



# ALPHABET SOUP

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# GINA

## Genetic Information Nondiscrimination Act

- Effective date: November 21, 2009
- Prohibits employers from discriminating in the terms or conditions of employment- such as hiring, promotion, pay, and fringe benefits – based on “genetic information.”

# GINA

## Genetic Information Nondiscrimination Act

- Limits use of genetic information by employers in 3 ways:
  - Prohibiting employers from using genetic information to make employment decisions
  - Restricting employers from intentionally acquiring genetic information about applicants and employees; and
  - Requiring that employers keep genetic information they have (receive) confidential.

# **GINA**

## **Genetic Information Nondiscrimination Act**

**VIOLATIONS EXPOSE EMPLOYERS TO CIVIL  
LAWSUITS WHEREIN EMPLOYEES MAY BE  
ENTITLED TO COMPENSATORY DAMAGES,  
PUNITIVE DAMAGES AND ATTORNEY FEES.**

# GINA

## Genetic Information Nondiscrimination Act

**BUT MUST KEEP THE INFORMATION  
OBTAINED CONFIDENTIAL**

- 1. “Water cooler” Exception
- 2. Voluntary Corporate Wellness Program
- 3. FMLA certification procedures

**BUT WHAT ABOUT ADA??** In some circumstances

- 5. obtaining info from commercially or publicly available sources – ie obituary

# **GINA**

## **Genetic Information Nondiscrimination Act**

- **Wellness Programs offering Reward**
  - Can provide discount for completing a Health Risk Assessment
  - As long as HRA does not seek nor collect family medical history

# HITECH

## Health Information Technology for Economic and Clinical Health Act

- Effective February 17, 2010 (part of ARRA)
  - Business Associates are now required to follow HIPAA privacy and security obligations
  - New notification requirements put in place if a breach of PHI occurs

# HITECH

## Health Information Technology for Economic and Clinical Health Act

- Apply to Business Associates or third parties such as plan administrators, attorneys, accountants who provide services to covered entities and receive PHI pursuant to performance of services.



# HITECH

## Health Information Technology for Economic and Clinical Health Act

- Apply to Business Associates or third parties

**Must implement administrative, technical, and physical safeguards to protect PHI.**

**Must implement policies to detect security violations.**

**Must designate security official responsible for overseeing compliance.**

**Must establish safeguards for workstations accessing PHI.**

# HITECH

## Health Information Technology for Economic and Clinical Health Act

- New notification requirements of covered entities and business associates in case of a breach of unsecured PHI.

### **Notice:**

- 1. Brief Description of what happened;**
- 2. description of unsecured PHI;**
- 3. steps individual should take to protect self from potential harm;**
- 4. Description of what entity is doing to fix; and**
- 5. Contact info in case individuals have questions.**

# HITECH

## Health Information Technology for Economic and Clinical Health Act

- Penalties to be assessed.

**\$100.00 to \$50,000 per violation up to max \$1.5 mill.**

**Criminal fines/jail time if person knowingly violated HIPAA.**

# FMLA

## Family and Medical Leave Act

- Require **covered employers** to provide **eligible employees** up to 12 weeks **job protected** unpaid leave for medical emergencies, family member serious illness, birth/adoption.

**Covered Employers:** all public employers and all private sector employers with 50+ employees

**Eligible Employees:** must have worked at least 12 months previously and worked at least 1,250 hrs in previous 12 months for employer.

# FMLA

## Family and Medical Leave Act

- Require **covered employers** to provide **eligible employees** up to 12 weeks **job protected** unpaid leave for medical emergencies, family member serious illness, birth/adoption.

**Must be allowed to return to same job or that equivalent in pay, terms and benefits.**

**But employers may require employees to use accrued paid leave first.**

# FMLA

## Family and Medical Leave Act

- Applies to employers with 50+ employees;
- Have to have been employed for at least 12 months and must have worked at least 1,250 hours in previous 12 months before eligible.
- Eligible for up to 12 weeks in a 12 month time period.

