Chapter 15

Selected Employment Benefits and Protections

Learning Objectives

By the time you finish studying this chapter, you should be able to:

LO1 List the matters regulated by the Fair Labor Standards Act.

LO2 Discuss the requirements of the minimum wage laws and to whom they apply.

LO3 Explain the Family Medical Leave Act, including to whom it applies and under what circumstances.

LO4 Explain contributory negligence, assumption of risk, and the fellow servant rule, and their roles in the regulation of safety in the workplace, and determine how OSHA impacted this regulatory environment.

LO5 Set forth what OSHA requires of employers to create a safer workplace and how it is enforced.

LO6 Describe the reporting responsibilities of employers under the OSHA Act.

LO7 Explain the purposes of ERISA and identify who and what type of entities are covered.

LO8 Describe the minimum ERISA standards for employee benefit plans.

Opening Scenarios

SCENARIO 1

1 Scenario

Drake, a new MBA graduate, is hired into a management position at $125,000 per year. It is Drake's first job as a professional. After several months, Drake finds he is leaving work later and later. Drake begins to resent that he works late, putting in more and more hours, and is not receiving any more than the originally agreed-upon salary. He is contemplating legal action against his employer for violation of the Fair Labor Standards Act. Will it be worth his while to pursue this?

SCENARIO 2

2 Scenario

Carly and Carl live with their two children and Carl's mom, who is in the advanced stages of Alzheimer's. Carly works in pharmaceutical sales and has a lot of job flexibility. Carl is the chief financial officer for an investment firm and his job is very demanding. Carl's mom takes a turn for the worse and will need extra care for a few weeks. Carly knows she has the flexibility and time so she goes to her supervisor and requests time off under the Family and Medical Leave Act to take care of her ailing mother-in-law. Will it be granted?

SCENARIO 3

3 Scenario

Singhie, an employee of Carterez, a contractor, is hospitalized due to the large number of cement particles she has inhaled while Bartow, a subcontractor, is laying the cement foundation for a structure. Carterez is cited by OSHA for violation of the protective gear requirements. Who is liable, Carterez, the contractor, or Bartow, the subcontractor?

Introduction

Beyond those we have discussed and perhaps with which you were already familiar, there are several other laws that impact the workplace in significant ways; and this chapter will introduce you to some of them. These include the Fair Labor Standards Act of 1938 (FLSA), the Family and Medical Leave Act of 1993 (FMLA), the Occupational Safety and Health Act of 1970 (OSHA), and the Employee Retirement Income Security Act of 1974 (ERISA). Each is an important aspect of the workplace landscape and will be addressed in turn.

Fair Labor Standards Act of 1938

Statutory Basis

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: . . . not less than $6.55 an hour beginning July 24, 2008; and $7.25 per hour effective July 24, 2009. [Sec. 6(a), Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq.]
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> . . . No employer shall employ any of his employees for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. [Sec. 7(a)(1), Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq.]

Introduction: Show Me the Money!

Face it. If we were all rich and didn't have to work, many of us would not do so. Since we do have to work, we want to make sure that we get all that is coming to us. We don't want to have to work for whatever meager wages our employer wants to pay us, compete with 10-year-olds for our job, or work whatever number of hours our employer decides he or she wants us to work without extra pay. Under the broad constitutional powers that Congress has to regulate interstate commerce, in 1938 it passed a law to regulate pay and hours worked. The law, now amended several times, is called the Fair Labor Standards Act (FLSA). The act set standards for the minimum age for workers, **minimum wages** they can make, and the rate at which they must be paid if they work over a certain amount of time during a workweek. The act also prohibits pay differentials based solely on gender.

LO1

minimum wages
The least amount a covered employee must be paid in hourly wages.

FLSA is administered by the U.S. Department of Labor's Wage and Hour Division, which has authority to investigate, gather information, issue regulations, and enforce FLSA provisions. States also have wage and hour provisions administered by comparable state agencies. Violations, if willful, are crimes punishable by fines of up to $10,000, with second convictions resulting in possible imprisonment. Child labor violations carry civil penalties. FLSA contains antiretaliation provisions to protect employees who use FLSA, such as filing a complaint or participating in an FLSA proceeding. The federal regulations of the Wage and Hour Division can be found at 29 C.F.R. chapter V, http://www.dol.gov/esa/whd/flsa/index.htm.

If FLSA is violated by the employer underpaying employees, employees may recover back wages. The federal government recovered more than $220,613,703 in back wages in 2007 alone, the agency's all-time high. The agency reported that since FY 2000, it has recouped more than $1.25 billion for nearly two million workers.[1]

Covered Employees

Since FLSA was enacted pursuant to the powers of Congress to regulate interstate commerce, that requirement forms, in part, a basis for determining coverage. Actually, there are two types of coverage in FLSA: individual coverage and enterprise coverage. If the individual employee's job involves interstate commerce directly, such as an over-the-road truck driver traveling from state to state, or moving or preparing goods for interstate commerce, including phoning and using the mail, then the individual is covered. For enterprise coverage, all employees of a business will be covered if the business is engaged in interstate commerce or in producing goods for interstate commerce and meets a minimum gross annual income requirement of $500,000. The law applies to both part-time and full-time employees. Federal, state, and local employees are also covered by the law, though there are some specific provisions for certain state and local employees.

If an employee works for certain types of businesses, then the $500,000 minimum does not apply. That is, employees will be covered even if their employer does not make at least $500,000 per year. These organizations include hospitals and other institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary, and secondary schools and institutions of higher education; and federal, state, and local government agencies. The law also covers domestic service workers such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters if they receive at least $1,400 (2004) in cash wages from one employer in a calendar year, or if they work a total of more than eight hours a week for one or more employers. State laws also may apply and when both cover a situation, the law setting the higher standards must be the one used.

Case 1

FLSA contains exemptions from these rules for several groups, which vary depending on the area of FLSA being addressed. As you can see from *Reich v. Circle C Investment, Inc.,* after reviewing the case at the end of the chapter, even the threshold decision as to who is covered by the act is not always an easy one. In *Reich* the court was faced with deciding whether topless dancers who only received tips were, in fact, employees for purposes of the Fair Labor Standards Act provisions on minimum wages, overtime, and record-keeping requirements.

Minimum Wages

The minimum wage law was passed in 1938, nine years after the Wall Street crash of 1929 and its Depression after math in hopes that it would avoid another depression. The advocates of the law, primarily unions and other workers, thought that a minimum wage would accomplish this by providing everyone with sufficient money on which to live without causing economic harm to business owners.

LO2

Under FLSA, employers are required to pay covered employees a certain minimum hourly wage. On July 24, 2007, pursuant to the Fair Minimum Wage Act signed by President George W. Bush on May 25, 2007, the minimum wage rose from $5.15 per hour, where it had been since September 1, 1997, to $5.85 per hour. On July 24, 2008, the minimum wage increased to $6.55, and on July 24, 2009, it increases to $7.25. In 1938, when FLSA was enacted, it was 25 cents per hour.

State wage laws may have higher minimums than the federal law. For example, Washington, DC, had a minimum wage of $7.00 per hour, which increased to $7.55 on July 24, 2008; Massachusetts, $7.50 per hour, with an increase to $8.00 on January 1, 2008; and New York's minimum wage is $7.15 per hour on with a scheduled increase to $7.25 on July 24, 2009.

