

**The Gathering Storm: Preparing Employers for the Winds of Change  
Employment Roundtable<sup>1</sup>**

*December 11, 2009*

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IN LABOR AND EMPLOYMENT LAW THIS PAST YEAR.**

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<sup>1</sup> This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

## 1. LEGISLATIVE UPDATE (Leslie Bottomly)

### A. Americans with Disabilities Act (ADA)

Following a series of court rulings restricting the protections offered by the ADA, a successful lobbying effort by groups representing individuals with disabilities resulted in federal legislation restoring an expansive reach to the ADA. The ADA Amendments Act of 2008 (ADAAA)<sup>2</sup> becomes effective on January 1, 2009. The new law does the following:

- Directs the EEOC to revise its regulations to define the term “substantially limits” more broadly (*i.e.*, to include more individuals within the definition of disabled under the ADA).
- For the first time, a list of “major life activities” is provided, although it is a non-exclusive list. The list includes activities the courts and the EEOC have widely recognized as major life activities, including: caring for oneself, manual tasks, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The list also includes “major bodily functions” which are described as “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”
- Mitigating measures other than “ordinary eyeglasses or contact lenses” will no longer be considered in assessing whether an individual has a disability. This means that individuals with, for example, diabetes or mental illness who are fine on medication may now be considered disabled under the new standard.
- Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- Makes it easier for an employee to sue his or her employer under the theory that the employer “regarded” the employee as disabled. Specifically, the amendments provide that an individual only needs to show he/she was discriminated against due to an impairment, regardless of whether or not the impairment limits or is perceived to limit a major life activity (thereby meeting the more stringent definition of “disability”).
- Provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation.

**LESSON:** As a result of the ADAAA, the ADA is expected to protect even more employees. Employers should respond by reviewing and revising their policies and forms used to administer the ADA. For example, medical certification forms that instruct the physician to determine the degree of disability in the individual’s medicated state will need to be revised to instruct the healthcare provider to make the determination in the individual’s unmedicated state. Employers should train supervisors and managers as to the ADA’s basic requirements (non-discrimination,

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<sup>2</sup> S 3406. The text of the Bill can be found at:  
<http://www.law.georgetown.edu/archiveada/documents/S3406FinalEngrossedVersion.pdf>

accommodation, and confidentiality of medical information) and as to the ADA's anticipated expanded scope. Finally, in order to guard against "regarded as" claims, employers should review and reconsider any pre-employment medical examinations currently conducted and review policies regarding the sharing of confidential medical information within the organization. Finally, keep your eyes open for new regulations and guidances that will undoubtedly be forthcoming from the EEOC to implement and interpret the ADAAA.

## **B. Family Medical Leave Act (FMLA)**

The Department of Labor recently issued new FMLA regulations in order to: (1) implement new types of leave available to employees with family members serving in the military; and (2) clarify certain regulations that have caused long-standing difficulties in administering the FMLA.<sup>3</sup> The new regulations are effective January 16, 2009. In summary, the new regulations do the following:

- Revamp the process and forms for informing employees of their eligibility for, and approval of, leave time.
- Allow employees to take time off for a wide variety of needs that arise when a relative who is retired from the military, or is in the military reserves, is called to active duty.
- Allow employees to take time off (up to 26 weeks) to care for a family member who is injured in active military duty.
- Allow, with the employee's permission, certain categories of employer representatives (not including the employee's supervisor) to directly communicate with the healthcare provider to verify and clarify medical certification.
- Simplify the rules around use of paid time off during FMLA.
- Further define the term "serious health condition," particularly as it relates to continuing treatment.
- Expressly allow retroactive designation of FMLA as long as it does not prejudice the employee.
- Allow the employer to deny perfect attendance awards to employees on FMLA as long as those on equivalent types of leave are treated similarly.
- Allow employers to require the employee to comply with the employer's normal call-in policy (absent special circumstances).
- Provide procedures for clarifying and verifying incomplete or ambiguous medical certifications.

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<sup>3</sup> 29 CFR 825. The new regulations can be found at <http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>

- Clear up existing uncertainty regarding whether an employee can waive their FMLA rights. Such waivers (settlements) are enforceable as long as the individual does not waive future FMLA rights.

**LESSON:** Employers need to revise their existing FMLA policies and forms to incorporate the regulatory changes. In addition, the changes must be analyzed in light of any applicable state law. The Oregon Bureau of Labor and Industries (BOLI) is currently examining the new FMLA regulations in order to determine whether any changes to the Oregon Family Leave Act rules are necessary. Finally, employers need to administer their leave policies in conformance with the new policies and forms.

## 2. ELECTRONIC DISCOVERY – DOCUMENT RETENTION POLICIES (Jim Barrett)

With the rising costs of discovery in litigation, where a company can be asked to produce hundreds of thousands of pages of documents, having a written document retention policy is more important than ever and can result in substantial cost savings.

The Federal Rules of Civil Procedure provide a safe harbor for corporations that destroy documents as part of a “routine, good-faith operation of an electronic information system.”<sup>4</sup> However, to take advantage of this safe harbor, the policy must be *in writing* and provide for the suspension of destruction of documents when the company reasonably anticipates litigation, government investigation, or audit.

The consequences of a failure to suspend document destruction will vary depending upon the circumstances, but could range from minor to catastrophic. In civil litigation, such as an employment discrimination lawsuit, if a party notices and proceeds to destroy evidence relevant to the case, then a court must view that evidence and the inferences arising from it in the light most favorable to the other party.<sup>5</sup> Oregon also allows a jury to draw adverse inferences from destroyed evidence.<sup>6</sup>

If the company can show that it was trying to be reasonable in its document retention and destruction policies, the courts can be forgiving. For example, in a recent FMLA lawsuit in the United States District Court for the District of Oregon, the court refused to draw an adverse inference from evidence destroyed by TriMet, even when that evidence was destroyed after the complaint had been filed, because TriMet was able to submit evidence that it began destroying outdated mainframe reel-to-reel tapes in two reasons unrelated to the litigation: (1) to reduce storage costs of up to \$4,000 per year; and (2) because it could no longer read the data on those tapes. In addition, the decision to destroy the unusable tapes was not made by anyone who had anything to do with the former employee and included all tapes five years or older.<sup>7</sup>

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<sup>4</sup> Fed. R. Civ. P. 37(e).

<sup>5</sup> *Bagdadi v. Nazar*, 84 F3d 1194, 1197 (9<sup>th</sup> Cir 1997).

<sup>6</sup> *Blincoe v. Western States Chiropractic College*, 2007 WL 2071916 (D Or Jul. 14, 2007) (citing *Whitney v. Canadian Bank of Commerce*, 374 P2d 441, 442 (Or. 1962)).

<sup>7</sup> *Peterson v. Tri-County Metropolitan Transp. Dist. of Oregon*, 2008 WL 723521 (D Or Mar. 14, 2008).

However, many courts hold companies to a strict standard and enforce the obligation to suspend normal destruction of documents when the company reasonably anticipates litigation, even *before* any complaint or EEOC charge is filed.<sup>8</sup>

Any suspension of the normal course of information and records retention and destruction – or “legal hold” – should be informed by legal judgment, tailored to the legal requirements of the case, and applied only for the life of the litigation, investigation, audit, or other circumstances giving rise to the suspension. The obligation to preserve evidence does not require that all electronic information be frozen.<sup>9</sup> The scope of what is necessary to preserve will vary widely between and even within organizations depending on the nature of the claims and the information at issue.

**LESSON:** Every organization must have a written document retention policy that provides for a suspension on the destruction of documents upon reasonable notice of the possibility of litigation. An effective policy requires training and communication between the key players, such as Human Resources and Information Technology (IT).

### 3. USE OF NONCOMPETE AGREEMENTS IN THE PACIFIC NW (Jim Barrett)

At the end of its 2007 session, the Oregon legislature passed Senate Bill 248,<sup>10</sup> which imposes significant new restrictions on employee arbitration and non-competition agreements. The new law applies to arbitration and non-competition agreements entered into on or after January 1, 2008.

Under the amendments to ORS 36.620 and 653.295, both arbitration and non-competition agreements between employers and employees are voidable unless:

- (1) The employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee’s employment that the agreement is required as a condition of employment; or
- (2) The agreement is entered into upon a subsequent bona fide advancement of the employee by the employer.

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<sup>8</sup> See *Zubulake v. UBSWarburg LLC*, 220 FRD 212, 216-17 (SDNY 2003) (in employment discrimination case, duty to preserve attached as soon as plaintiff’s supervisors became reasonably aware of the possibility of litigation, rather than when EEOC complaint was filed several months later).