# FMLA

## Family and Medical Leave Act

- Entitled to leave for .....
  - For birth and care of newborn child
  - For placement of adoption or foster care
  - For serious medical illness
  - To care for a spouse, child or parent with serious medical condition
  - For qualifying exigencies if spouse, parent, child is on active duty for National Guard or Reserves
  - To care for family member with serious medical condition or injury if active military (26 wks)

# FMLA

## Test your Knowledge

**Employer misstates duration of FMLA leave and erroneously tells employee that her FMLA leave would last one month longer than the actual statutory deadline. Is she entitled to the additional month of FMLA leave?**

**5<sup>th</sup> Cir. says no.**

*Durose v. Grand Casino of Miss., Inc.*, 251 F. App'x 886, 889 (5<sup>th</sup> Cir. Oct 2008)



# FMLA

## Test your Knowledge

EE took FMLA leave 9-05 to care for child. Then in 2-06 took FMLA for own medical condition. 8-06 sought but was denied FMLA leave b/c had not completed requisite 1,250 hours in previous 12 months. Position filled in her absence and returned to work with different position and less pay. Violation?

**Fiscal year ended June 30 for purposes of tracking leave.**

**Court held – New FMLA leave yr commenced 7-1 and EE had not worked 1,250 hrs in the previous 12 months so – upheld denial of claims.** *Lyons v. NEISD*, 277 F. App'x 455, 456 (5<sup>th</sup> Cir. 2008)

# FLSA

## Fair Labor Standards Act

Enacted in 1938 with stated purpose of improving “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.” *29 USC Sec. 202.*

# EASE OF VIOLATING FLSA

- **1. Regulations are very confusing and even sophisticated employers often make mistakes**
  - **Calculating OT owed**
  - **Identifying Exempt vs. Non-Exempt Employees**
  - **Maintaining accurate and complete records (3 yrs back)**

# DANGERS OF FLSA VIOLATIONS

- **1. FLSA creates potential for personal liability of owners/president/other executives.**
- **2. Liability could attach to an individual if he actually had the opportunity to hire/fire employees, direct how work performed or discipline employees.**

# DANGERS OF FLSA VIOLATIONS

- **Liable for:**
  - **Unpaid wages**
  - **Additional equivalent amount as liquidated damages (unless can show good faith defense)**
  - **If Plaintiff prevails, attorney fees and cost award is mandatory.**

# DANGERS OF FLSA VIOLATIONS

- **1. Dramatic increase in wage and hour class actions over past 8 years.**

**Between 2004 and 2006, number of federal wage cases increased by 86%.**

**Number of collective (class) actions increased by 70%.**

# DANGERS OF FLSA VIOLATIONS

- **3/07 Albertsons – paid \$53.3 million for misclassifying exempt v. non-exempt.**
- **Cingular Wireless – paid \$5.1 million for Customer Service Employees working off clock.**
- **1/07 E-Loan Inc. – paid \$13.6 million for OT and meal break violations.**
- **11/07 Radio Shack paid \$8.8 million for misclassifying store managers as exempt.**
- **10/06 Wal-Mart paid \$78 million for failing to compensate for mealtime, off the clock and rest breaks.**

# DANGERS OF FLSA VIOLATIONS

- **2/07 Coca-Cola paid \$14 million for employees who worked off the clock.**
- **11/06 IBM paid \$65 million for OT claims of installation and maintenance computer workers.**
- **5/05 Farmers Ins. Paid \$48.5 million for employee misclassification.**
- **10/02 Perdue Farms paid \$10 million for failure to pay for time spent donning/doffing.**



# FLSA

## Fair Labor Standards Act

### FLSA:

Requires payment of minimum wage;

Requires payment of overtime wages to covered employees for hours worked in excess of a 40 hour week;

Mandates equal pay for males and females doing equal work;

Restricts employment of child labor; and

Requires certain recordkeeping with respect to wages and hours.