Wage rates may be lower if, in accordance with appropriate regulations, an industry wage order makes them so in Puerto Rico, the Virgin Islands, or American Samoa. The Fair Minimum Wage Act of 2007 provided for a 50-cent-per-hour industry-based increase in wages for American Samoa until the wage rate was generally the same as for the United States. If the covered employee is an apprentice, learner, or disabled worker, then, under certain circumstances, she or he may receive less than the minimum wage if the employer obtains a certificate issued by the Department of Labor's wage and hour administrator. Tipped employees (defined in the regulations as those who regularly receive more than $30 a month in tips) may be paid direct wages of $2.13 per hour, but the employer must make up the difference if the tips do not equal the usual minimum wage. Employees may be paid on a piece-rate rather than an hourly rate as long as they receive the equivalent of the minimum wage. (See Exhibits 15.1, "Exemptions from Both Minimum Wage and Overtime Pay," and 15.2, "Other FLSA Exemptions," for wage and overtime exemptions.) In *Kilgore v. Outback Steakhouse of Florida, Inc.,* included at the end of the chapter,

Case 2

Exhibit 15.1 *Exemptions from Both Minimum Wage and Overtime Pay*

- Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and employees in certain computer-related occupations (as defined in Department of Labor regulations).
- Employees of certain seasonal amusement or recreational establishments, employees of certain small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery.
- Farm workers employed by anyone who used no more than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year.
- Casual babysitters and persons employed as companions to the elderly or infirm.

Source: http://www.dol.gov/esa/whd.

the court wrestled with the issue of whether it was permissible for an employer to make servers who received tips pool their tips and split them with other employees who did not receive tips. The court held that this was permissible for the employer to do. Note that on March 21, 2008, a San Francisco superior court held that Starbucks would have to pay $100 million ($86 million plus interest) to its 120,000 baristas (coffee servers) statewide because it had been Starbucks' policy to allow shift supervisors to share the tips received by the baristas, resulting in an average hourly wage of $1.71 for the baristas. Starbucks intends to "vigoriously" appeal the case.[2]

As mentioned, FLSA has exemptions, so not everyone is covered under the statute. However some states cover FLSA exempted employees under their state laws.

The following are the primary exemptions from both the wage and the overtime provisions of FLSA. Note that under FLSA some employees are exempt from the overtime provisions but not the minimum wage provisions (see Exhibit 15.2, "Other FLSA Exemptions").

1 Scenario

1. Outside salespeople; executive, administrative, and professional employees, including teachers and academic administrative employees in elementary and secondary schools. (This is why it would not be worth Drake's time to pursue a claim in opening scenario 1; more below).
2. Employees of certain individually owned and operated small retail or service establishments not part of a covered enterprise.
3. Employees of certain seasonal amusement or recreational establishments, messengers, full-time students, employees of certain small newspapers, switchboard operators of small telephone companies, sailors employed on foreign vessels, employees engaged in fishing operations.
4. Farm workers employed by anyone who used no more than 500 person-days of farm labor in any calendar quarter of the preceding calendar year.
5. Casual babysitters and people employed as companions to the elderly. (Recall our discussion in Chapter 4 on affirmative action about southern legislators specifically carring out the minimum wage and overtime exemption for farmworkers, domestics, and caretakers, predominantly black, who performed services for so many of them and their constituents.

Exhibit 15.2 *Other FLSA Exemptions*

As you can see from the list below, there are many exemptions to the FLSA provisions. These do not include state exemptions that may exist.

(MW = minimum wage; OT = overtime; CL = child labor)

Aircraft salespeople—OT

Airline employees—OT

Amusement/recreational employees in national parks/forests/wildlife refuge system—OT

Babysitters on a casual basis—MW & OT

Boat salespeople—OT

Buyers of agricultural products—OT

Companions for the elderly—MW & OT

Country elevator workers (rural)—OT

Disabled workers—MW

Domestic employees who live in—OT

Farm implement salespeople—OT

Federal criminal investigators—MW & OT

Firefighters working in small (less than five firefighters) public fire departments—OT

Fishing—MW & OT

Forestry employees of small (less than nine employees) firms—OT

Fruit & vegetable transportation employees—OT

Homeworkers making wreaths—MW, OT, & CL

Houseparents in nonprofit educational institutions—OT

Livestock auction workers—OT

Local delivery drivers and drivers' helpers—OT

Lumber operations employees of small (less than nine employees) firms—OT

Motion picture theater employees—OT

Newspaper delivery—MW, OT, & CL

Newspaper employees of limited-circulation newspapers—MW & OT

Police officers working in small (less than five officers) public police departments—OT

Radio station employees in small markets—OT

Railroad employees—OT

Seamen on American vessels—OT

Seamen on other than American vessels—MW & OT

Sugar processing employees—OT

Switchboard operators—MW & OT

Taxicab drivers—OT

Television station employees in small markets—OT

Truck and trailer salespeople—OT

Youth employed as actors or performers—CL

Youth employed by their parents—CL

Source: http://www.dol.gov/elaws/esa/flsa/screen75.asp.

The FLSA overtime regulations underwent a major overhaul in August 2004 regarding their exemption for white-collar professionals; that is, primarily those in executive, administrative, and professional jobs. This matter had been debated for years and was accomplished under President George W. Bush. These rules are extremely important since they determine who must be paid overtime for working more than 40 hours per week. The general rule was that white-collar employees in the above categories were not entitled to overtime pay. Determinations as to who fit into these categories were made using a salary test and a duties test.

Prior to the rule change, the salary levels used in the wage and hour rules had not been updated for nearly 30 years. Under the old rules, FLSA exempted from overtime pay workers who made more than \$155 per week, or \$8,060 per year, and who met certain other requirements that had been complained of as convoluted and confusing. For instance, the employee also had to devote at least 80 percent of his or her time to "exercising discretion" or other "intellectual" tasks that cannot be "standardized in . . . a given period of time." The new rules were designed to simplify application of the regulations to white-collar exemptions.

Under the new regulations, which require businesses to review their existing pay levels and jobs to make sure employees are being paid correctly under the new rules, employees earning up to $23,660 per year, or $455 per week, are automatically entitled to overtime pay, regardless of whether they are hourly or annual salaried employees. That is, regardless of the classification of the job, if the salary is at or below a certain level ($23,660 per year or $455 per week), the employee is entitled to overtime pay. For the most part, executive employees would be exempt if they manage two or more employees; if they have hiring, firing, and promotion authority or significant input; or if they have advance degrees or similar training and work in a specialized field or the operations, finance, and auditing areas of a business. It was speculated that the jobs that would be most affected by the new overtime regulations would be assistant managers in stores, restaurants, and bars. Under the new regulations, an employer could boost salaries (that is, pay an employee more than $23,660) in order to avoid the new rules requiring overtime to be paid to those who earn up to $23,660.

Employees who earn at least $100,000 per year and perform some executive, professional (either learned or creative), or administrative job duties are automatically exempt from the overtime provisions of FLSA. That is why in opening scenario 1, Drake would not be entitled to more pay for the additional hours he finds himself putting in. Government officials speculated that an estimated 107,000 white-collar employees earning $100,000 or more who had been eligible for overtime under the old regulations would lose it under the new rules.

1 Scenario

As with the prior regulations, the Department of Labor can collect back wages for overtime violations and companies not in compliance run the risk of costly lawsuits by employees. Retaliation against employees filing claims or reporting an employer's violations is a separate violation of the law. Since FLSA class action lawsuits have increased by 70 percent since 2000, and the new regulations may change many employees' status from what it was before the new regulations, it is a safe bet that this is an area to which an employer would do well to give considerable attention.

Case 3

In the *Reich v. Newspapers of New England, Inc.* case, included at the end of the chapter, you will see how detailed the inquiry must be in order to determine whether an employee is exempt. While the rules for journalists were left intact by the new regulations, it is these sorts of cases that the new regulations were promulgated to decrease. The goal of the new regulations was to provide employers with more guidance as to who was exempt and who was not, so that there would be less of a need for litigation to make such determinations. Due to the wide variance among journalists and their duties, the analysis in the case is still necessary.