<sup>9</sup> See *Zubulake v. UBS Warburg LLC*, 220 FRD 212, 217 (SDNY 2003) (organizations need not preserve “every shred of paper, every e-mail or electronic document, and every back-up tape”); see also *Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865, at \*4 (ND Ill Oct. 27, 2003) (“A party does not have to go to ‘extraordinary measures’ to preserve all potential evidence . . . . It does not have to preserve every single scrap of paper in its business.”) (citing *China Ocean Shipping (Group) Co. v. Simone Metals Inc.*, No. 97 C 2694, 1999 WL 966443, at \*3 (ND Ill Sept. 30, 1999) and *Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 WL 1694325, at \*32 (ND Ill Oct. 23, 2000)).

<sup>10</sup> <http://www.leg.state.or.us/07reg/measpdf/sb0200.dir/sb0248.en.pdf>.

The new restrictions apply to all arbitration agreements between an employer and employee. It is unclear, however, whether this restriction will be applied to arbitration agreements between an employer and employee that are not imposed as a condition of employment, such as separation, stock, or change of control agreements. In contrast, the provision of the statute applicable to compete agreements expressly excludes from its scope agreements that are outside of the context of an employment relationship.<sup>11</sup>

The foregoing limitations on arbitration agreements may ultimately prove invalid when applied to employment contracts affecting interstate commerce. Under § 2 of the Federal Arbitration Act (FAA), written arbitration agreements are valid and enforceable “save on such grounds as exist at law or in equity for the revocation of any contract.” Because the new law singles out arbitration agreements and does not apply to all contracts, the limitations on arbitration agreements are likely preempted by § 2 of the FAA.<sup>12</sup> However, until it is challenged, the law is valid and, since challenges tend to be costly, the most prudent course is to comply.

In addition to requirements discussed above, Senate Bill 248 sets out additional restrictions that apply only to non-competition agreements. Non-competition agreements are not enforceable for a period longer than two years. In addition, excluding certain restrictions specific to the broadcast industry, most non-competition agreements will not be enforceable unless:

- (1) The employee is an administrative, executive, or professional employee exempt from overtime pay under ORS 653.020(3);
- (2) The employee has access to trade secrets or other competitively-sensitive business information; and
- (3) The employee’s annual gross compensation at termination exceeds the median family income for a four-person family under Census Bureau guidelines (currently around \$70,000).<sup>13</sup>

If the employee is non-exempt and/or does not meet the income requirements, a non-compete may be enforced for up to two years if the employer pays the employee for the duration of the non-compete period the greater of fifty percent of the employee’s annual gross base salary and commissions at the time of the employee’s termination, or fifty percent of the median family income for a four-person family, as determined by the United States Census Bureau for the most recent year available at the time of the employee’s termination.

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<sup>11</sup> ORS 653.295(3).

<sup>12</sup> While only employment contracts that impact interstate commerce would be preempted, most contracts easily satisfy that criteria. The Supreme Court has indicated that parties may be able to contract around the FAA by including an express choice of a particular state’s arbitration laws. However, if an employment contract contains a choice of law provision specifically invoking Oregon’s Uniform Arbitration Act, as opposed to a general choice of law provision designating the application of Oregon law to any dispute, there is a risk that the new provisions of ORS 36.620(5) (which mirror the limitations of ORS 653.295 applicable to arbitration agreements) would apply even if a preemption challenge were successful.

<sup>13</sup> The statute does not specify whether the median family income is for Oregon or the United States. According to staff at the BOLI technical assistance line, BOLI uses the Oregon median family income for the purposes of determining whether a non-compete is valid under ORS 653.295.

A significant change in the law that benefits employers is the express exclusion of employee and customer non-solicitation agreements from the scope of the non-compete statute. However, while there is no longer any statutory bar to entering into such agreements, they may still be subject to standard contracting requirements (e.g., requiring offer, acceptance, and consideration), and courts will likely continue to require that the restrictions as to time and/or scope be reasonable as well.

**LESSON:** The new law imposes significant limitations and benefits on employers who seek to enter into arbitration and/or non-compete agreements with their employees. Requiring such agreements as a condition of employment requires advance planning and documentation of the timing and terms of the agreement to maximize the likelihood that a court or arbitrator will enforce it. Employers should have agreements and procedures in place well in advance of making an offer of employment to any new employees.

#### **4. PROVIDING EMPLOYEE BENEFITS FOR DOMESTIC PARTNERS, CIVIL UNIONS, AND SAME-SEX SPOUSES (John Walch)**

Employers offer benefits to the domestic partners, same-sex spouses, and/or civil union partners (collectively, “domestic partners” or “domestic partnerships”) of employees for a variety of reasons. Some employers offer domestic partnership benefits because they have to – the benefit is required by either a collective bargaining agreement or applicable law.<sup>14</sup> Other employers view providing such benefits as necessary to being competitive. Offering domestic partner benefits allows the employer to attract and retain valuable employees, which helps to promote a financially-successful business. Others simply view the practice as the right thing to do, and necessary to align the organization’s values with its business practices.

Employers should carefully consider the legal, business, and other implications of offering domestic partner benefits. The first step is to consider the status of state laws and whether they will restrict or require such benefits.<sup>15</sup> As the recent election cycle indicated, domestic partnership laws are constantly changing. If state and local laws allow employers to offer such benefits, the employer will then need to decide how it wants to structure the domestic partner benefits to reflect the company’s policies and objectives, and consider whether and/or how those benefits will be taxed.

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<sup>14</sup> Currently, about 11 states legally recognize domestic partnerships, including Oregon. However, about 30 states have laws or constitutions that either limit marriage to one man and one woman, refuse to recognize domestic partnerships validly created elsewhere, or both. For example, the Michigan Supreme Court views the marriage amendment to that state’s Constitution as prohibiting public employers from recognizing domestic partnerships for any purpose, including employee benefits. *National Pride at Work, Inc. v. Governor of Michigan*, 481 Mich 56 (2008).

<sup>15</sup> Under Oregon law, employers must provide benefits to employees without regard to sexual orientation or marital status. ORS 659A.030. Employees who are in a domestic partnership, therefore, should be treated the same as married employees for the purpose of qualifying for and entitlement to employee benefits.

## **A. Domestic Partner Benefits**

Next, the employer must decide whether to extend domestic partner benefits to both same-sex and opposite sex partners.<sup>16</sup> Then, the employer needs to define precisely the requirements for a domestic partnership. In Oregon, a same-sex domestic partnership definition is found in the Oregon Family Fairness Act.<sup>17</sup> It defines a domestic partnership as “a civil contract entered into in person between two individuals of the same sex who are at least 18 years of age, who are otherwise capable and at least one of whom is a resident of Oregon.”<sup>18</sup> Some employers choosing to offer domestic partnership benefits require the employee and their domestic partner to provide evidence of the relationship by signing an affidavit certifying the partner’s eligibility or producing the registration certificate issued to the domestic partners by the appropriate government agency.<sup>19</sup>

Employers next need to decide what benefits to provide and to whom. Employers may wish to extend coverage to the children of employees’ domestic partners under their plans. If so, the employer will need to determine the age and dependency limitations for these beneficiaries, and address whether such children are eligible if the domestic partner is not covered. As with any eligibility decision, employers will want to balance the cost of the expanded benefit coverage and additional administrative burdens with the expected benefits of providing such benefit eligibility.

In any case, employers who offer domestic partner benefits may need to amend the eligibility requirements in their benefit plan documents and policies to provide the desired coverage.<sup>20</sup> These issues arise in both insured and non-insured benefit plans, and may have different impacts under state and federal laws.<sup>21</sup>

## **B. Federal Income Tax Treatment of Domestic Partner Benefits**

Federal income tax law provides favorable income tax treatment of many employer-provided benefits to employees, their “spouses,” and “dependents.” However, federal law restricts the

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<sup>16</sup> In states that do not permit same-sex domestic partnerships, limiting the definition of “domestic partner” to same-sex partners is usually permitted since opposite-sex partners can marry and receive such benefits, while same-sex partners cannot.

<sup>17</sup> 2007 Oregon Laws, ch. 99 (HB 2007).

<sup>18</sup> *Id.*, § 3(1).

<sup>19</sup> Requiring such proof from employees with domestic partners when it is not required of married employees may be deemed discriminatory under the applicable law. It is, therefore, prudent to consult with counsel before imposing such requirements.

<sup>20</sup> Note that insurance policies used to provide medical benefits are subject to state, not federal, law. The Oregon Department of Insurance has stated that all insurance policies delivered in Oregon must treat domestic partners as spouses, even if such policies are part of a plan subject to ERISA (Employee Retirement Income Security Act). Or. Ins. Bull. INS 2008-2 (Feb. 5, 2008). It is unclear whether that position is tenable given ERISA’s broad preemption clause. However, at a minimum, Oregon’s position may create a conflict between the terms of the ERISA plan and the insurance policy that funds the plan’s benefits.

