following:

1. Date the employee began work for pay	1. _____
A. Add 3 years to the date on line 1.	A. _____
2. The date employment was terminated	2. _____
B. Add 1 year to the date on line 2.	B. _____
3. Which date is later; A or B?	3. _____
C. Enter the later date.	C. _____

The employer must retain Form I-9 until the date on Line C.
The employer is required to retain the page of the form on which the employer and the employee entered data. If copies of documents presented by your employees were made, they should be kept with the corresponding Form I-9.

How To Store Form I-9

- On-site or at an off-site storage facility
- In a single format or a combination of formats, such as
  - Paper
  - Microfilm
  - Electronic

ADA and ADEA

- Age Discrimination in Employment Act ("ADEA") Extended to Job Applicants
  - Disparate impact – discriminatory practices in the workplace that result from application of policies, practices, rules or other systems that appear to be neutral to a group of individuals resulting in a disproportionate and adverse impact on people age 40 years or older.

ADA and ADEA

- Age Discrimination in Employment Act ("ADEA") Extended to Job Applicants
  - *Kleber v. CareFusion Corp.*, 888 F.3d 868 (7th Cir. 2018)
    - Plaintiff, age 58, with decades of legal experience
    - Job posting – Applicants shall have no more than seven years of relevant legal experience
    - Defendant hired applicant who was age 29
    - Defendant did not interview Plaintiff because the Plaintiff's level of experience exceeded the stated requirements and made him "overqualified"
    - Appeals Court – 7 year experience cap violated the disparate impact provisions of the ADEA

ADA and ADEA

- Age Discrimination in Employment Act ("ADEA") Extended to Job Applicants
  - Seventh Circuit Court of Appeals – upheld Appeals Court, but made clear that employers may have affirmative defenses that the challenged practice is based on "reasonable factors other than age"
  - Key Takeaway: employers should be able to explain why any limit placed upon work experience for an open position can be justified for reasons "other than" simply to exclude someone of a certain age group, notably individuals age 40 or over who are covered by the ADEA. Avoid publishing any job postings or using interview questions that may be interpreted to be discriminatory towards individuals age 40 or over.

ADA and ADEA

- ADA – Is An Alternative Work Schedule a Reasonable Accommodation?
  - *Hostettler v. Coll. of Wooster*, No. 17-3406, 2018 WL 3432244, at *2 (6th Cir. July 17, 2018)
    - Plaintiff was employed full-time as HR Generalist
      - Duties included performance-improvement plans, recruiting new hires, and designing training programs
    - Defendant allowed Plaintiff 12 weeks of unpaid maternity leave under FMLA, even though she did not qualify for FMLA
    - After 12 weeks of FMLA leave, Plaintiff presented doctor's note requesting part-time work
    - Plaintiff began working half days and worked from home
    - Some say her work was good; some say it was sub-par
    - Defendant fired her after her doctor submitted request for extended time working part-time
    - Lower court granted summary judgment to Plaintiff

ADA and ADEA

- ADA – Is An Alternative Work Schedule a Reasonable Accommodation?
  - Sixth Circuit reversed summary judgment
    - The standard for Plaintiff being qualified is that she can perform the essential functions of a job with or without an accommodation.
    - A job function is only essential if it is a core job duty—one that would fundamentally alter the position if it was removed. This analysis has to be done on a case-by-case basis.
    - Full-time presence at work is not, on its own, an essential function. Time and presence requirements must be tied to some other job requirement.
    - "an employer cannot deny a modified work schedule as unreasonable unless the employer can show why the employee is needed on a full-time schedule; merely stating that anything less than full-time employment is per se unreasonable will not relieve an employer of its ADA responsibilities."

ADA and ADEA

- ADA – Is Attendance an Essential Function?
  - Jobs where the work can only be performed at the job site – such as construction, manufacturing, call centers, etc. – will not likely be affected.
  - Office work and sales jobs where technology may allow an employee to conduct work from other locations, or on other schedules, may be affected.
  - EVERY REQUEST for a reasonable accommodation must be assessed on its own. Cannot deny an employee's modified or work-from-home schedule because no one else has such a schedule. Each request must have a separate, well-documented interactive process.
    - Do not make premature decisions before engaging in the interactive process. Once the employee requests a reasonable accommodation, it is the employer's responsibility to evaluate the request and discuss the options that are available to the employee after a thorough understanding of the employee's physical and mental limitations.