Overtime Provisions

In addition to minimum wages, covered employees working over 40 hours per week are entitled to overtime pay of at least time and a half—at least one and one-half times the covered employee's regular hourly wage rate. FLSA does not

Exhibit 15.3 *Full and Partial Overtime Pay Exemptions*

EXEMPTIONS FROM OVERTIME PAY ONLY

Certain commissioned employees of retail or service establishments; auto, truck, trailer, farm implement, boat, or aircraft salesworkers; or parts-clerks and mechanics servicing autos, trucks, or farm implements who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers.

Employees of railroads and air carriers, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans.

Announcers, news editors, and chief engineers of certain nonmetropolitan broadcasting stations.

Domestic service workers living in the employer's residence.

Employees of motion picture theaters.

Farm workers.

PARTIAL EXEMPTIONS FROM OVERTIME PAY

Partial overtime pay exemptions apply to employees engaged in certain operations on agricultural commodities and to employees of certain bulk petroleum distributors.

Hospitals and residential care establishments may adopt, by agreement with their employees, a 14-day work period instead of the usual 7-day workweek, if the employees are paid at least time and one-half their regular rates for hours worked over 8 in a day or 80 in a 14-day work period, whichever is the greater number of overtime hours.

Employees who lack a high school diploma, or who have not attained the educational level of the 8th grade, can be required to spend up to 10 hours in a workweek engaged in remedial reading or training in other basic skills without receiving time and one-half overtime pay for these hours. However, the employees must receive their normal wages for hours spent in such training and the training must not be job specific.

Source: http://www.dol.gov/esa/wpd.

limit the hours employees work but, rather, sets standards for the hours constituting a normal workweek for wage purposes. The statute then sets wage rates for hours worked over and above the normal week. It is a common misconception that the law prohibits an employer from requiring employees to work over 40 hours per week. The law does not dictate hours, but merely states that, if an employee works over 40 hours, he or she must be paid time and a half for the time worked in excess of 40 hours. (See Exhibit 15.3, "Full and Partial Overtime Pay Exemptions.") In *Sherwood v. Washington Post,*[3] the court analyzed whether a creative reporter is exempt from the overtime provisions of FLSA.

Child Labor Laws

FLSA sets minimum age standards for allowing children to work. Under the law, most cannot work before age 16, with 18 being the minimum age for hazardous jobs. The Department of Labor publishes a list of such occupations. Children between the ages of 14 and 16 may work at certain types of jobs that do not interfere with their health, education, or well-being. Certain agricultural work also is permitted. States may have child labor laws even stricter than the federal law, and, if so, they override federal law. In May 2008, as a part of the Genetic Information Nondiscrimination Act of 2008, FLSA was amended to increase the civil penalties for child labor violations resulting in death or serious bodily injury.

The Family and Medical Leave Act of 1993

Statutory Basis

Leave Requirement

(a) (1) Entitlement to leave—an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee. [The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.]

Introduction: It's All in the Family . . .

The FMLA was previously in the gender chapter because it was enacted primarily in response to female employees' concerns about keeping their job or not being demoted or losing benefits after the birth or arrival of a child. Since its passage, however, the law has evolved into a much broader piece of legislation. With baby boomers playing such a large part in the national conscience and policies, it was inevitable that since the law also covers taking time off to care for parents, this would also become a fertile area under the law.

General Provisions

LO3

On February 5, 1993, President Clinton signed into law the first piece of legislation of his administration: The Family and Medical Leave Act (FMLA). The act guarantees employees who have been on the job at least a year up to 12 weeks of unpaid leave per year for a birth, an adoption, or care of sick children, spouses, or parents (or their own serious illness) and the same or an equivalent job upon their return.

2 Scenario

This is why, in opening scenario 2, Carly will not be granted the FMLA leave she requests. She wishes to take time off for her husband's parent, not her own. This is not covered by the act. In January 2008, President George W. Bush signed into law an FMLA amendment that would allow an eligible employee to take up to 26 weeks unpaid leave in a 12-month period to care for a returning war veteran seriously injured in the line of duty. In addition the National Defence Authorization Act, for FY 2008 (NDAA) allows eligible employees to take up to 12 weeks of unpaid leave to deal with exigencies caused by a spouse, son, daughter, or parent either being called to active duty or being on active duty. The FMLA applies to employers with 50 or more employees within a 75-mile radius. Employees must have worked for their employer for at least one year and for at least 1,250 hours during the 12 months preceding the time off. They must give the employer at least 30 days' notice when practical (such as for a birth).

Employers may require employees to first use vacation or other leave before applying for the unpaid leave, but employees must be compensated for the vacation days as they normally would. Where both members of the couple work for the same employer, the employer can restrict the couple to a total of 12 weeks' leave per year. Employers must continue to provide employees with health insurance during their leave and may exclude the highest-paid 10 percent of their employees from FMLA coverage.

Employers also can require medical confirmation of an illness, which the U.S. Department of Labor, which has issued regulations on the act, defines as requiring at least one night in the hospital. Complaints may be filed with the Wage and Hour Division of the Labor Department, or the employee can file a lawsuit if he or she feels the employer violated the act.

In 1997, Congress declined to grant President Clinton's request to extend the FMLA to permit employees to take up to 24 hours of unpaid leave each year to fulfill certain family obligations such as attending parent-teacher conferences, taking a child to the doctor, finding child care, or caring for elderly relatives. Societal impediments also can be a factor, such as men feeling they will be viewed as disloyal if they take a leave of absence under the FMLA. However, the greatest impediment to full use of the law is the fact that the leave is unpaid. Though California recently provided that employees be paid 55 percent of their salary for up to six weeks of FMLA leave (in addition to whatever other leave employees may have), the United States is in the unique position of being the only industrially similar nation that does not provide at least some type of paid parental leave. This may, in fact, be remedied at some point future. In April 2008, the House Committee on Government Oversight and Reform passed a bill to provide federal employees at least a percentage of their income for four weeks when leave is taken to have or adopt a child.[4] Still pending in Congress, the bill proposes that employees and employers pay into a fund which will provide the source of the paid leave. Such legislation has been introduced before without success. However, since both parents work in 70 percent of American working households, and all other similar countries have such legislation, chances are that at some point some sort of legislation will eventually be passed.

The FMLA has been the subject of a great deal of uncertainty ever since its passage. The law, particularly the Department of Labor's regulations, has been a constant source of confusion for employers. There have been questions as to how serious an illness must be for the employee to qualify for the leave, assessment of eligibility requirements for the leave, what to do about intermittent leave, reinstatement after taking leave, and notification and certification requirements for leave, just to name a few issues. These issues have resulted in a steadily increasing number of FMLA claims, causing it to develop into one of the most active areas of employment law. An informal survey of 237 human resources professionals conducted by business publisher HR Next found the majority called the FMLA the "most bothersome U.S. regulation to administer." A July 2007 survey by the Society for Human Resource Management (SHRM), found that nearly 40 percent of human resource professionals reported that confusion over implementation of the FMLA has led to illegitimate leave being granted.[5] Two of the most challenging FMLA-related activities identified by organizations are tracking/administering intermittent FMLA leave and determining the overall costs incurred while complying with the requirements of the FMLA. According to the survey, many HR professionals noted that the timing of intermittent FMLA leave requests (e.g., around weekends, holidays, pleasant weather) raised suspicions of abuse. The Wage and Hour Division of the Department of Labor has heard these comments and is in the process of conducting a major revision and updating of their regulations. When the agency posted a request for comments over 15,000 were recevied.