<sup>21</sup> For example, the Oregon Family Leave Act requires covered employers to provide paid leave for employees to care for spouses. The Family Fairness Act broadens the definition of “spouse” to include domestic partners. However, Oregon law does not modify the federal Family Medical Leave Act, which does not treat domestic partners as spouses.

definition of “spouse” to a marriage between one man and one woman.<sup>22</sup> Same-sex marriages or domestic partnerships under state laws do not qualify as “spouses” under federal law. As a result, the favorable federal tax treatment of employment benefits provided to spouses is unavailable to same-sex partners unless they meet the federal tax definition of “dependent.” Although an employer may still provide employees’ same-sex partners with benefits, the value of the benefits are taxable as imputed income to the employee-partner.

Under current law, a dependent is either a “qualifying child” or a “qualifying relative.” Since the “qualifying child” definition imposes age and relationship conditions that make forming a domestic partnership impossible, employee benefits such as medical, dental, or vision are tax-free only if they are provided to the employee’s “qualifying relative.” A “qualifying relative,” for most employee benefit purposes, is a citizen or resident of the United States or a resident of Canada or Mexico that:

- Is not a “qualifying child”<sup>23</sup> of the employee or any other taxpayer.
- Is the employee’s child or child’s descendent, sibling (including half-sibling) or sibling’s child, parent or their ancestor, aunt, uncle, in-law *or any member of the employee’s household other than a spouse having the same residence as employee for that taxable year*. Note that this requires a shared residence for the entire tax year.
- Receives over one-half their support from the employee.

This definition causes difficulty for both employers and employees. Enrollment in benefit plans is usually prospective, done late in one year in preparation for the next. The qualifying relative test is historic: it looks backwards to a completed tax year. Thus, at the time of enrollment neither the employer or employee knows whether the benefit is tax-free or not. That causes withholding, tax reporting, and possibly eligibility issues at the end of the year if the domestic partner fails one of the qualifying relative tests. Either the domestic partner is not eligible for the benefit already received, or income and employment taxes were over or under-withheld. Similar difficulties arise in cafeteria plans and in administering payroll, which may have to account for some employee benefit contributions on a pre-tax basis (for the employee and “dependents”) and some on an after-tax basis (for domestic partners or children not meeting the “dependent” definition). Employers should address and correct such situations as quickly as possible.

**LESSON:** Adding domestic partner benefits is a step-by-step process. The steps for implementing domestic partner benefits are:

1. Consider benefits and costs of providing domestic partnership benefits.
2. Analyze state laws regarding domestic partnerships to determine statutory requirements or limitations.

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<sup>22</sup> 1 USC § 7.

<sup>23</sup> Children of a domestic partner may also meet the definition of “qualifying child” or “qualifying relative” and become dependents for income tax purposes. However, it may be necessary for the employee partner to adopt such a child for them to meet the qualifying child definition.

3. Define “domestic partner” for each benefit plan, the benefits for which they are eligible, and whether eligibility extends to children of domestic partners.
4. Determine what documentation, if any, will be required to establish the existence of the partnership.
5. Revise benefit plan enrolment forms.
6. If allowing non-dependent domestic partners to enroll in benefit plans, establish coverage values for income and employment tax purposes. Update payroll processes and software to impute, withhold, and report taxable income.
7. Amend plan documents, summary plan descriptions and communicate changes to employees. Train benefits staff to respond to questions and how to provide additional information.

## **5. PHONING IT IN: TELECOMMUTING CONSIDERATIONS (John Walch)**

Although the price of gasoline has dropped recently, both employers and employees remain interested in telecommuting. Employees value telecommuting because it creates additional flexibility, helps employees balance work and personal responsibilities, saves the employee money, protects the environment, and reduces commuting time. Telecommuting allows employers to expand their service hours, reduce absenteeism and tardiness, increase the pool of available labor, and reduce the need for additional space. However, a telecommuting employee is still an employee, and the usual laws still apply to employees working from home. Telecommuting raises a number of unique issues under those laws. Below are some of the issues employers should consider before permitting employees to telecommute.

### **A. Wage and Hour Compliance**

One concern when employees telecommute is an increased risk that non-exempt employees will work overtime hours for which they are not paid time-and-a-half as required by law or receive necessary breaks. It is much more difficult to monitor hours worked when an employee is off-site. Employers can reduce the possibility of an unpaid overtime violation, however. Requiring non-exempt telecommuters to sign agreements acknowledging that they are not permitted to work overtime without prior written approval and requiring these employees to clock in and out using e-mail or the telephone are two examples. Another is to limit telecommuting to exempt employees.

### **B. Accommodations for Disabilities**

Telecommuting may be a reasonable accommodation to employees that have a disability under the ADA that prevents them from performing their job at the normal work location. However, telecommuting is not a reasonable accommodation if it eliminates an essential job function or creates an undue hardship on the employer. If the nature of the job requires the employee to be present at the normal work location, telecommuting would not be a reasonable accommodation. As employers expand telecommuting opportunities, it may become more difficult to argue that

permitting a disabled employee to telecommute creates an undue hardship. Similarly, if employers selectively choose the employees allowed to telecommute, the employer must be careful to ensure that they are not discriminating against employees due to their actual or perceived disability.

### **C. Discrimination Issues**

Employers should consider the potential consequences under employment discrimination laws when deciding which employees may telecommute. Employers should avoid administering telecommuting policies in ways that appear discriminatory – by allowing a woman to telecommute but not a similarly-situated man, for example. Because employees within protected classes may predominately occupy certain jobs, the employer should have a legitimate business reason for excluding those jobs from telecommuting. Employers need to remind employees that telecommuting does not change the terms and conditions of employment unless clearly specified. A telecommuting employee's wages and benefits should remain unchanged, as if the employee was not telecommuting.

### **D. Tax and Unemployment Concerns**

If the telecommuting employee resides in a state different than where the employer is located, the employer must determine where it files tax returns and makes tax payments. Tax laws also may affect what is considered income, what the employer is required (or is not permitted) to withhold, and whether or not reimbursements to the employee are taxable income. Similarly, does the employer pay unemployment taxes to its home state or the employee's state? Will a laid-off telecommuting employee become eligible for unemployment benefits in the employer's state, the employee's state, or both?<sup>24</sup>

### **E. Trade Secrets and Confidential Information**

To improve productivity, employers may give telecommuting employees broad access to company information using a personal computer. Giving telecommuters access to this information increases the risk of unauthorized disclosure or misappropriation, whether by the employee or third parties. Employers should consider the information truly necessary for the telecommuter and monitor the information employees are using and the information they produce from home. Employers should take steps to protect this information to the same extent that the employer protects information stored or produced at the employer's premises. Employers may want to require telecommuters to sign a nondisclosure or confidentiality agreement that addresses the use and protection of company information. They may also impose certain technological standards on the computer equipment used by the employee.

### **F. Privacy Issues**

Generally, a person has a valid privacy right only when the person has a "reasonable expectation" of privacy. Since the law generally considers homes to be private, telecommuters

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<sup>24</sup> In *In re Allen*, 100 NY2d 282 (NY 2003), a New York appeals court denied unemployment benefits to a Florida telecommuter because she did not work in New York but at her Florida residence. Florida denied the benefits since she worked for a New York company in New York.

working from home will probably have such an expectation.<sup>25</sup> The best way to remove a telecommuter's expectation of privacy is to obtain signed waivers that acknowledge the employee understands that certain aspects of their employment will be subject to unannounced monitoring. A telecommuting policy should notify telecommuters that as a condition of employment, the employer may inspect computer files or documents prepared or used by the employee in the scope of their employment and monitor computers and telephone lines during work hours without notice. In some circumstances, it may be necessary to visually monitor, or at least periodically inspect, the workplace of a telecommuter.

### **G. Occupational Safety and Health**

OSHA requires most employers to record work-related injuries and illnesses, including those that occur off-site at a telecommuter's home. OSHA has stated that it does not inspect home offices, expect employers to do so or hold employers liable for employees' home offices. OSHA will "informally" advise an employer if OSHA receives a specific complaint from an employee who works from home but will not pursue the complaint. Employers should require their telecommuters to comply with workplace safety policies, especially if employees use hazardous substances in any manufacturing process at the home, since OSHA does respond to those complaints.<sup>26</sup>

### **H. Workers' Compensation**

When a telecommuting employee is injured at home, it can be very difficult to determine whether that injury is compensable under the workers' compensation law because the analysis is extremely fact specific. While there are usually witnesses to worksite injuries, there are usually not witnesses to an injury occurring at a telecommuter's home. That makes it very difficult to determine if the injury occurred in the course and scope of the employee's job. Depending on the circumstances, it may be helpful to investigate a work injury reported by a telecommuter, including the place in the home where the injury incurred. Before doing so, however, employers should obtain written permission from the employee (see the Privacy discussion, above). Conscientious or risk-averse employers may want to inspect telecommuter home offices periodically for safety and ergonomics issues, and provide for such inspections in the telecommuting policy.