ADA and ADEA

- ADA – Is Attendance an Essential Function?
    - Assess the employee's job description, requirements, and duties and compare them with his or her physical or mental limitations.
    - Is the job description current and does it accurately reflect the employee's position? If not, update it as soon as possible and use the new description to evaluate the employee's ability to perform the essential functions of his or her job.

ADA and ADEA

- ADA – Is Attendance an Essential Function?
    - Is the employee's physical presence, in-person communication, and/or teamwork necessary to perform an essential function of the employee's job? If not, telecommuting may be a reasonable accommodation absent evidence of undue hardship. If so, determine if the employee actually performs that essential function in practice. Telecommuting may not be feasible if the employee regularly performs the essential function, but if he or she does not, it should likely be considered. Regardless, you should also consider the length of the time period requested to telecommute.

ADA and ADEA

- ADA – Is Attendance an Essential Function?
    - Review telecommuting policies and practices. Do you have a formal written telecommuting policy? If not, create one and have your attorney review it before implementing it. If so, does the employee meet the guidelines already established? If the answer is yes, the employee can be reasonably accommodated by being allowed to telecommute. If the answer is no, management personnel should discuss whether it can allow the employee to telecommute without experiencing undue hardship. If no policy exists at all, examine whether employees telecommute under other circumstances, especially employees without disabilities. If employees are known to work remotely for various reasons, not allowing telecommuting as a reasonable accommodation will raise red flags.

Family and Medical Leave Act (FMLA)

- New Federal Judge in Middle Tennessee Dismisses FMLA Claim for Failure to Follow Notice Requirements

Everson v. SCI Tenn. Funeral Serv., LLC, 2018 WL 1899368 (M.D. Tenn., Apr. 20, 2018).

- Plaintiff served as general manager of a funeral home.
- Plaintiff suffers from Ménière's disease—an inner ear disorder—and was allowed to take off work in 2010 and 2014 to undergo treatment procedures.
- In January 2015, he asked his supervisor for permission to take a week off work later that month to undergo a third procedure. His supervisor responded: "That's fine, whatever time you need."
- Two days after that conversation, Defendant fired Plaintiff, stating that it fired him for failing to refrigerate an unembalmed body.

Family and Medical Leave Act (FMLA)

- New Federal Judge in Middle Tennessee Dismisses FMLA Claim for Failure to Follow Notice Requirements
  - Court dismissed Plaintiff's FMLA claim on summary judgment, ruling that Plaintiff did not follow Defendant's policy that employees must contact the company's Leave and Disability Center to request FMLA leave.
    - FMLA regulations were changed in 2009 to "explicitly [permit] employers to condition FMLA-protected leave upon an employee's compliance with the employer's usual notice and procedural requirements, absent unusual circumstances."

Family and Medical Leave Act (FMLA)

- Top 10 Tips to Combat FMLA Abuse by Jeff Nowak, July 20, 2018

  (https://www.fmlainsights.com/fighting-fmla-abuse-in-the-summertime-top-10-employer-tools-to-keep-employees-honest/)

  1. ***Require that Employees complete a written leave request form for all absences.*** Although an employer cannot deny FMLA leave if the employee provides verbal notice of the need for FMLA leave and they articulate an unusual circumstance as to why they could not follow proper procedures, requiring the employee to put a leave request in writing and return it to Human Resources tends to deter them from gaming the system.

Family and Medical Leave Act (FMLA)

- Top 10 Tips to Combat FMLA Abuse by Jeff Nowak, July 20, 2018

2. ***Prepare a list of probative questions you ask all employees when they request time off.*** Employers, you have the right to know why your employee can't come to work! So, prepare a list of questions that you ask your employees when they call in an absence. These will help you better determine whether FMLA is in play and if the request might be fraudulent:
    - What is the reason for the absence?
    - What essential functions of the job can they not perform?
    - Will the employee see a health care provider for the injury/illness?
    - Have they previously taken leave for this condition? If so, when?
    - [If they are calling in late in violation of the call-in policy], when did the employee first learn he/she would need to be absent? Why did they not follow the Company's call-in policy?
    - When do they expect to return to work?