Case 4

The *Spangler v. Federal Home Loan Bank of Des Moines* case, included for your review, goes a long way toward demonstrating why employers have such a problem with this law. Think about how you would have handled the situation of an employee with depression calling in and leaving a message that she would not be in because of "depression again." The issue became whether this statement was sufficient to put the employer on notice that the employee was invoking the FMLA and taking FMLA leave.

Occupational Safety and Health Act

Statutory Basis

Occupational Safety and Health Act

§ 654 (§ 5) Duties

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this Act which are applicable to his own actions and conduct.

Introduction: Safety at Work

Workplace safety seems like it might not be such a big deal—that is, of course, until you slip on spilled salad dressing in the kitchen of the restaurant for which you work and you cannot continue to pay your tuition. Workplace safety is often perceived as the bailiwick of angry-looking union reps or blue-collar "working stiffs" who carry lunch pails to work. But it is a workplace issue that affects us all. *Each year,* more than 5,700 Americans die from workplace injuries; another 50,000 workers die from illnesses caused by workplace exposure; more

Exhibit 15.4 *The Top Six Ethics-Related Global Workplace Issues*

Forced labor, child labor, working hours
Health and safety in the workplace, working conditions
Discrimination, harassment
Financial malfeasance
Fraud, theft
Gift giving, bribes

Source: American Management Association, *The Ethical Enterprise: Doing the Right Things in the Right Ways, Today and Tomorrow* (New York: American Management Association/Human Resources Institute, 2006), http://www.amanet.org.

than 83,000 work sites are found in violation of the Occupational Safety and Health Act's standards; and 4.7 million suffer nonfatal workplace injuries costing businesses over $170 billion; making health and safety one of the most vital workplace issues facing the workplace today.[6] (See Exhibit 15.4, "The Top Six Ethics-Related Global Workplace Issues.")

On December 29, 1970, President Richard Nixon signed into law the Occupational Safety and Health Act, attempting to ensure safe and healthful working conditions for all employees and to preserve the human resources of the United States. Since 1971, OSHA claims that the act has helped to cut workplace fatalities by more than 60 percent and injury/illness rates by 40 percent. More than 100,000 workers who might have died on the job did not because of improved safety and health.

The OSH Act specifically requires that an employer provide a safe and healthy workplace "to each of *its* employees . . . ." Does that language limit the liability of the employer only to those individuals who are actually employees of the employer? Under a concept called the "multiemployer doctrine," on multiemployer worksites, an employer who creates a safety hazard can be liable under the OSH Act, regardless of whether the employees threatened are its own or those of another employer on the site. In scenario 3, Caterez could be found liable due to the multiemployer doctrine. An employer is liable as long as the government can show that the employee at a worksite was exposed to the risk by the contractor's safety violations. In scenario 3, if it can be shown that Singhie was exposed to the cement dust due to the contractor's safety violation of not providing the mask, Caterez can be held liable and would be the responsible party to handle the OSHA violation.

3 Scenario

General Provisions

OSHA requires that an employer provide a safe workplace. Prior to passage of OSHA, there was no comprehensive national legislation about workplace safety and state laws varied greatly. Employers could locate their workplaces in states with lax safety laws providing little protection for workers. Under such laws, employees were often limited in the damages they could recover due to injuries arising from the employer's unsafe workplace.

LO4

contributory negligence
A defense to a negligence action based on the injured party's failure to exercise reasonable care for her or his own safety.

LO5

assumption of risk
A defense to a negligence action based on the argument that the injured party voluntarily exposed herself or himself to a known danger created by the other party's negligence.

fellow servant rule
An employer's defense to liability for an employee's injury where the injury occurred on the job and was caused by the negligence of another employee.

Contributory negligence allows the employer to defend against the employee's injury suit by claiming that the employee contributed to the injury through the employee's own negligence. The **assumption of risk** defense precludes the employee from recovering when the employee knows of a risk involved in the workplace, chooses to chance not being injured, and is in fact injured. The **fellow servant rule** permits the employer to escape liability when the negligence was the fault of an employee rather than the employer. As you can imagine, injured workers did not find much protection under these laws requiring that the employer provide a safe working environment.

Under OSHA, although workers are still limited in their financial recovery to what they can obtain under workers' compensation laws, they may now obtain relief from hazardous situations in the form of correction of the circumstances by the employers. In addition, workers' compensation laws are generally no-fault, so the employer cannot use these three defenses to avoid the injured employee's claim for workers' compensation for being injured on the job due to unsafe working conditions.

Section 5(a) of the act imposes two basic requirements on all employers—regardless of size—to accomplish the goal of a safer workplace. First, the employer must comply with all the safety and health standards dictated by the Department of Labor, generally called the "compliance" requirements. Second, the employer must "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." This broad requirement is called the "general duty" clause, and the traditional employer defenses noted above are not often available. The only exceptions to the reach of the act are self-employed people, family members employed by family farms, state and local government employees (except under an OSHA-approved plan), and work environments that are regulated by other federal agencies (such as mining or nuclear energy).

In furtherance of workplace safety, OSHA creates certain specific regulatory standards of safety (for example, how much flour dust is permitted to be in a wheat-processing plant) in addition to its general duty clause, which applies in the absence of specific standards. The law applies to any employer that has employees and is in a business affecting commerce (most employers!). In order to accomplish its mission of workplace safety, OSHA provides several tools, including unannounced workplace inspections by OSHA compliance officers, citations and penalties for violations, and continual safety training requirements. Complaints to OSHA may arise from employees, grievances filed by other sources, or reports of fatal or multiple injuries. OSHA protects from retaliation employees who file such complaints by prohibiting employers from discharging or discriminating against employees who exercise rights afforded by the act. OSHA also provided for the creation of the National Institute for Occupational Safety and Health (NIOSH), the research arm of OSHA, which conducts research on workplace health and safety and makes recommendations to the secretary of labor that, if approved, may become the standards of conduct in a certain industry.

Routine inspections in certain high-risk industries also are conducted by OSHA. The employer may consent to the inspection or may demand that the OSHA representatives obtain a search warrant. There may be reasons to use one strategy or the other that lie outside the scope of this text so it is advisable to consult with legal counsel. The inspection is likely to proceed in either scenario. To ensure that the inspectors are viewing the workplace in the same condition as that experienced by the employees, inspections are conducted without prior notice to an employer. In fact, anyone giving unauthorized advance notice of the inspection to the employer can be punished by a fine of up to $1,000. The inspector will arrive at the work-site, ask to see the safety and accident records of the employer, conduct a "walk around" to visually inspect the site, and discuss with the employer any violations or concerns, as well as possible solutions to the problems. Because OSHA cannot inspect all 8.9 million worksites covered by the act, it has established an inspection priority system in order to have the most significant impact. Under this system, the agency inspects situations of imminent danger, catastrophes and fatal accidents, employee complaints involving serious harm, referrals, or planned inspections.

LO6 Penalties and "abatement orders" are assessed in connection with the inspection officer's report. A nonserious or a serious violation may require payment of a penalty ranging from $0 to $7,000, while repeated and/or willful violations have a price tag of up to $70,000 per violation or up to $500,000 plus prison time if the violation was willful and involved a fatality. Criminal sanctions and even higher fines are also possible where the employer acts willfully and causes the death of an employee. (See Exhibit 15.5, "Seven Main Categories of OSHA Violations and Resulting Penalties.") Congress is currently contemplating raising these fines. Infact, in 2008, it did so for chid labor injuries as discussed above.