### **I. Tort Liability**

Employers are generally responsible for injuries to others or damage to property caused by an employee's negligence. This is especially true if the injury or damage occurs on the employer's property. Whether this principle is true for damage or injury occurring at the home of a telecommuter is not as clear. To protect themselves from such claims, an employer should obtain liability insurance that includes the employee's home whenever it is being used for the employer's business. Likewise, the employer should require telecommuters to maintain homeowner's or renter's insurance as part of the telecommuting policy.

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<sup>25</sup> However, the employee's use of the employer's computer and telephone systems from home is *not* private, assuming the employer has appropriate policies in place.

<sup>26</sup> *Home Based Worksites*, OSHA Directive CPL 02-00-125 (available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=2254](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2254)).

## **J. Zoning**

Many localities have zoning laws that limit or restrict the operation of home businesses. In most cases, the law requires home businesses to obtain a business license or permit. Employers should identify in their telecommuting policy the party is responsible for obtaining, maintaining, and paying for any required permit or license.

**LESSON:** Before permitting employees to telecommute, employers have a host of issues to consider. It is also prudent to develop written telecommuter policies and agreements addressing responsibilities and requiring telecommuters to acknowledge certain expectations. Telecommuter agreements should include the following:

- a statement that telecommuting is allowed in the discretion of the employer, which may terminate the telecommuting arrangement at any time;
- a statement that the telecommuting agreement does not amend the employer's policies or expectations, and the employee's compensation or benefits, except as provided in the agreement;
- the telecommuter's commitment to devote working time to work, and not be distracted by personal commitments (and that doing so may cause the termination of the arrangement or the employee);
- a description of the employee's work schedule and location (especially if the employee will be spending some time at the worksite and some at his or her home office);
- the right of the employer to make reasonable visits to inspect the home work location for safety or information security issues;
- an acknowledgment of the employee's responsibility for ensuring a safe work environment, reporting any work-related injuries, and (if applicable) insuring against injuries to others on the employee's property; and
- an acknowledgment that all work product belongs to the employer, and the right of the employer to monitor use of company equipment used in the home.

## **6. U.S. SUPREME COURT UPDATE (Kathy Feldman)**

This year the Supreme Court had little good news for employers: it expanded the scope of liability for retaliation under § 1981 (prohibiting race discrimination in the formation and performance of contracts) and the Age Discrimination in Employment Act (ADEA); made it harder for employers to defend themselves in disparate impact cases (discriminatory effects of a facially neutral employment policy); loosened the standards for meeting the exhaustion requirements under federal law, and kept the door open for plaintiffs to introduce evidence of discrimination against other employees. The one ray of light for employers was a case upholding

the employer's right to consider the employee's age (as it pertained to how close the employee was to reaching retirement) in calculating an award of disability benefits.

- *CBOCS West, Inc. v. Humphries*<sup>27</sup>

In *CBOCS West*, the Supreme Court expanded the scope of § 1981 claims to include retaliation based on race.<sup>28</sup> Section 1981 is a civil rights law enacted after the Civil War that prohibits race discrimination in the making and enforcement of contracts. As the employment relationship is deemed a contractual one, § 1981 prohibits race discrimination in employment contracts. However, the Supreme Court held in 1989 that conduct occurring after the contract was formed (*i.e.*, any conduct other than discrimination in hiring) was not covered by the statute.<sup>29</sup> This interpretation claims seemed to preclude claims for harassment, discriminatory treatment, and retaliation based on race.

In 1991, Congress changed the legal landscape by enacting a definition of “make and enforce contracts” that encompasses “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”<sup>30</sup> This change made it clear that racial discrimination and harassment claims were actionable under § 1981. Most lower courts have interpreted § 1981 as encompassing retaliation claims despite the fact that “retaliation” is not referenced within the statute itself. In *CBOCS West*, the Supreme Court confirmed that § 1981 prohibits retaliation based on race.

Unlike Title VII, which also prohibits race discrimination in employment, § 1981 does not require administrative exhaustion (filing an administrative charge with and obtaining a right to sue letter from the EEOC before proceeding in court), so the Court's recognition of a § 1981 retaliation claim may mean that we see more race-based retaliation claims at the courthouse.

- *Federal Express Corp. v. Holowecki*<sup>31</sup>

At issue in *Federal Express* was what constitutes filing a charge for the purpose of exhausting administrative remedies under the Age Discrimination in Employment Act (ADEA). Like Title VII, the ADEA requires employees to file a charge with the EEOC before instituting a lawsuit. The plaintiff in *Federal Express* filed an “Intake Questionnaire” and affidavit regarding her allegations of discrimination with the EEOC, which declined to treat the filing as a “charge” and, therefore, did not notify the employer of the claims or otherwise begin the normal administrative processes. The employer argued that, since no charge was filed, the action should be dismissed.

The Supreme Court interpreted the term “charge” broadly, following the EEOC's position “that the proper test for determining whether a filing is a charge is whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights.”<sup>32</sup> In addition, the Court said that the charge must contain an allegation and the name of the charged party. Applying this standard, the Court held that a valid

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<sup>27</sup> 128 S Ct 1951 (May 27, 2008).

<sup>28</sup> 42 USC § 1981.

<sup>29</sup> 109 S Ct 2363 (1989)

<sup>30</sup> 42 USC 1981(b).

<sup>31</sup> 128 S Ct 1147 (Feb. 27, 2008).

<sup>32</sup> 128 S Ct at 1155.

charge was filed and the action could proceed. The Court acknowledged that “under this permissive standard a wide range of documents might be classified as charges.”<sup>33</sup> It also rejected the argument that a valid charge should not be recognized unless the EEOC treats it as such, although it recognized that “[t]he employer’s interests, in particular, were given short shrift \*\*\*\*”<sup>34</sup> The Supreme Court did direct the EEOC to determine “what additional revisions in its forms and processes are necessary or appropriate,” so changes may be forthcoming.<sup>35</sup>

The Court’s loose interpretation means that it may be difficult to determine whether a valid charge has been filed. If the EEOC is not sure what a “charge” looks like, the rest of us are likely to have some trouble as well.

- *Gomez-Perez v. Potter*<sup>36</sup>

This case provided another example of the Supreme Court’s willingness to recognize retaliation claims despite the lack of explicit statutory language prohibiting retaliation. Here, a postal service employee brought a claim under the federal-sector provisions of the ADEA, which does not expressly prohibit retaliation (retaliation is explicitly prohibited in the private-sector ADEA scheme). Based upon the reasoning of prior decisions interpreting similar statutes, the Court concluded that retaliation is prohibited.

- *Kentucky Retirement Systems v. EEOC*<sup>37</sup>

This case involved a challenge to Kentucky’s disability retirement plan, which awarded benefits to employees who became disabled before reaching retirement age based in part on how close the employee was to reaching retirement. The Court held that the plan did not violate the ADEA. The Court found that the EEOC failed to show that age “actually motivated” the employer’s difference in treatment. Instead, the Court concluded that the difference in treatment was motivated by the pension status of the plan participants. The Court also emphasized that the plan “does not rely on any of the stereotypical assumptions that the ADEA sought to eradicate.”<sup>38</sup>

- *Meacham v. Knolls Atomic Power Laboratory*<sup>39</sup>

The claims at issue in *Meacham* arose from a reduction-in-force. The employer selected 31 employees for layoff, of whom 30 were age 40 or older. The selection was based upon performance scoring on “performance,” “flexibility,” and “critical skills.” The plaintiffs alleged that the company’s selection criteria had an adverse impact on older workers. A statistical expert testified that such results could rarely occur by chance.

The Court considered whether the employer facing a disparate impact claim under the ADEA and planning to use the ADEA’s exemption for “reasonable factors other than age” has the

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<sup>33</sup> *Id.* at 1158.

<sup>34</sup> *Id.* at 1160.

<sup>35</sup> *Id.* at 1161.

<sup>36</sup> 128 S Ct 1931 (May 27, 2008).

<sup>37</sup> 128 S Ct 2361 (June 19, 2008).

<sup>38</sup> 128 S Ct at 2369.