Family and Medical Leave Act (FMLA)

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3. ***Enforce call-in procedures.*** Every employer should maintain a call-in policy that, at a minimum, specifies when the employee should report any absence (e.g., "one hour before your shift"), to whom they should report the absence, and what the content of the call off should be. If you don't have call-in procedures set up in an employee handbook or personnel policy that is distributed to employees, begin working now with your employment counsel to put these procedures in place. They will help you better administer FMLA leave, combat FMLA abuse and help you address staffing issues at the earliest time possible.

Family and Medical Leave Act (FMLA)

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4. ***Certify … and Recertify!*** Clearly, one of the best tools employers can use to fight FMLA abuse is the medical certification form. Unfortunately, all too many employers fail to obtain (or fail to do so in a timely manner) from the employee the medical information necessary to determine whether the employee suffers from a serious health condition and even is entitled to leave. Keep your employees honest — require them to certify their absence and seek recertification at the earliest opportunity. Require medical certification to initially verify the serious health condition, upon the first absence in a new FMLA year, and when the reason for leave changes.

Family and Medical Leave Act (FMLA)

- Top 10 Tips to Combat FMLA Abuse by Jeff Nowak, July 20, 2018

5. ***Use the "Cure" Process to your Advantage When Following Up on Certification.*** Where the medical certification form does not sufficiently answer the questions posed on the form or the health care provider's responses tend to raise doubts, employers should immediately communicate with the employee to cure the deficiencies and/or shed light on any suspect information provided in the form. In your correspondence, specifically list the unanswered or incomplete questions and provide the employee with a deadline of at least seven calendar days to fix the deficiencies. Here, you might consider asking questions that probe further into the information you find particularly suspect. Also, seek clarification whenever the employee has failed to cure and the certification remains incomplete or insufficient. Additionally, consider using a physician or a nurse to contact the employee's health care provider on the employer's behalf.

Family and Medical Leave Act (FMLA)

- Top 10 Tips to Combat FMLA Abuse by Jeff Nowak, July 20, 2018

6. ***Have Employee Complete a Personal Certification.*** Upon return from any leave of absence (FMLA or otherwise), ask the employee to complete a personal certification asking them to confirm that they actually took leave for the reason provided. The benefit of using this kind of form is fairly straightforward: In the event that the employee takes leave inconsistent with the stated reason, the employer can discipline him/her for falsification of employment records. In doing so, you avoid having to make the argument that they abused FMLA leave, which comes with some tricky legal analysis. Here, you simply argue that the employee falsified a record and you took action as you would in any other situation where an employee falsified a document.

Family and Medical Leave Act (FMLA)

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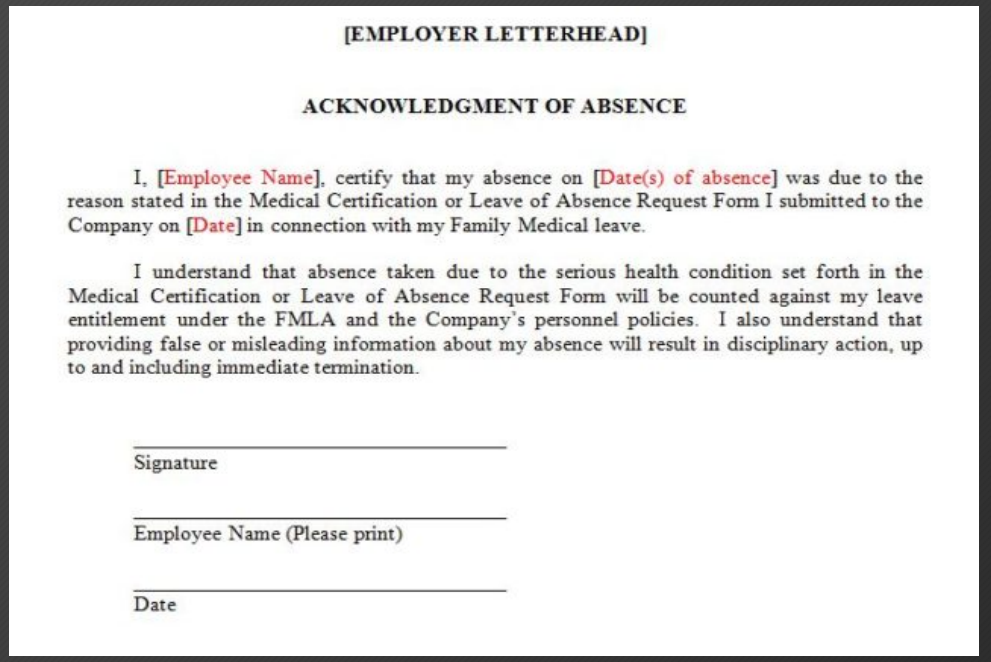
My recommended form looks like this:



[EMPLOYER LETTERHEAD]

ACKNOWLEDGMENT OF ABSENCE

I, [Employee Name], certify that my absence on [Date(s) of absence] was due to the reason stated in the Medical Certification or Leave of Absence Request Form I submitted to the Company on [Date] in connection with my Family Medical leave.

I understand that absence taken due to the serious health condition set forth in the Medical Certification or Leave of Absence Request Form will be counted against my leave entitlement under the FMLA and the Company's personnel policies. I also understand that providing false or misleading information about my absence will result in disciplinary action, up to and including immediate termination.

_____
Signature

_____
Employee Name (Please print)

_____
Date

Family and Medical Leave Act (FMLA)

- Top 10 Tips to Combat FMLA Abuse by Jeff Nowak, July 20, 2018

7. ***Check in on your Employee and/or Make Them Stay Put.*** Want to be really aggressive but operate within the law? I have a handful of clients who explicitly tell employees that it is their policy to check in on the employee if they are using paid sick leave, and then they actually check in on them. Taking this one step further, some clients require their employees to remain in the immediate vicinity of their home while they are recuperating. If they don't follow this policy, they face discipline. Think this tactic is illegal? Think again. One court already upheld this very approach! (Pellegrino v. Commc'ns Workers of Am., AFL-CIO, CLC, No. CIV.A. 10-0098, 2011 WL 1930607, at *2 (W.D. Pa. May 19, 2011), aff'd sub nom. Pellegrino v. Commc'ns Workers of Am., 478 F. App'x 742 (3d Cir. 2012)).

Family and Medical Leave Act (FMLA)

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8. ***Follow up on Patterns of Absences.*** *Monday/Friday absences. Taking days off around a holiday to extend time off.* These situations smack of FMLA abuse. If you witness a pattern of absences over even a modest period of time (e.g., over a series of weeks or in back-to-back months), we arguably have the right to reach out the employee's physician. Here, we follow the FMLA regulations (29 CFR 825.308) and ask the employee's physician to confirm for us whether the pattern you're witnessing is consistent with Johnny's serious health condition and his need for leave.

Family and Medical Leave Act (FMLA)

- Top 10 Tips to Combat FMLA Abuse by Jeff Nowak, July 20, 2018

9. ***Scheduling Medical treatment Around Your Operations.*** Require that employees make a reasonable effort to schedule medical treatment around your operations and consider temporarily transferring employees (to an equivalent position) where leave is foreseeable based on planned medical treatment. Too many employers simply give up on this requirement, allowing employees to call the shots as to when they will obtain medical treatment, and the employee's preference is smack dab in the middle of the workday.

10. ***Conduct a comprehensive audit of your FMLA practices.*** Work with your employment counsel to ensure that your FMLA policy and forms are up to date, that you are employing the best strategies to combat FMLA abuse and that your FMLA administration is a well-oiled machine.

Employment Agreements and Arbitration Provisions

- *Epic Systems Corp. v. Lewis*, 2018 WL 2292444 (U.S. May 21, 2018) – the U.S. Supreme Court approved arbitration as a means to mitigate exposure to employment-based class actions.
  - Class action waivers in arbitration agreements can be enforced against employees, subject generally only to state law defenses (such as fraud, duress or unconscionability) applicable to all contracts.
- An employer can acquire signed arbitration agreements as part of a new employee's initiation and "onboarding" process.

Employment Agreements and Arbitration Provisions

- An example of a portion of an arbitration clause in an employment agreement is as follows:
  - As a condition of your employment at ABC, you agree that any controversy or claim arising out of or relating to your employment relationship with ABC Company or the termination of that relationship, [except for . . . (indicate exceptions, if any)] must be submitted for non-binding mediation before a thirdparty neutral and (if necessary) for final and binding resolution by a private and impartial arbitrator, to be jointly selected by you and ABC Company. * * * If efforts at informal resolution through mediation fail, disputes arising under this Agreement must then be submitted to binding resolution by arbitration before a neutral third party. The arbitration shall be conducted and administered by [the American Arbitration Association (AAA) . . .