As long as an employer is covered by the act, has more than 10 employees, and is not subject to one of the few exceptions (certain low-hazard industries in the retail, finance, insurance, real estate, and service sectors), it must maintain certain records for OSHA compliance. Where the injury or illness is work-related and meets the general recording criteria or falls into specific categories, reporting is mandated. It must be reported as long as it is an illness, a death, or an injury that involves (1) medical treatment, (2) loss of consciousness, (3) restriction of work or motion, or (4) transfer to a different position. Employers also must report workplace injuries due to assaults by family members or ex-spouses as a part of their recordkeeping requirements. Violence in the workplace results in 2 million injuries and deaths each year and OSHA takes the position that employers who do not take reasonable steps to prevent or abate a recognized workplace violence hazard may be found to be in violation of the general duty clause.

The records must contain the following information, must be reported on OSHA Form 300,[7] and must be posted for the employees to see (i.e., it need not be filed with the government but, instead, must be kept throughout the year and compiled for the February posting): Case number, employee's name, job title, date of injury or onset of illness, where the event occurred, description of the event, classification of the case, number of days away from work.

Employees must be informed of their OSHA rights by their employer. This may be done by the employer displaying an OSHA poster in the workplace, but displaying this poster is not mandatory. Employee rights also include requesting and participating in inspections, notice of an employer's violations or citations, access to monitoring procedures and results, and access to medical information.

Exhibit 15.5 *Seven Main Categories of OSHA Violations and Resulting Penalties*

1. **Other than serious violation:** A violation that has a direct relationship to job safety and health, but probably would not cause death or serious physical harm. A proposed penalty of up to $7,000 for each violation is discretionary.
2. **Serious violation:** A violation where there is substantial probability that death or serious physical harm could result and that the employer knew, or should have known, of the hazard. A mandatory penalty of up to $7,000 for each violation is proposed.
3. **Willful violation:** A violation that the employer knowingly commits or commits with plain indifference to the law. Penalties of up to $70,000 may be proposed for each willful violation, with a minimum penalty of $5,000 for each violation. If an employer is convicted of a willful violation of a standard that resulted in the death of an employee, the offense is punishable by a court-imposed fine or by imprisonment for up to six months, or both. A fine of up to $250,000 for an individual, or $500,000 for a corporation, may be imposed for a criminal conviction.
4. **Repeated violation**: A violation of any standard, regulation, rule, or order where, upon reinspection, a substantially similar violation can bring a fine of up to $70,000 for each such violation. The original violation must be final in order to be the basis for a repeated citation.
5. **Failure to abate prior violation:** Failure to abate a prior violation may bring a civil penalty of up to $7,000 for each day the violation continues beyond the prescribed abatement date.
6. **De minimis violation:** Violations of standards that have no direct or immediate relationship to safety or health.
7. **Additional violations:** Examples include falsifying record, reports, or applications; violations of posting requirements; assaulting a compliance officer; or otherwise resisting, opposing, intimidating, or interfering with a compliance officer while engaged in the performance of her or his duties.

Due to the expenses associated with these violations and considering the fact that each day represents a separate violation, employers often request variances in order to prevent citations or penalties. Employers may ask OSHA for a variance from a standard or regulation if they cannot fully comply by the effective date, due to shortages of materials, equipment, or professional or technical personnel, or can prove their facilities or methods of operation provide employee protection "at least as effective" as that required by OSHA. Employers can request a temporary variance, a permanent variance, an interim order, or an experimental variance in order to remain in compliance with OSHA standards. Variances are not retroactive, so an employer who has been cited for a standards violation may not seek relief from that citation by applying for a variance.

Source: U.S. Department of Labor, OSHA Office of Training and Education, Construction Safety and Health Outreach Program, "OSHA Act, OSHA Standards, Inspections, Citations and Penalties," May 1996, http:www.osha.gov/doc/outreachtraining/htmlfiles/introsha.html#.

Employees who provide information to OSHA are protected from discharge and/or discrimination by the employer in retaliation for the reporting.

Responsibility for enforcing OSHA rests with the Department of Labor's Occupational Safety and Health Administration (OSHA). If an employer seeks to challenge a citation or penalty imposed, as opposed to simply demanding a warrant from the inspector to come onto the premises, it may submit an appeal to the Occupational Safety and Health Review Commission (OSHRC), an independent federal agency functioning as an administrative court created to decide issues of citations or penalties resulting from OSHA inspections.

An example of a relatively large penalty for willful violations would be the Cintas case in 2007, where OSHA proposed a penalty of $2.78 million after an inspection following the death of a worker who fell into a dryer while clearing a wet laundry jam.[8] Cintas was subject to 42 willful, instance-by-instance citations for violations of the OSHA lockout/tagout standard, including the failures to shut down and to lock out power to the equipment before clearing jams.

Actually, the question of "willfulness" is one that remains somewhat open in the courts. It is an important one to answer as fines can be significantly increased where willfulness is shown. OSHA defines a "willful" violation as "a violation that the employer intentionally and knowingly commits or a violation that the employer commits with plain indifference to the law. The employer either knows that what he or she is doing constitutes a violation, or is aware that a hazardous condition existed and made no reasonable effort to eliminate it." In addition, the OSHRC has also interpreted willfulness to include a violation the employer knew or should have known. In a case against Tyson Foods, Inc., an employee died after inhaling a poisonous gas while repairing equipment leaks. The gas was created by decaying chicken feathers and the company was fined $436,000.[9]

Specific Regulations

Certain specific regulations seem to apply across the board to all types of employment environments. For instance, a number of specific requirements involve the physical layout of the worksite including proper ventilation, adequate means of emergency exit, safety nets, guard rails, and so on. Employees must be trained and informed (through classes, labels, signs) regarding protective measures, for everything from wearing protective devices such as masks, to the proper use of chemicals. Medical examinations must be provided by the employer where an employee has been exposed to toxic substances.

OSHA can set standards on its own initiative or in response to petitions from other parties. If it is determined that a specific standard is needed, any of several advisory committees may be called upon to develop recommendations. Recommendations for standards also may come from NIOSH. Once OSHA has developed plans for a standard, it publishes them in the *Federal Register* as a "Notice of Proposed Rulemaking." A recent example is OSHA's recommendations for poultry processing facilities to reduce the number and severity of work-related musculoskeletal disorders. In preparing the recommendations, OSHA reviewed existing practices and programs as well as available scientific information on ergonomics and solicited comments from representatives of trade and professional associations, labor organizations, individual firms, and other interested parties. The final recommendations were announced in September 2004. The employer may be held liable for workplace hazards under the general duty clause even if specific regulations do not exist (see discussion of the general duty clause, below).

emergency temporary standards
Standards are imposed by OSHA without immediately going through the typical process where an employee is exposed to grave danger from exposure to substances and the standards are necessary to protect employees from the danger.

The secretary of labor may establish **emergency temporary standards** that will be effective immediately on publication in the *Federal Register* without having to go through the lengthy rule-making process otherwise required by the act where he or she "determines (a) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (b) that such emergency standard is necessary to protect employees from such danger." The emergency standard is effective until regular standards are approved through the regular procedures or for six months, whichever is shorter.

continual-training requirement
OSHA requires that the employer provide safety training to all new employees and to all employees who have been transferred into new positions.

One of the most burdensome requirements on employers is the **continual-training requirement**. OSHA requires that employers adopt a program of continual workplace safety training of employees. An employer is required to provide safety training every time an employee is hired or transferred into a new position, even if for just a day. This is generally the most frequently cited type of violation under the statute. As a result, OSHA has made an effort to simplify the requirement and now supplies employers with material safety data sheets regarding various types of chemicals and the surrounding hazards associated with them.