<sup>39</sup> 128 S Ct 2395 (June 19, 2008).

burden of both production and persuasion to prove such a defense. The Supreme Court, in an 8-to-1 opinion authored by Justice Souter, concluded that the reasonable factor other than age exemption is an affirmative defense for which the employer bears the burden of both production and persuasion.

- *Sprint United Mgmt. Co. v. Mendelsohn*<sup>40</sup>

The *Sprint* case deals with the treatment of “me too” evidence in discrimination cases (*i.e.*, evidence of discrimination against other employees in the plaintiff’s protected class). The Supreme Court held that such evidence is neither *per se* admissible or non-admissible. Rather, the Court reasoned that the issue is always one of a fact-specific relevance and undue prejudice analysis under the Evidence Rules. The Court stated: “The question whether evidence of discrimination by other supervisors is relevant . . . is fact based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.” The Court emphasized that the trial court has wide discretion in these matters and is in the best position to make these sorts of judgment calls. It, therefore, remanded the issue of admissibility back to the trial court for further analysis.

- *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*<sup>41</sup>

The Court considered whether Title VII protects from retaliation those employees who participate in an employer’s internal investigations of unlawful discrimination or harassment when there is no pending administrative investigation. In *Crawford*, the employer began an investigation about a manager’s alleged sexual harassment. The plaintiff, who had worked there for approximately 30 years, was one of the employees interviewed during the course of the investigation. During the interview, she told the investigator that she was harassed by the manager. While the investigation concluded that the manager had engaged in some inappropriate behavior, he was not disciplined. Crawford was subsequently accused of embezzlement and drug abuse, and discharged.

The question below was whether Crawford’s conduct was protected under Title VII’s “opposition” or “participation” clauses. The Circuit Court held that Crawford’s conduct was not protected from retaliation under Title VII, which covers “opposition” to illegal practices and “participation” in investigations, proceedings or hearings. In its view, she did not “oppose” the practices because she had not independently complained about the alleged harassment (the Circuit Court required “overt opposition” as opposed to cooperation with an investigation), and the “participation” clause did not apply because there was no administrative charge pending when the internal investigation was conducted. The U.S. Supreme Court agreed with the Sixth Circuit and affirmed the district court’s grant of summary judgment.

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<sup>40</sup> 128 S Ct 1140 (Feb. 26, 2008).

<sup>41</sup> 211 Fed Appx 373 (6<sup>th</sup> Cir 2006) (unpublished), *cert. granted*, 128 S Ct 1118 (2008) (No. 06- 1595).

- Upcoming Case:

*AT&T Corporation v. Hulteen*<sup>42</sup>

The Supreme Court will hear a case that examines how retirement benefits should have been calculated for women working at AT&T Corporation who took maternity leave prior to the enactment of a 1978 federal law prohibiting discrimination against those who take such leave.

The case centers on the question of whether AT&T workers should have been given service credits toward retirement for maternity leave taken before the Pregnancy Discrimination Act went into effect.

As an amendment to Title VII of the Civil Rights Act, the Pregnancy Discrimination Act prohibits discrimination against those who take pregnancy leave. Since the law's enactment, maternity leave is counted as a credit toward retirement benefits. The law essentially requires employers to give women who take pregnancy leave the same benefits as employees who take other types of temporary disability leave.

Four women brought the suit against AT&T, challenging its use of a service credit policy to calculate employee pension and retirement benefits. Each of the women took pregnancy leave between 1968 and 1976 while working for Pacific Telephone & Telegraph Co., which is now AT&T. The women would have received more favorable benefits or retirement opportunities had they been given full service credit for their pregnancy leaves at the time that they parted from AT&T.

Before 1977, the company classified pregnancy leave as personal leave. An employee on personal leave received a maximum of 30 days credit, while there was no limit on the amount of credit for employees on temporary disability leave. In 1979, the policy was changed to the Anticipated Disability Plan, which provides service credit for pregnancy leave on the same terms as other temporary disability leaves.

The women who sued, who are former and current employees, all had between 63 and 261 uncredited days of pregnancy leave during their tenure with the company.

In August 2007, the U.S. Court of Appeals for the Ninth Circuit ruled that AT&T violated Title VII by refusing to give credit to the pensions and retirements of women who took time off for maternity leave prior to 1979. The Solicitor General recommended that the high court review the case in order to resolve a lower court conflict over the issue, and correct a decision by the Ninth Circuit that gave an "impermissible retroactive effect to the PDA by imposing liability on employers for refusing to credit leave before the PDA was enacted. While the Supreme Court could decide differently, most employers should expect the Supreme Court to favor employees again.

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<sup>42</sup> 498 F3d 1001 (9<sup>th</sup> Cir 2007), *cert. granted*, 128 S Ct 2957 (2008) (No. 07-543).

## 7. NEW EEOC GUIDELINES (Jim Barrett/Kathy Feldman)

The following is a summary of recently issued EEOC guidelines and advice memoranda:

### A. Employment Tests and Selection Procedures<sup>43</sup>

The use of tests and other selection procedures can be a very effective means of determining which job applicants or employees are most qualified for a particular job. However, use of those tools can violate federal anti-discrimination laws if the employer intentionally uses them to discriminate against a protected class (race, sex, national origin, etc.), or if they disproportionately exclude people in a particular protected class.

The EEOC has promulgated the following “Best Practices for Testing and Selection”:

- (1) Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
- (2) Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer’s purpose. While a test vendor’s documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid under the Uniform Guidelines on Employee Selection Procedures (UGESP).
- (3) If a selection procedure screens out a protected group, the employer should determine whether there is an equally-effective, alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.
- (4) To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.
- (5) Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.

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<sup>43</sup> See [http://www.eeoc.gov/policy/docs/factemployment\\_procedures.html](http://www.eeoc.gov/policy/docs/factemployment_procedures.html).

The following are some examples of cases involving selection criteria alleged to be discriminatory:

- **Title VII and Cognitive Tests:** Less Discriminatory Alternative for Cognitive Test with Disparate Impact.

In *EEOC v. Ford Motor Co. and United Automobile Workers of America*,<sup>44</sup> the court approved a settlement agreement on behalf of a nationwide class of African Americans who were rejected for an apprenticeship program after taking a cognitive test known as the Apprenticeship Training Selection System (ATSS). The ATSS was a written cognitive test that measured verbal, numerical, and spatial reasoning in order to evaluate mechanical aptitude. Although it had been validated in 1991, the ATSS continued to have a statistically significant disparate impact by excluding African American applicants. Less discriminatory selection procedures were subsequently developed that would have served Ford's needs, but Ford did not modify its procedures. In the settlement agreement, Ford agreed to replace the ATSS with a selection procedure, to be designed by a jointly-selected industrial psychologist, that would predict job success and reduce adverse impact. Additionally, Ford paid \$8.55 million in monetary relief.

- **Title VII and Physical Strength Tests:** Strength Test Must Be Job-Related and Consistent with Business Necessity If It Disproportionately Excludes Women.

In *EEOC v. Dial Corp.*,<sup>45</sup> women were disproportionately rejected for entry-level production jobs because of a strength test. The test had a significant adverse impact on women – prior to the use of the test, 46% of hires were women; after use of the test, only 15% of hires were women. Dial defended the test by noting that it looked like the job and use of the test had resulted in fewer injuries to hired workers. The EEOC established through expert testimony, however, that the test was considerably more difficult than the job and that the reduction in injuries occurred two years before the test was implemented, most likely due to improved training and better job rotation procedures. On appeal, the Eighth Circuit upheld the trial court's finding that Dial's use of the test violated Title VII under the disparate impact theory of discrimination.

**LESSON:** The number of discrimination charges filed with the EEOC raising issues of employment testing and/or exclusions is on the rise and is attributed, in part, to the increase use of job applications and questionnaires that can be filled out online. Employers who use employment testing or selection procedures should ensure that they are valid and comply with EEOC guidance.

## **B. EEOC Best Practices for Eradicating Religious Discrimination in the Workplace<sup>46</sup>**

Title VII protects all aspects of religious observance and practice, as well as belief, and defines religion very broadly for purposes of determining what the law covers. For purposes of Title VII, religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or

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<sup>44</sup> No. 1:04-CV-00845 (SD Ohio June 16, 2005).

<sup>45</sup> 469 F3d 735 (8<sup>th</sup> Cir 2006).

<sup>46</sup> See [http://www.eeoc.gov/policy/docs/best\\_practices\\_religion.html](http://www.eeoc.gov/policy/docs/best_practices_religion.html).

unreasonable to others. An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few – or no – other people adhere to it. Title VII's protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs.

Religious beliefs include theistic beliefs (*i.e.*, those that include a belief in God) as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death." Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.

Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Whether a practice is religious depends on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons (*e.g.*, dietary restrictions, tattoos, etc.).