- Application to Various Employment Claims
  - Wage-and Hour Claims
  - Anti-Discrimination and Anti-Harassment Claims
  - ERISA Claims

Sexual Harassment and Discrimination – LGBT as a Protected Class

U.S. Court of Appeals

- Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity as a protected class
  - Subclass of sex discrimination

- 7th Circuit in 2017 - *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017)
- 2nd Circuit in February 2018 - *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018)

Sexual Harassment and Discrimination – LGBT as a Protected Class

Transgender Status

- *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012), the EEOC held that intentional discrimination against a transgender individual because that person's gender identity is, by definition, discrimination based on sex and therefore violates Title VII.
  - *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015) - the EEOC applied *Macy* and also held that an employer's restrictions on a transgender woman's ability to use a common female restroom facility constitutes disparate treatment.
  - *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013) - the EEOC applied *Macy* and also held that intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment.
  - *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014) - the EEOC applied *Macy* and also held that an employer's failure to revise its records pursuant to changes in gender identity stated a valid Title VII sex discrimination claim.

Sexual Harassment and Discrimination – LGBT as a Protected Class

Sexual Orientation

- *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015) - the EEOC held that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.
  - Standard of sex-based considerations under *Baldwin:*
    1. Discrimination on the basis of sexual orientation necessarily involves treating an employee differently because of his or her sex.
       - i.e., a lesbian employee disciplined for displaying a picture of her female spouse can allege that an employer took a different action against her based on her sex where the employer did not discipline a male employee for displaying a picture of his female spouse.

Sexual Harassment and Discrimination – LGBT as a Protected Class

Sexual Orientation

- Standard of sex-based considerations under *Baldwin:*

2. Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex.
    - That is, an employee alleging discrimination on the basis of sexual orientation is alleging that the employer took the employee's sex into account by treating him or her differently for associating with a person of the same sex.

3. Discrimination on the basis of sexual orientation is sex discrimination because it necessarily involves discrimination based on gender stereotypes, including employer beliefs about the person to whom the employee should be attracted.

Sexual Harassment and Discrimination – LGBT as a Protected Class

Examples of LGBT-related claims that are unlawful sex discrimination:

- Failing to hire an applicant because she is a transgender woman.
- Firing an employee because he is planning or has made a gender transition.
- Denying an employee equal access to a common restroom corresponding to the employee's gender identity.
- Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees.
- Denying an employee a promotion because he is gay or straight.

Sexual Harassment and Discrimination – LGBT as a Protected Class

Examples of LGBT-related claims that are unlawful sex discrimination:

- Discriminating in term, conditions, or privileges of employment, such as providing a lower salary to an employee because of sexual orientation, or denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman.

- Harassing an employee because of his or her sexual orientation, for example, by derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex.

- Discriminating against or harassing an employee because of his or her sexual orientation or gender identity, in combination with another unlawful reason, for example, on the basis of transgender status and race, or sexual orientation and disability.

Sexual Harassment – Nondisclosure Agreements

On May 15, 2018, H.B. 2613 became effective in the state of Tennessee, prohibiting private and public employers from requiring an employee or applicant to execute or renew a nondisclosure agreement with respect to sexual harassment in the workplace as a condition of employment. Any employee injured as a result of a violation of this prohibition has the same rights and remedies available to employees under Tenn. Code Ann. § 50-1-304 (retaliatory discharge).

The Tax Cuts and Job Acts of 2017

Transportation Benefits:

- An employer cannot deduct any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer for travel between the employee's residence and place of employment, except as necessary for ensuring the employee's safety.

- The Act suspends the previously allowed employee exclusion from gross income and wages for qualified bicycle commuting reimbursements for taxable years beginning after Dec. 31, 2017 and before Jan. 1, 2026, meaning employer reimbursements for bicycle commuting expenses are taxable and subject to payroll taxes and income tax withholding.

- "Qualified transportation plan" allows employees to pay for their own parking on a pre-tax basis through a salary reduction election.