General Duty Clause

general duty clause
A provision of the act requiring that employers furnish to each employee employment and a place of employment free from recognized hazards that cause or are likely to cause death or serious physical harm to the employee.

The **general duty clause** protects employees against hazards in the workplace, *where no other OSHA standard would address the condition.* The general duty clause stems from the act's provision that "Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." For instance, once it is found that a certain chemical used in an employer's manufacturing process causes reproductive harm, or perhaps damage to the employees' skin, then under the general duty clause the employer must take steps to protect employees and to provide a workplace free from this hazard. It is the employer's responsibility to be aware of these workplace hazards and to ensure that all employees are equally protected. A recognized hazard also may take the form of actual knowledge when the employer actually knows of the hazard or the form of constructive knowledge if the industry recognizes the hazard even if the employer doesn't actually know of the hazard.

It is not always easy for an employer to determine what constitutes a recognized hazard because we are constantly improving our knowledge; so, what we may think is all right today may prove harmful later. Imagine the employer's apprehension that a court some day in the future will rule that the effect of secondhand smoke in offices is a recognized hazard to other nonsmokers in that office. If that were the case, an employer may be liable to a nonsmoker who suffers a smoke-related injury because the employer did not provide a smoke-free environment in which to work.[10] In fact, in anticipation of such a situation, many states have regulations on the provision of smoke-free working conditions.

And what does the general duty clause's term "likely" mean in connection with those risks that an employer must protect against? If there is a chance that 1 person in 1,000 may be harmed, does that mean that the risk is likely, or must 5 people out of 10 be at risk for harm to be likely? The OSHRC has stated that the harm need not be likely but possible. In fact, the commission has said that "the proper question is not whether an accident is likely to occur, but whether, if an accident does occur, the result is likely to be death or serious physical harm."

Under OSHA, there are times when an employer or an employee may not comply with workplace rules or safety regulations and no violation results. For instance, where, based on a reasonable apprehension of death or serious injury and a reasonable belief that no less drastic alternative is available, an employee believes that the employer has violated its general duty to provide a safe working environment, the employees may refuse to work in that environment and the employer cannot punish them for doing so.

In *Whirlpool Corporation v. Marshall,*[11] the U.S. Supreme Court upheld an OSHA regulation protecting employees against retaliation for refusing to work under dangerous conditions. Two employees at a Whirlpool plant refused to perform maintenance work that would require them to walk on elevated mesh screens less than two weeks after a co-worker fell to his death through the screens. The employees were sent home and written reprimands were placed in their personnel files. The Court held that Whirlpool had illegally retaliated against the employees.

On the other hand, there may be workplace hazards or injuries for which the employer will not be held responsible under OSHA. If the harm is the result of **reckless** behavior by an employee, if it is physically or economically impossible for the employer to comply with a safety requirement, or if compliance with a requirement presents a greater harm than not complying (**greater hazard defense**), then there will be no OSHA violation imposed on the employer. For example, a citation was issued because a construction company failed to install a cable railing on the perimeter of the top of a building it was constructing. The employer presented evidence that the risk involved in constructing the railing would subject its employees to a greater risk than if the railing were not there. To assert this defense, however, an employer must show

recklessness
Conscious disregard for safety; conscious failure to use due care.

greater hazard defense
An employer may use the greater hazard defense to an OSHA violation where the hazards of compliance are greater than the hazards of noncompliance, where alternative means of protection are unavailable, and where a variance was not available.

- The hazards of compliance with the standard are greater than the hazards of noncompliance.
- Alternative means of protection are unavailable.
- A variance from the secretary of labor was unavailable or inappropriate.

In *Horne Plumbing and Heating Co. v. OSHRC,*[12] the employer had taken precautionary measures; but two employees ignored the employer's instructions and warnings from co-workers; worked in an unsafe area of the site anyway; and were killed. The court noted: "[a] hazard consisting of conduct by employees, such as equipment riding, cannot be totally eliminated. A willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime. Congress intended to require elimination only of preventable hazards." The court found that the employer did everything possible to ensure compliance with the law, short of remaining at the worksite and directing the operations itself. This is slightly different than willfulness as it is simply whether a reasonable person would have recognized the hazard. Was this final effort required to protect the employee? The court responded that [citing a separate case]:

> While close supervision may be required in some cases to avoid accidents, it is unrealistic to expect an experienced and well-qualified [worker] to be under constant scrutiny. Such a holding by the Commission, requiring that each employee be constantly watched by a supervisor, would be totally impractical and in all but the most unusual circumstances, an unnecessary burden.

If the injury or illness does not result from a work-related cause, no report need be made. An illness or injury is considered work-related if (1) it occurred on the employer's premises, (2) it occurred as a result of work-related activities, (3) the employee was required to be there by the employer, or (4) the employee was traveling to work or to a place he or she was required to be by the employer. If the activity does not fit into one of these categories, then it was not work-related and no report needs to be made. Accidents occurring in a telecommuting employee's home are not covered, but those occurring in an employer's car are.

Employee Benefits

Statutory Basis

Employee Retirement Income Security Act

§ 1132. Civil Enforcement.

(a) A civil action may be brought—

(1) By a participant or beneficiary—

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

§ 1140. Interference with protected rights.

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

Introduction: Will It Be There When I Retire?

Although not required to provide such benefits, many firms offer employees retirement plans, healthcare, and other employee benefits. In most cases, through their employers, employees invest a portion of their salary in a plan that provides funding for the employee's retirement. But if the employer goes bankrupt, or the employee switches jobs, what happens to all of this money the employee paid into that plan? Or assume an employee has excellent medical benefits with his present company, benefits of which he often takes advantage; is he tied to that company and discouraged from leaving because he is concerned that he will not find those benefits on his own or elsewhere? What about an employee who pays into a retirement fund through her employer, only to find there are insufficient funds for her to receive the benefits when she retires?

Enron, WorldCom, Global Crossing, and United Airlines all filled the headlines of major newspapers for the last couple of years with respect to their bankruptcies and accounting scandals. But Enron and WorldCom also contributed significantly to employee benefits law by adversely impacting the retirement benefits and health benefits for their employees, as well as the investments of other companies and entities' retirement plans. For example, Enron employees whose retirement plans were heavily invested in Enron stock lost their retirement savings; and the University of California lost $145 million when Enron's stock collapsed, while the Florida State Board of Administration and New York City pension funds lost a combined $444 million.[13]

LO7

In 1974, as a result of concerns regarding the protection of pension benefits of workers who lost their jobs prior to retirement, Congress enacted the Employee Retirement Income Security Act (ERISA), a federal law that governs certain administrative aspects of employee benefit and retirement plans and that is enforced by the Department of Labor (DoL). Congress was concerned about the millions of employees and their dependents who were affected by employee benefit plans. ERISA was designed to encourage cautious, careful management of retirement funds by employers who were receiving tax benefits for doing so. As we will see in, ERISA coverage is not restricted to merely retirement plans but covers many types of promised employee benefits. ERISA is a complex act that is multifaceted, and you will only be introduced to it in this text. (See Exhibit 15.6, "Myths about ERISA.")

General Provisions

LO8

An employer that offers welfare benefits (e.g., health, life, disability, or accident insurance) or retirement plans to its employees is subject to certain requirements under ERISA, which covers most private-sector employee benefit plans. In general, ERISA does not cover plans established or maintained by governmental entities or churches, plans maintained outside the United States primarily for the benefit of nonresident aliens, or plans maintained for nonemployees such as a director or independent contractors. The Department of Labor enforces the reporting and disclosure, and fiduciary requirements of ERISA. Individual plaintiffs may file actions based on ERISA violations and ERISA preempts all state laws that relate to employee benefit plans, whether or not the situation contemplated by the state law is actually covered specifically in ERISA.