Title VII also requires reasonable accommodation of employees' sincerely held religious beliefs, observances, and practices when requested, unless accommodation would impose an undue hardship on business operations. Undue hardship under Title VII is defined as "more than *de minimis*" cost or burden -- a substantially lower standard for employers to satisfy than the "undue hardship" defense under the Americans with Disabilities Act (ADA), which is defined instead as "significant difficulty or expense." Costs to be considered include not only direct monetary costs, but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work. Whether the proposed accommodation conflicts with another law will also be considered.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption a proposed accommodation would involve. An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information. A mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship.

Discrimination based on religion within the meaning of Title VII could include, for example: not hiring an otherwise qualified applicant because he is a self-described evangelical Christian; a Jewish supervisor denying a promotion to a qualified non-Jewish employee because the supervisor wishes to give a preference based on religion to a fellow Jewish employee; or, terminating an employee because he told the employer that he recently converted to the Baha'i Faith.

Similarly, requests for accommodation of a "religious" belief or practice could include, for example: a Catholic employee requesting a schedule change so that he can attend church services

on Good Friday; a Muslim employee requesting an exception to the company's dress and grooming code allowing her to wear her headscarf, or a Hindu employee requesting an exception allowing her to wear her bindi (religious forehead marking); an atheist asking to be excused from the religious invocation offered at the beginning of staff meetings; an adherent to Native American spiritual beliefs seeking unpaid leave to attend a ritual ceremony; or an employee who identifies as Christian but is not affiliated with a particular sect or denomination requests accommodation of his religious belief that working on his Sabbath is prohibited.

Below are some of the "Best Practices" that the EEOC recently promulgated to avoid discrimination on the basis of religion:

### **1. Religious Harassment**

- Employers should have a well-publicized and consistently applied anti-harassment policy that: (1) covers religious harassment; (2) clearly explains what is prohibited; (3) describes procedures for bringing harassment to management's attention; and, (4) contains an assurance that complainants will be protected against retaliation. The procedures should include a complaint mechanism that includes multiple avenues for complaint; prompt, thorough, and impartial investigations; and prompt and appropriate corrective action.
- Once an employer is on notice that an employee objects to religious conduct that is directed at him or her, the employer should take steps to end the conduct because even conduct that the employer does not regard as abusive can become sufficiently severe or pervasive to affect the conditions of employment if allowed to persist in the face of the employee's objection.

### **2. Reasonable Accommodation of Religious Beliefs and Practices**

- Employers should inform employees that they will make reasonable efforts to accommodate the employees' religious practices.
- Employers should consider developing internal procedures for processing religious accommodation requests.
- An employer is not required to provide an employee's preferred accommodation if there is more than one effective alternative to choose from. An employer should, however, consider the employee's proposed method of accommodation, and if it is denied, explain to the employee why his proposed accommodation is not being granted.
- When faced with a request for a religious accommodation which cannot be promptly implemented, an employer should consider offering alternative methods of accommodation on a temporary basis, while a permanent accommodation is being explored. In this situation, an employer should also keep the employee apprised of the status of the employer's efforts to implement a permanent accommodation.

- The *de minimis* undue hardship standard refers to the legal requirement. As with all aspects of employee relations, employers can go beyond the requirements of the law and should be flexible in evaluating whether or not an accommodation is feasible.
- Employers should ensure that managers are aware that reasonable accommodation may require making exceptions to policies or procedures that are not part of a CBA or seniority system, where it would not infringe on other employees' legitimate expectations.

### **3. Schedule Changes**

- Employers should work with employees who need an adjustment to their work schedule to accommodate their religious practices.
- Employers should consider adopting flexible leave and scheduling policies and procedures that will often allow employees to meet their religious and other personal needs. Such policies can reduce individual requests for exceptions. For example, some employers have policies allowing alternative work schedules and/or a certain number of "floating" holidays for each employee. While such policies may not cover every eventuality and some individual accommodations may still be needed, the number of such individual accommodations may be substantially reduced.

### **4. Change of Job Assignments and Lateral Transfers**

- An employer should consider a lateral transfer when no accommodation which would keep the employee in his or her position is possible absent undue hardship. However, an employer should only resort to transfer, whether lateral or otherwise, after fully exploring accommodations that would permit the employee to remain in his position.
- Where a lateral transfer is unavailable, an employer should not assume that an employee would not be interested in a lower-paying position if that position would enable the employee to abide by his or her religious beliefs. If there is no accommodation available that would permit the employee to remain in his current position or an equivalent one, the employer should offer the available position as an accommodation and permit the employee to decide whether or not to take it.

### **5. Modifying Workplace Practices, Policies, and Procedures**

- Employers should make efforts to accommodate an employee's desire to wear a yarmulke, hijab, or other religious garb. If the employer is concerned about uniform appearance in a position which involves interaction with the public, it may be appropriate to consider whether the employee's religious views would permit him to resolve the religious conflict by, for example, wearing the item of religious garb in the company uniform color(s).

- Employers should be sensitive to the risk of unintentionally pressuring or coercing employees to attend social gatherings after the employees have indicated a religious objection to attending.

## **6. Permitting Prayer, Proselytizing, and Other Forms of Religious Expression**

- Employers should train managers to gauge the actual disruption posed by religious expression in the workplace, rather than merely speculating that disruption may result. Employers should also train managers to identify alternative accommodations that might be offered to avoid actual disruption (*e.g.*, designating an unused or private location in the workplace where a prayer session or Bible study meeting can occur if it is disrupting other workers).
- Employers should incorporate a discussion of religious expression, and the need for all employees to be sensitive to the beliefs or non-beliefs of others, into any anti-harassment training provided to managers and employees.

**LESSON:** Questions about religion in the workplace have increased as religious pluralism has increased. In a 2001 survey of human resource professionals conducted by the Society for Human Resource Management and the Tanenbaum Center for Interreligious Understanding, 36% of human resource professionals who responded reported an increase in the religious diversity of their employees in the preceding five years. Further, the number of religious discrimination charges filed with EEOC has more than doubled from 1992 to 2007, although the total number of such charges remains relatively small compared to charges filed on other bases.

### **C. The Americans With Disabilities Act of 2008<sup>47</sup>**

On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008 (ADA Amendments Act or Act). The Act makes important changes to the definition of the term “disability” by rejecting the holdings in several Supreme Court decisions and portions of EEOC’s ADA regulations. The Act retains the ADA’s basic definition of “disability” as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. The EEOC will be evaluating the impact of these changes on its enforcement guidances and other publications addressing the ADA. Notably, the EEOC is charged with issuing regulations defining the term “substantially limits.”

## **8. THE RISING TIDE OF CLASS ACTION EMPLOYMENT LAWSUITS (Michael J. “Sam” Sandmire)**

If there is anything that strikes fear into companies operating in today’s legal climate, it is the prospect of defending a class action lawsuit, where the exposure presented by any individual employment case balloons by orders of magnitude. Employment-related class actions have been rising over the last few years, in stark contrast to the overall decrease in class action litigation

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<sup>47</sup> See [http://www.eeoc.gov/ada/amendments\\_notice.html](http://www.eeoc.gov/ada/amendments_notice.html).

generally. In fact, labor cases now make up almost half of all federal class actions.<sup>48</sup> The majority of labor class actions consist of either Fair Labor Standards Act (FLSA) or other wage and hour cases. In contrast, employment *discrimination* class action cases, not included in the “labor” category, actually experienced a slight decline.<sup>49</sup>

Across-the-board, class actions typically involve large amounts of money. The great majority of cases settle, often for millions of dollars, with a large portion of the settlement proceeds going to the employees’ attorneys. The downside risks in class actions are usually too high to justify going to trial when settlement, while not ideal, at least provides certainty and an opportunity for the company to move on.

One of the reasons for the upsurge in wage and hour class actions may be the 2004 changes in the federal regulations governing exemptions from overtime-pay requirements. Another reason may be the ease with which plaintiffs can secure multiple penalties for the same wage and hour conduct, including related state penalties for final pay or other payroll violations. For example, in a case where the employer has not paid all overtime due to a class of employees, those employees would have a cause of action to recover the unpaid overtime as well as any associated penalties. Terminated employees argue they are also entitled to “late pay” penalties (up to 30 days’ wages in Oregon) under the theory that they did not receive all compensation owing in their final paycheck. Plaintiffs’ attorneys seek ways to “stack” the available penalties to increase their take. In addition, courts more readily certify federal FLSA “collective actions,” than other class actions.