The Tax Cuts and Job Acts of 2017

Qualified Moving Expenses:

- The Act discontinues the favorable tax treatment for employer reimbursements of an employee's moving expenses until 2026.
- In addition, the Act prohibits employees from deducting moving expenses that were not paid or reimbursed by an employer.
- On the other hand, if an employer treats payment or reimbursement of an employee's moving expenses as W-2 wages, the employer can deduct the payment as a compensation expense.
- Both the exclusion and deduction of moving expenses are preserved only for active duty members of the military who move pursuant to a military order.

The Tax Cuts and Job Acts of 2017

Unreimbursed Business Expenses:

- Beginning January 1, 2018, miscellaneous itemized deductions are no longer allowed, meaning that if an employer reimburses an employee for a business expense, the reimbursement is tax-free to the employee.

- However, if the employer does not reimburse the employee's business expense, the employee will no longer be able to claim a tax deduction for the expense.

The Tax Cuts and Job Acts of 2017

Entertainment Expenses:

- Employers may no longer deduct any business-related entertainment expenses, regardless of whether the item is associated with the conduct of the employer's trade or business.
  - This change eliminates the 50% deduction that generally had been allowed for business-related entertainment, including meals.

- However, a 100 percent deduction is still allowed for expenses incurred for recreational, social, or similar activities (including facilities, but not club dues) primarily for the benefit of employees (other than employees who are highly compensated employees).

The Tax Cuts and Job Acts of 2017

Meals:

- Employers will continue to be allowed a 50% deduction for food or beverage expenses directly related to the employer's business (i.e., meals for employees while traveling for work).
  - For now, this 50% deduction will be available for expenses associated with providing food and beverages on employers' business premises that (a) are provided for the convenience of the employer or (b) qualify as *de minimis* food or beverages, but this deduction will be disallowed for any such expenses paid or incurred on or after January 1, 2026.

The Tax Cuts and Job Acts of 2017

Employee Achievement Awards:

- The Act states that awards of tangible personal property may still be treated as deductible by the employer, but the Act revises the definition of tangible personal property by *excluding cash, cash equivalents, gift cards, gift coupons or gift certificates* (other than arrangements conferring only the right to select and receive tangible personal property from a limited array of such items pre-selected or pre-approved by the employer), *or vacations, meals, lodging, tickets to theater or sporting events, stocks, bonds, other securities and other similar items*.

The Tax Cuts and Job Acts of 2017

Paid Leave Credit:

- The Act puts in place a tax credit for employers that provide paid family and medical leave.
- To receive the credit, employers must provide at least two weeks of leave and compensate their workers at a minimum of 50 percent of their regular earnings during such leave.
- See the IRS FAQs following for more information.
  - https://www.irs.gov/newsroom/section-45s-employer-credit-for-paid-family-and-medical-leave-faqs

IRS Section 45S Employer Credit for Paid Family and Medical Leave FAQs

Q: What is the employer credit for paid family and medical leave?

A: This is a general business credit employers may claim, based on wages paid to qualifying employees while they are on family and medical leave, subject to certain conditions.

Q: Who may claim the employer credit for paid family and medical leave?

A: Employers must have a written policy in place that meets certain requirements, including providing:

1. At least two weeks of paid family and medical leave (annually) to all qualifying employees who work full time (prorated for employees who work part time), and

2. The paid leave is not less than 50 percent of the wages normally paid to the employee.

IRS Section 45S Employer Credit for Paid Family and Medical Leave FAQs

Q: Who is a qualifying employee?

A: A qualifying employee is any employee under the Fair Labor Standards Act who has been employed by the employer for one year or more and who, for the preceding year, had compensation of not more than a certain amount. For an employer claiming a credit for wages paid to an employee in 2018, the employee must not have earned more than $72,000 in 2017.

IRS Section 45S Employer Credit for Paid Family and Medical Leave FAQs

Q: What is "family and medical leave" for purposes of the paid family and medical leave credit?

A: This is leave for one or more of the following reasons:

1. Birth of an employee's child and to care for the child.
2. Placement of a child with the employee for adoption or foster care.
3. To care for the employee's spouse, child, or parent who has a serious health condition.
4. A serious health condition that makes the employee unable to perform the functions of his or her position.
5. Any qualifying exigency due to an employee's spouse, child, or parent being on covered active duty (or having been notified of an impending call or order to covered active duty) in the Armed Forces.
6. To care for a service member who is the employee's spouse, child, parent, or next of kin.