ERISA technically applies to **employee benefit plans** and covers two basic types of plans. The first type of plan ERISA covers is welfare plans. A *welfare plan* is any plan, program, or fund that the employer maintains to provide the following: medical, surgical, or hospital care; benefits for sickness, accident, disability, or death; unemployment benefits; vacation benefits; apprenticeship and training programs; day care centers; scholarship funds; prepaid legal services; or severance pay. However, payroll practices from the employer's general assets are not welfare benefit plans covered by ERISA.

The other type of plan ERISA covers is **retirement** or **pension plans**. There are two general forms of *pension plans:* those with **defined contributions** and those with **defined benefits**. The former involves plans in which each employee has her or his own account and the benefits received at retirement are based solely on the principal and income contributed. Contributions and defined contribution plans can come from employees, the employer, or both. Defined benefit plans comprise all other plans but generally refer to plans where the amount the employee receives at retirement is specifically designated at the time the employee enters the plan. Contributions to defined benefit plans generally only come from the employer, although some old plans also allow employee contributions. In defined contribution plans, the security comes from knowing the amount of principal that will be invested, while the security in defined benefit plans comes from knowing exactly how much will be paid in the end.

employee benefit plan (or plan)
A contractual obligation either through a plan, fund, or arrangement by which an employer or an employee organization such as a labor union agrees to provide retirement benefits or welfare benefis to employees and their dependents and beneficiaires.

retirement or pension plan
A plan that provides for compensation at retirement or deferral of income to periods beyond termination of employment.

defined contribution
Retirement plan where the benefits payable to a participant are based on the amount of contributions and earnings on such contributions.

defined benefit
Retirement plan where the benefit payable to a participant is defined up front by a formula, the funding of which is determined actuarially.

Exhibit 15.6 *MYTHS about ERISA*

1. Your pension plans are not protected against the trustees who administer them.
2. No matter what, if you put money into a retirement plan, it will be there when you retire.
3. No matter what, if you put money into a retirement plan, it will not be there when you retire.
4. ERISA applies only to retirement or pension funds.

ERISA imposes the following requirements on a plan to ensure that employee benefit plans are created and maintained in a fair and financially sound manner:

- It must be in writing and communicated to all employees in a language they will understand within a specified period of time. Employees also must be notified in writing of plan changes.
- The assets of a plan must be held in trust.
- A plan must be for the exclusive benefit of the employees and their beneficiaries. An employer may have assets of the plan returned only after all plan liabilities have been satisfied.
- It must satisfy certain minimum participation, vesting, and distribution requirements.
- A plan may only be established and maintained by an employer, although funding of the plan may be from employer or employee contributions or both.

Also, ERISA establishes requirements for managing and administering pension and welfare plans. There are two main important issues arising from ERISA compliance: reporting and disclosure, and fiduciary duties.

Reporting and Disclosure

ERISA requires the employer or plan administrator to provide information to each participant and beneficiary about retirement plans and welfare plans; this information also must be provided to the federal government under certain circumstances. The required information includes a summary plan description (SPD), identifying in understandable terms the plan participants' eligibility for participation and benefits under the plan. Plan changes must be communicated in a timely manner through either a new SPD or a summary of material modification. The SPD is required to be furnished to each participant eligible for benefits under the plan, as well as other beneficiaries. The SPD is not required to be filed with the DOL, but it must be furnished when requested. An annual report must be filed with DOL containing financial and other information concerning the operation of the plan. Plan administrators also must furnish participants and beneficiaries with a summary of the information contained in the annual report. Certain plans may be exempt for the annual report requirement. For instance, the reporting and disclosure laws do not apply to insured welfare plans with fewer than 100 participants.

ERISA was recently amended by the Pension Protection Act of 2006 to address the perceived abuses of Enron and WorldCom and the risks of having retirement investments heavily weighted in employer stock. Since Enron, participants in individually directed account plans have the following rights and must be notified of such rights:

- Participants must be notified in advance of any period in which they will be prohibited from trading in their plan accounts, or so-called blackout periods.
- Participants in defined contribution plans that invest in publicly traded stock of their employer must be allowed to diversify their accounts into at least three other investment options and must be notified timely of such rights.

Case 5

Courts have taken ERISA's specific disclosure rules and crafted a broader and more general duty to disclose information. For example, as discussed in the *Varity Corp. v. Howe* case, provided at the end of the chapter, the Supreme Court ruled that a fiduciary has the duty not to mislead participants regarding their benefits. Many lower courts also have addressed cases alleging an affirmative duty to disclose information that may impact a participant's decisions regarding her or his benefits.

For example, several cases address whether or not a company has an affirmative duty to disclose to retiring employees whether or not enhanced early retirement benefits may be offered in the future. Claims under these cases argue that the fiduciary had the duty to provide more or better information to the plaintiff regarding benefits. The stock drop cases addressed whether or not ERISA requires an affirmative duty to disclose. The Enron court in particular found that such a duty might exist if there are "special circumstances" with a potentially "extreme impact" on the "plan as a whole." The next wave of ERISA litigation also hinges on this affirmative duty to disclose, and has been focused on disclosure of plan fees and expenses. This duty-to-disclose issue continues to be litigated and develop, and ERISA fiduciaries might be wise to overdisclose rather than underdisclose information that may be relevant to plan participants.

Fiduciary Duty

Prior to the enactment of ERISA, plan coordinators routinely abused the funds entrusted to them, often at the expense of the employees. For instance, the funds may have been offered as loans to selected people, with little or no interest in return and little or no security for the loans, thereby interfering with employees' ability to earn income from the otherwise proper investment of funds.

ERISA established a number of requirements, called *fiduciary standards,* to prevent these abuses. Those authorized to make decisions about the placement and investment of the pension plan or those who offer the plan investment advice are considered **fiduciaries** and are subject to the following fiduciary requirements:

fiduciary
Someone who has discretionary authority over the investment or management of plan assets on behalf of others.

- *Loyalty*—Fiduciaries must discharge their duties *solely in the interests of plan participants.* Although a fiduciary may have other concerns, they must ignore those concerns when making fiduciary decisions. They must have undivided loyalty to the participants in the plan.

- *Exclusive purpose*—Fiduciaries when making decisions must make them with the exclusive purpose of providing benefits under the plan and defraying the reasonable expenses under the plan. Accordingly, fiduciaries may not act for their personal benefit or for the benefit of their employer or any other party.
- *Prudence*—A fiduciary must exercise the care and judgment one would expect from a prudent person pursuing similar objectives under the same circumstance. In some instances, this requires a fiduciary to rely on the judgment of advisors, provided that such advisors are prudently selected and supervised. Prudence is determined at the time the investment decision is made and not retroactively with 20/20 hindsight.
- *Diversification*—When investing plan assets, a fiduciary must do so in a diversified manner so as to avoid large losses. This *diversification* standard is intended to limit the investment risk of a plan. The *prudence* standard generally would require that a fiduciary managing the investments of a plan maintain a diversified portfolio. However, the *diversification* standard in effect creates a presumption that an undiversified portfolio is not prudent.
- *Compliance with plan documents*—A fiduciary is required to administer the plan in a manner that is consistent with its governing documents.