Much attention has been focused on the effect of the recent enactment of the Class Action Fairness Act of 2005 (CAFA)<sup>50</sup> on class actions. CAFA allows, among other things, a new basis for removing some class actions from state to federal court, which can be very beneficial to employers.<sup>51</sup> However, it generally only applies when the amount in controversy exceeds \$5 million, placing many cases outside its scope. Thus far, we have not seen any major downward trend in these types of class actions as a result of CAFA.

There is some good news for employers. The Oregon Supreme Court’s recent decision in *Gafur v. Legacy Good Samaritan Hosp. and Medical Center*<sup>52</sup> will prevent the onslaught of rest and meal break class actions that is occurring in California. In *Gafur*, the court held that employees do not have a private right of action to recover for missed rest and meal breaks.

On the other hand, in *Dukes v. Wal-Mart, Inc.*, the Ninth Circuit allowed a sex discrimination class action involving approximately 1.5 million class members to proceed.<sup>53</sup> The employees in

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<sup>48</sup> The Impact of the Class Action Fairness Act of 2005 on Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules (April 2008) (hereafter, 2008 Impact Report), [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf). According to that report, federal labor cases were the largest single category of class actions in federal court from July 1, 2001, through June 30, 2007.

<sup>49</sup> *Id.*

<sup>50</sup> 28 USCA §§ 1332(d), 1453, and 1711-1715.

<sup>51</sup> Oregon state court’s class action procedures are governed by ORCP 32. ORCP 32I allows the defendant to avoid a class action by “curing” the alleged claims. Unfortunately, as a practical matter, the courts seem to view “curing” under ORCP 32I as nearly impossible.

<sup>52</sup> 344 Or 525, 185 P3d 446 (2008).

<sup>53</sup> 509 F3d 1168 (9<sup>th</sup> Cir 2007).

*Dukes* allege that Wal-Mart discouraged the promotion of women to management positions and paid them less than it paid men. The case is significant in that: (1) it is the largest employment discrimination class action ever certified in the United States, and (2) it demonstrates the developing theory of “unconscious bias” discrimination litigation.<sup>54</sup> The damages sought include more than one billion dollars in back pay and punitive damages, in addition to injunctive relief.

The sheer size of the class in *Dukes v. Wal-Mart, Inc.*, the vast differences in the putative class members in terms of positions, salary, time and place of employment, and the fact that such a diverse class was approved by the Ninth Circuit, means plaintiffs’ attorneys can be expected to continue to push the boundaries of class action litigation even further. The *Dukes* case makes it more difficult for defendants to argue that cases should not be certified due to the unmanageability of large classes involving diverse fact issues. The Ninth Circuit found the use of experts’ testimony and statistical evidence sufficient to solve many of the problems with such a large class, a trend that provides both opportunities and problems for employers.

The *Dukes* case, which has been in litigation for several years already, also is notable for the relatively novel concept of liability for “unconscious bias.” This is “a social science theory premised upon the belief that people inherently and unthinkingly apply race and gender stereotypes to everyday decisions.”<sup>55</sup> Expert witness testimony may provide evidence that such a bias exists and affects employment decisions “even when there is no objective evidence of animus.”<sup>56</sup> In the *Dukes* case, such evidence was utilized by plaintiffs to demonstrate “commonality” among the diverse group of plaintiffs – all the plaintiffs were allegedly affected by such “unconscious bias.”

Another recent trend is the use of arbitration agreements which require arbitration of all employment disputes, but prohibit class actions. Although the viability of such clauses is still uncertain,<sup>57</sup> they may prove to be a very useful preventive tool in some circumstances and in some jurisdictions. On the other hand, arbitration itself is not always preferable to litigation, and some courts have stricken the class action prohibition clause and still enforced the arbitration agreement – meaning that the class action then must proceed within the arbitration process. As a result, the employer loses certain procedural protections afforded to litigants in court-based class actions.

**LESSON:** With the scope of employment class actions broadening, one important way for an employer to reduce its exposure is to regularly audit employment practices and rectify any problem areas promptly. Employers should pay careful attention to wage and hour policies, particularly policies that could lead to a similar cause of action across a broad spectrum of its

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<sup>54</sup> See generally, Charles E. Feuss and Jeremy D. Sosna, Courts Are Warming to Claims of ‘Unconscious Bias,’ as a Result, Employers Face Bigger Class Actions and Costlier Litigation, 10/1/2007 Nat’l LJ S2 (Col. 1).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., *Gentry v. Superior Court*, 42 Cal 4<sup>th</sup> 443 (2007) (class arbitration waivers in employment agreements are not enforceable if the court determines that class arbitration would be a significantly more effective way of vindicating rights); see also *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 OrApp 553, 152 P3d 940 (2007) (ban on class actions in arbitration agreement so unfairly favored lender as to render agreement substantively unconscionable).

workforce. Even very small claims on a per employee basis can add up quickly when the court assesses penalties and attorney fees on top of wages.

## **9. EMPLOYEE FREE CHOICE ACT (Stacey Mark)**

With the recent election of a Democratic President, and Democratic majorities re-elected to the House and Senate, some version of the Employee Free Choice Act of 2007 (EFCA) is almost certain to become law in 2009. As proposed, the EFCA would effect sweeping changes to the National Labor Relations Act (NLRA), making it easier for unions to represent a workforce by: (1) requiring the National Labor Relations Board (NLRB) to certify a union if a majority of workers signed union cards, eliminating the need for secret ballot elections; (2) requiring companies and newly certified unions that are unable to reach agreement on an initial contract within 90 days to enter into binding arbitration, with the resulting contract remaining in force for two years; and (3) increasing penalties imposed on employers, but not unions, for unfair labor practices committed during a union organizing campaign.

Currently, an employer may voluntarily recognize a union (pre-election recognition), or a union may file a representative petition with the NLRB. A union will typically demand recognition as the exclusive bargaining representative when it has a sufficient majority of support, as determined by signed authorization cards or a “card check.” The employer does not have to recognize the union without an election, which may be sought by the union, the employer, or the employees. If there is a showing (by card check or petition) that at least 30% of an appropriate bargaining unit wishes to be represented by a union or by another group, the NLRB will hold a secret ballot election. If a majority of employees choose to be represented, the NLRB will certify that representative to bargain collectively with the employer on behalf of the employees in the unit. Once the employer and the union agree on a contract, the employees get to vote on it.

Under the EFCA as proposed, secret ballot elections are eliminated. Instead, if a majority of employees sign union authorization cards, the workforce becomes unionized without an election. Under this system, the workers’ votes are made public to the employer, to union organizers, and to the employees’ co-workers. Although the process is not secret, it is possible for the union to quietly obtain the required majority before all of the employees and the employer are even aware that a union campaign is afoot. This risk is far greater for small employers. For example, consider an employer with a workforce of 20 employees: a union could get authorization cards from 11 employees over a weekend and, unbeknownst to the employer and the remaining staff, they will be unionized come Monday morning.

Once the union is certified, the parties must begin bargaining within 10 days. If they cannot reach agreement on a contract within 90 days, or through mediation in the 30 days after that, an arbitrator decides what terms will govern the parties’ employment relationship for the first two years. Employees have no say in this process.

The EFCA imposes substantial additional penalties on employers for unfair labor practices, including triple back pay awards for employees and fines of up to \$20,000 per violation. The Act imposes no additional penalties on unions that commit unfair labor practices.

## ➤ **How the Elimination of Secret Ballots Plays Out in Practice**

In 2007, Oregon enacted its own version of the EFCA applicable to public employees.<sup>58</sup> Under that law, either employees or the union may file a petition for certification without an election if a majority of employees sign authorization cards. However, as originally enacted, the procedure under Oregon law provided employees with two important safeguards not present under the EFCA. First, employees could rescind their authorization after signing a card (this provision has since been eliminated from the regulations).<sup>59</sup> In addition, if 30% of the employees petitioned the Employee Relations Board (the Oregon equivalent of the NLRB), the Board will hold a secret ballot election. In theory, such safeguards should eliminate some of the shortcomings of the EFCA. Unfortunately, in practice, it is not clear that they do. The Oregon law fails to address the primary drawback of such “free choice” legislation, which is the lack of secrecy.

In some organizing efforts under the Oregon law, it has been reported that employees who did not want to be represented by the union felt coerced into signing cards.<sup>60</sup> Employees for one public employer described verbal confrontations with the union during visits to employees’ homes and workplaces. Employees who petitioned for an election have also reported hostile and retaliatory treatment from union representatives and pro-union co-workers, who were aware of the petitioners’ identities because the process was not secret.