IRS Section 45S Employer Credit for Paid Family and Medical Leave FAQs

Q: What is "family and medical leave" for purposes of the paid family and medical leave credit?

A: (con't) If an employer provides paid vacation leave, personal leave, or medical or sick leave (other than leave specifically for one or more of the purposes stated above), that paid leave is not considered family and medical leave. In addition, any leave paid by a State or local government or required by State or local law will not be taken into account in determining the amount of employer-provided paid family and medical leave.

IRS Section 45S Employer Credit for Paid Family and Medical Leave FAQs

Q: How is the paid family and medical leave credit calculated?

A: The credit is a percentage of the amount of wages paid to a qualifying employee while on family and medical leave for up to 12 weeks per taxable year. The minimum percentage is 12.5% and is increased by 0.25% for each percentage point by which the amount paid to a qualifying employee exceeds 50% of the employee's wages, with a maximum of 25%. In certain cases, an additional limit may apply.

Q: How does the credit impact an employer's deduction for the wages paid to an employee while on family and medical leave or claim for any other general business credits?

A: An employer must reduce its deduction for wages or salaries paid or incurred by the amount determined as a credit. Also, any wages taken into account in determining any other general business credit may not be used in determining this credit.

IRS Section 45S Employer Credit for Paid Family and Medical Leave FAQs

Q: What is the effective date of the paid family and medical leave credit?

A: The credit is generally effective for wages paid in taxable years of the employer beginning after December 31, 2017, and it is not available for wages paid in taxable years beginning after December 31, 2019.

Q: Will the IRS provide additional information on the credit?

A: The IRS expects that additional information will be provided that will address, for example, when the written policy must be in place, how paid "family and medical leave" relates to an employer's other paid leave, how to determine whether an employee has been employed for "one year or more," the impact of State and local leave requirements, and whether members of a controlled group of corporations and businesses under common control are treated as a single taxpayer in determining the credit.

Wage and Hour Issues

Individual Criminal and Civil Liability for Violations

- The Fair Labor Standards Act ("FLSA") requires that all employers pay overtime to employees, unless such employees are exempt.
  - Overtime must be paid at a rate of at least one and one-half times the employee's regular rate of pay for each hour worked in a workweek in excess of 40 hours.
- Liquidated damages - double "backpay" damages for unpaid overtime.
  - Employers can only avoid double damages for unpaid overtime if they can show that
    (1) their actions were taken in good faith and
    (2) they had reasonable grounds for their belief that they were complying with the FLSA. *29 U.S.C. § 260*.

Wage and Hour Issues

Individual Criminal and Civil Liability for Violations

- Willful violators may be prosecuted criminally and fined up to $10,000, on top of the liquidated damages discussed above.
- A second conviction may result in imprisonment.
- FLSA also requires an employer to pay a successful claimant's reasonable attorney's fees and costs of suit in addition to other damages.
  - In other words, an employer sued under the FLSA faces the very real possibility of paying *both* sides' attorneys' fees and costs.

Wage and Hour Issues

DOL PAID Program

- Payroll Audit Independent Determination (PAID) program with the U.S. DOL
- Allows employers to voluntarily correct errors they discover that violate the Fair Labor Standards Act's (FLSA's) requirements, and allowing the employer to obtain DOL approval of a settlement, which waives employees' rights to sue under FLSA.
- Also removes liquidated damages (double damages) from the list of damages accessible under the FLSA against employers because the employer will be acting in good faith by voluntarily coming forward to participate in the PAID Program.

Wage and Hour Issues

DOL PAID Program

- RECOMMENDATION: Work with us to perform a self-audit prior to entering into a voluntary correction program
  - Self-audits may examine a wide range of issues, including:
    - Uncompensated off-the-clock work.
    - Whether the FLSA's travel time requirements are being met.
    - Whether an employer is unlawfully paying comp time in lieu of overtime.
    - Misclassification of workers as independent contractors.
    - Misclassification of workers as exempt who should be nonexempt.