# FLSA

## Exempt vs. Non-Exempt Employees

Exempt Employees – not entitled to overtime.

So – if an employee is salaried, is he automatically considered to be exempt?

**Nope**

# FLSA

## Exempt vs. Non-Exempt Employees

### Exemption Classifications:

#### Salary Level Test

**Anyone making less than \$455 a week (\$23,660 a yr) automatically entitled to OT.**

**Does not apply to doctors, lawyers, teachers, outside sales ,and certain computer related occupations (pd at least \$27.63 an hour.)**

# FLSA

## Exempt vs. Non-Exempt Employees

### Exemption Classifications:

#### Salary Basis Test

**Regularly receives predetermined amount of compensation for each pay period and must be paid full salary for any week in which employee performs any work.**

**Compensation cannot be reduced because of variations in quality or quantity of work performed.**

# FLSA

## Exempt vs. Non-Exempt Employees

### Duties Test:

6 Classifications of Exempt Employees – not entitled to overtime.

1. Executives
2. Administrative Employees
3. Professionals
4. Outside Sales Employees
5. Computer Employees
6. Highly Compensated Employees

# FLSA

## Test your Knowledge



**What is minimum wage in Texas?**

**\$7.25 an hour**

# FLSA

## Test your Knowledge

**JohnEE works in Starbucks as a server 37 hours in week one and 43 hours in week 2. Entitled to overtime if paid every two weeks?**



**Yes**

# FLSA

## Test your Knowledge

**All Non-Exempt employees told – NO OVERTIME UNLESS PRE-APPROVED BY MANAGEMENT. JessEE works 45 hours in one workweek and does not obtain pre-approval – is he to be paid OT?**



**Yes – must always pay empEEs for work performed whether or not authorized.**



# FLSA

## Test your Knowledge

**Full time employees defined by your policies and procedures as 35 hours. SuzEE (Non-Exempt) works 43 hours in a week – How much pay is she owed?**



**5 hours of Regular pay and 3 hours at 1 ½ pay as OT.**

# FLSA

## Test your Knowledge

**Suzee – wants to waive OT b/c she did not do much work (mainly personal issues) on Monday. She wants to come in Saturday off the clock to make up the work. Can she?**



**No – employee cannot waive OT pay.**

# FLSA

## What is a workweek?

Any regularly recurring period of 7 consecutive 24 hour periods. *29 CFR Sec. 778.105*

Need not coincide with the calendar week but may begin on any day and at any hour of the day. *29 CFR Sec. 778.105*

But any workweek change must be intended to be permanent. *29 CFR Sec. 778.105*

# FLSA

## Recordkeeping

1. DOL may look 3 years back.
2. Employer must have written document retention and destruction policy.
3. Must have designated manager for document retention and destruction policy and procedures.
4. Have a mechanism for regular maintenance of policy and procedures.
5. Train Managers on document retention.
6. Create destruction logs and maintain them.

# FLSA

## Recordkeeping Required Records by DOL

- 1. Employee full name, SS No., Address, Sex and occupation.**
- 2. Time and day of week when EE workweek begins.**
- 3. hours worked each day, each week, basis on which wages are paid (hrly, wkly, salary)**
- 4. Regular hourly pay rate, total OT earnings, additions and deductions from wages.**
- 5. Date of payment and pay period covered by payment.**

# FLSA

## Protection of Employer

- ❖ **Develop, review and improve wage and hour policies such as clocking in and out, use of timesheets, approval for OT, policies regarding breaks, travel time, time spent on preliminary and postliminary tasks.**
- ❖ **Audit job descriptions re Exempt v. Non-Exempt employees.**
- ❖ **Audit policies and procedures to ensure updated and accurate.**
- ❖ **DOCUMENT!**