**LESSON:** During his campaign, President-Elect Obama promised that, if elected, he would sign the EFCA as soon as it lands on his desk. It is not clear whether the current economic crisis will have an impact on that promise, or whether Congress and the Senate will revisit the issues and revise the EFCA.<sup>61</sup> One thing certain, however, is that, if enacted, the EFCA will effect the most significant change in labor law since the NLRA came into being in the 1940s. Employers and employees who are caught unaware will likely have a rude awakening to life in a unionized workplace. Accordingly, both employers and employees should educate themselves on the significant shift in power to the unions that passage of the EFCA would effect.

## **10. SUSTAINABILITY IN EMPLOYMENT (Stacey Mark)**

In business, the word “green” or “sustainable” is commonly understood as a policy or practice that has positive environmental objectives. Businesses tend to think of sustainability primarily in connection with green buildings and changes in environmental practices. However, the core concept of sustainability – meeting the needs of the present without compromising the ability of future generations to meet their own needs – embodies a social component that applies equally to employment policies and procedures. As applied to employment, the term encompasses best practices that help create and maintain workplaces that are safe, healthy, and functional, and

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<sup>58</sup> See ORS 243.682(2).

<sup>59</sup> The Oregon Department of Administrative Services, Human Resources Division filed a petition to restore to state employees the ability to rescind their authorization, but the Board denied the petition. See [http://www.oregon.gov/ERB/OAR\\_Invitation\\_for\\_Public\\_Comments.shtml](http://www.oregon.gov/ERB/OAR_Invitation_for_Public_Comments.shtml).

<sup>60</sup> See <http://www.oregon.gov/ERB/pdfs/PetitionToAmendRules.pdf>.

<sup>61</sup> See Fox News interview with Congressmen Steny Hoyer and John Boehner, <http://server1.laborpains.org/?p=1124>.

incorporate sustainability principles. By implementing such practices, a company can distinguish itself from those businesses simply engaged in “greenwashing.”<sup>62</sup>

As reported by the Society for Human Resource Management,<sup>63</sup> some common green employment practices include:

- Recycling programs that encourage the reuse of supplies and limit unnecessary use of supplies (such as paper);
- Switching to energy-efficient equipment (*i.e.*, switching from desktop to laptop computers, installing motion detectors for lights; automatic shut-off for equipment);
- Promoting a variety of alternative transportation options, including walking, biking, carpooling, and public transit;
- Installing automatic shut-offs for equipment and lights;
- Buying or leasing refurbished goods and supplies (*e.g.*, toner cartridges, recycled paper);
- Donating used office goods to employees or local charities;
- Minimizing pollution during the production process;
- Partnering with environmentally-friendly suppliers;
- Participating, sponsoring, or encouraging employee participation in community projects that support green objectives.

To offset the effects of higher gas prices and global warming, some Oregon employers have provided employees with benefits in the form of cash subsidies toward the purchase of hybrid cars, increased compensation for giving up a car altogether, compressed workweeks,<sup>64</sup> and telecommuting options. All of these practices are highly successful methods for reducing the organization’s carbon footprint, but they do not get to the core concept of social sustainability.

To the extent the concept of social equity or social sustainability is addressed in the employment context, the primary focus has been on employing a greater number of people in better-paying jobs, without depriving them of what we in the United States consider fundamental protections,

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<sup>62</sup> Greenwashing is the “unjustified appropriation of environmental virtue by a company. <http://www.sourcewatch.org/index.php?title=Greenwashing>.

<sup>63</sup> 2008 Society for Human Resource Management Green Workplace Survey Brief:

<sup>64</sup> Recently adopted by various governmental units, including Clackamas County and the State of Utah, to help alleviate fuel costs. One employer reported a clever way to get a full 40 hours’ work from employees, allow them a three-day weekend every other week, and not incur any overtime by varying the work schedule and the changing the designated work week (the employee works an alternating schedule of M-F 99998 with an 8-5 shift on Friday, and then M-Th 9999, and starts the workweek at 1:00 p.m. on Friday. The Friday hours are split over two work weeks, and the employee gets every other Friday off).

like collective bargaining, safe working conditions, prohibitions on discrimination and child and forced labor, and by providing socially responsible investment options for retirement funds. However, social sustainability goes beyond these considerations, requiring an examination of the effects of work and the business as a whole on its stakeholders: the employee, the employee's family, the company's customers and suppliers, and the surrounding community.

As a start, companies can incorporate sustainability principles by creating and maintaining workplaces that balance the company's operational and fiscal needs with the safety, health, emotional, personal, and financial needs of their employees. Balance requires an understanding of what all of the interested parties need out of the relationship. Most companies generally look for the same attributes: employees who are creative, productive, efficient, reliable workers who fit in, and stay only as long as they are needed and/or engaged. However, employees all have different needs. One may seek fulfillment and status through work, while another is just looking to stay busy. Some are desperate for health insurance or a regular paycheck. Some work best with close supervision while others need complete autonomy to be successful. This means that the applicants you think will be perfect employees because their resumes match the job you have open may turn out to be a terrible fit because your expectations or culture don't match.

In addition, while the company's primary concern is the bottom line, employees must often juggle conflicting obligations that interfere with their ability to work. For many employees, the conflicts are the same: children who are sick or in need of child care, aging or infirm parents, personal illness, transportation, and domestic violence. Companies can help employees address many of these issues through employment and benefits policies. Here are just a few examples:

**Transportation.** All of those employees who are late or absent because of "car trouble" will need a different excuse if you locate your business in an urban or other location easily accessible to public transportation, and provide incentives for employees to use it. The availability of public transportation not only addresses the employees' need for reliable transportation (a problem that results in frequent absenteeism), it may eliminate gas and parking expenses. Locating a business near public transportation also benefits the community by minimizing traffic and emissions. You can even encourage clients to use public transportation by providing a free coffee card or other incentive to those who don't need their parking validated.

**Child Care.** A first step in assisting employees with child care obligations is establishing a Dependent Care Assistance Plan (DCAP). A DCAP allows employees to use a portion of their pre-tax earnings to pay for child care expenses (much like a flexible spending account). However, companies can go further by creating or subsidizing an on-site or close-to-work child care center, or provide a child care subsidy as a benefit. If this is not practical, or you can't afford to do it alone, other business located in your building, on your block, or in your industrial complex may be interested in participating in a joint effort. Allowing employees to work flexible hours or telecommute when they have child care issues will also reduce conflicts.

**Health.** In addition to health insurance, companies can provide a more safe and healthful environment by improving air quality, ergonomics, light, and ventilation. You can provide wellness incentives like on-site flu shots and other preventive care for employees and their families. Providing access to a deck, park, or wooded area is more likely to get employees up and outside during breaks. You can adopt policies that encourage employees to exercise (for example, through company-sponsored sports teams, club dues, on-site exercise facilities, allowing use of accumulated sick time to exercise during the work day, allowing employees to

trade unused sick days for vacation) and improve their diets (by providing, for instance, only healthy drinks and snacks). You can encourage sick employees to stay home by allowing them to telecommute, and reward employees for good health through attendance bonuses or other benefits.

**Charitable Giving.** Many employers promote charitable giving to non-profit organizations that they designate. Consider sponsoring employees to volunteer their time or services to organizations of their choice by providing paid (or even unpaid) time off. You can support causes that are important to your employees through matching contributions, donations of company services or resources, allowing non-disruptive internal solicitations for charitable causes (*e.g.*, a toy or clothing drive, bake sale, or raffle), recognition or an official celebration of a particular cause, such as Earth Day.<sup>65</sup>

The best way to determine what sustainability efforts would be the most meaningful and appropriate in your workplace is to ask and involve your stakeholders. Make sustainability a job requirement by incorporating it in your core values, job descriptions, evaluations, compensation, benefits, and policies. Educate your employees about your policies and goals. Encourage employees to contribute ideas for making the workplace more sustainable. If you find a need to implement significant changes of any kind, consider how these changes will impact your stakeholders and try to involve them in your decision making process (for example, don't embark on a remodeling and construction project without evaluating its effect on a healthy work environment, including the air quality, access to light, presence of toxic substances, and features that promote well-being and creativity, allow for freedom of movement, social interaction, and an interesting and stimulating visual environment).

Although the results can be difficult to measure, adopting sustainable practices can lead to demonstrable economic benefits that result from attracting desirable employees, reducing turnover and sick time, improving overall productivity, and reducing costs. At the same time, companies may benefit by enhancing their reputation and their brand, not only with employees, but with customers and the communities in which they operate.

**LESSON:** As social responsibility is becoming more important to government, to employees, and to communities, businesses will need to get on board. And it's not always easy being green. Making employment practices more sustainable requires less reliance on what is conventional and more on what works. Different companies have different employees with different needs. Tailoring employment policies to meet the specific needs of the company and its stakeholder requires balance, which is what sustainability is all about.

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<sup>65</sup> See <http://www.earthday.gov/atwork.htm>.