The Latest on the Overtime Final Rule

- Initial Effective Date: December 1, 2016
- Minimum salary necessary to qualify as an exempt executive, administrative, professional or computer employee is $913 per week or $47,476 annually
    - This was more than double the prior threshold of $455 per week
- Texas federal court issued an injunction on the FLSA Final Rule on November 22, 2016
    - *State of Nevada v. United States Dep't of Labor*, No. 4:16-CV-00731 (E.D. Tex.)
- DOL appealed to the Fifth Circuit in late December 2016

The Latest on the Overtime Final Rule

- Trump administration – to brief or not to brief?
- Sen. Lamar Alexander: "That was a bad rule. So I would urge you to show us how to write a good overtime regulation."
- Alexander Acosta (DOL Chief) - $33,000 minimum salary rather than over $47,000

The Latest on the Overtime Final Rule

- August 31, 2017 – the U.S. Federal Court, Eastern District of Texas granted a summary judgment against the DOL concluding that the Overtime Final Rule was invalid, ruling that the 100% increase was outside of the DOL's authority.
- New overtime rule proposal in October 2018, according to the U.S. Department of Labor fall regulatory agenda.

The Latest on the Overtime Final Rule

- The new administration began the rulemaking process for a new but likely lower threshold, issuing a Request for Information (RFI) in July.
  - RFI - how should the new threshold be set or whether it should do away with the threshold altogether.
- Separately, bills introduced in both houses of Congress propose to legislate a $48,412 threshold. The bills have a fair number of co-sponsors, but no Republican support.

Equal Pay Act

- On April 9, 2018, the Ninth Circuit Court of Appeals issued an *en banc* decision in *Rizo v. Yovino*, holding that prior salary does not qualify as a "factor other than sex" to justify a pay difference under the Equal Pay Act—appearing to support the thinking behind the salary history bans.

- In *Foco v. Freudenberg-NOK Gen. P'ship*, 549 F. App'x 340, 341 (6th Cir. 2013), the Sixth Circuit Court of Appeals affirmed the trial courts dismissal of Plaintiff's claim under the EPA. Plaintiff was an applications engineer who claimed three male application engineers were paid more. At some point during her work, Plaintiff also took on account management responsibilities, and she claimed three male account managers were also paid more than she was. The trial court dismissed her claims, holding that the engineers had significantly more work experience than Plaintiff did. As for the account managers in question, they had superior qualifications, experience, and produced far more revenue for the employer.

Equal Pay Act

- On appeal, the Sixth Circuit stated that to have a viable claim under the EPA, a plaintiff must show that the employer paid workers of the opposite sex higher wages for equal work, or paid workers of the opposite sex higher wages for jobs that require the same level of skill, effort and responsibility. While the jobs in question do not have to be identical, they must be "substantially equal."

- There are four statutory affirmative defenses to an EPA claim: (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, and (4) any factor other than sex. The employer in this case fell into the fourth category, as pay differences based on qualifications and experience are "factors other than sex."

- To insulate themselves from EPA liability, employers should review pay practices and salaries. Make sure pay disparities amongst employees in the same or similar jobs can be explained by one of the factors above.

Equal Pay Act

- 6th Circuit Summary - the federal Equal Pay Act prohibits employers from relying on salary history as the sole justification for paying two otherwise-equal employees differently, particularly if those employees are different genders.
  - RECOMMENDATION: Do not ask about salary history at all.

Employers should, at a minimum:

- Avoid relying on salary history as the lone determination of starting pay;
- Periodically review compensation practices to ensure non-discriminatory and equitable treatment;
- Document market factors that contribute to any discretionary determination of starting pay, including the individual's education, prior experience, special skills, and expertise, individual negotiations by the candidate, market factors, and other job-related factors; and
- Comply with state and local laws regarding salary history inquiries and use of prior salaries in making compensation determinations (and stay abreast of increasing changes).

Equal Pay Act

- Modify hiring and employment processes and documents:
  - Remove questions about prior salary, compensation, and benefits from applications and other hiring documents;
  - Remove questions about prior salary, compensation, and benefits from interview guides and questions;
  - Identify new questions to include in these processes that would be permissible;
  - Develop rules regarding when and under what circumstances questions about salary, compensation, and benefits may be asked; when such information can be used; and/or when such information can be verified (if at all) in compliance with each jurisdiction's laws;
  - Provide training to recruiters and hiring managers (and anyone else involved in the interview and hiring process) regarding the hiring and employment practices.