If fiduciaries of retirement plans are required to diversify the plan's assets and act prudently, why did Enron, WorldCom, Global Crossing, and other large corporations have a significant concentration of plan assets in the company's stock? ERISA provides an exception to the fiduciary requirements for "individual account plans" that allow participants to direct the investment of their accounts. Individual account plans are defined contribution plans like popular 401(k) plans. However, the fiduciary is still responsible for selecting the menu of investment alternatives and providing adequate information concerning these choices. One such investment is often the employer's stock. Whether the employer's stock should be an investment and whether the amount of investment in employer stock should be limited is a question of prudence and diversification, as Enron, WorldCom, and Global Crossing have proven. In reaction to Enron, WorldCom, Global Crossing, and other instances where the value of employer stock has dropped, causing losses in retirement plans, in 2006 Congress amended ERISA to require public companies that allow for investment of employee contributions into an employer stock fund to notify them of their right to diversify into other nonemployer stock investments. In addition, public companies that match employee contributions in company stock must allow participants who have more than three years of service to diversify out of such investment and must provide for at least three alternative investments. Such companies also must provide notice of such diversification rights. Until employees are allowed to diversify out of employer stock, continued investment in such employer stock will be subject to the general fiduciary requirements of ERISA. *Varity Corp. v. Howe* explores the nature of these fiduciary duties.

Certain transactions between an employee benefit plan and "parties in interest," which include the employer, fiduciaries, and others who may be in a position to exercise improper influence over the plan, are prohibited by ERISA and may suffer penalties. Most of these types of transactions also are prohibited by the tax code. However, there are some statutory exemptions from the prohibited transaction rules, and the DOL and IRS can authorize such exemptions through regulatory and individual exemptive procedures.

Eligibility and Vesting Rules

vesting
Becoming legally entitled to receive a benefit that cannot be forfeited if employment is terminated.

ERISA and the tax code require that all employees of age 21 or over who have completed one year of employment must be covered by their employer's pension plan. **Vesting** means acquiring rights that cannot be taken away. ERISA and the tax code provide that an employee's right to her or his pension benefit becomes 100 percent nonforfeitable after three years of employment or gradually nonforfeitable over six years (20 percent per year, beginning in the second year). In either case, the employee's right is vested, but the employee may not obtain the money or use it until retirement. Once an employee's rights in the plan are vested, the employee cannot lose the pension benefits, even if she or he switches employers. Regardless of vesting schedules with regard to pension benefits for contributions by employers on behalf of employees, employees are *always* 100 percent vested in their *own* contributions, though there are variable tax penalties for early withdrawal.

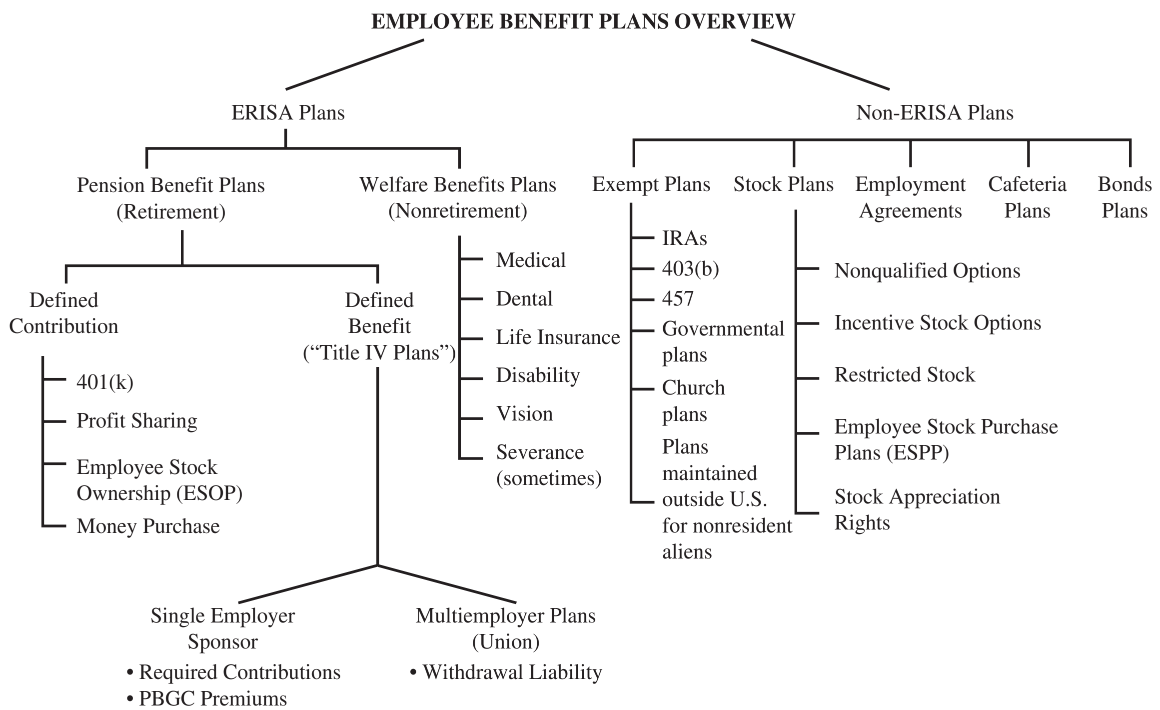
Funding Requirements for Defined Benefit Plans

To ensure that adequate funds are available under defined benefit plans to pay employees on their retirement, ERISA establishes minimum standards on how those plans should be funded throughout the years. Such standards require that employers fund the costs associated with accruals of benefits based on service in each year and amortize any prior service or actuarial gains or losses on investment over a set period of years.

In addition, employers with defined benefit plans must purchase insurance from the Pension Benefit Guarantee Corporation (PBGC) to cover potential losses of benefits if the plan is terminated without sufficient funds to pay all promised benefits. The PBGC was established by ERISA and is similar to the FDIC in that it acts to insure pensions to a certain guaranteed limit in the event that the plan and the employer are unable to pay all promised benefits: The pensions of retired workers generally are insured for the full amount owed, while the pensions of vested but still employed workers are covered only to the extent that their vested interests have accrued at the time the plan terminates, but only to a level guaranteed by the PBGC. Accordingly, workers can lose promised and accrued benefits. This result is what happened to workers at United Airlines, for instance, when their pension plans were terminated in its bankruptcy proceedings.

When a firm considers modifying a retirement plan for its employees, it must be wary since the employees may have been making decisions in reliance on the original benefit plan. Even if a proposed plan offers greater benefits than those originally included, an employer has a fiduciary duty to notify all employees of the changes that might take effect once the employer gives the proposal "serious consideration." Consider the perspective of someone who is about to retire but who

Exhibit 15.7 *Employee Benefit Plans Overview*



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might have greater benefits if she simply waits a month or two until a new plan is implemented. She would prefer to know about the possibility, wouldn't she?

Where a plan is being given serious consideration, managers must truthfully and forthrightly offer the information to all employees. If notice of the possible changes are not given to employees, the firm should make eligibility for plan participation retroactive to the date of serious consideration. (See Exhibit 15.7, "Employee Benefit Plans Overview," for an overview of benefit plans, and Exhibit 15.8, "ERISA," for ERISA provisions.)

ERISA Litigation

The collapse of Enron was the impetus behind many legal and regulatory reforms in the area of corporate governance. It also contributed to substantial litigation involving complex ERISA issues regarding fiduciary liability. Although, ultimately, the Enron ERISA litigation settled out of court, the few judicial decisions and the briefs that DOL filed in the Enron case influenced many cases claiming breach of fiduciary duty when the value of employer stock in retirement plans declined suddenly.[14] The outcomes of these "stock drop" cases differ, with some being decided in motions to dismiss, others at summary judgment, and most of them settling out of court. However, such cases provide insight into who is or is

Exhibit 15.8 *ERISA: Employee Retirement Income Security Act of 1974, as Amended*

REPORTING AND DISCLOSURE

Participants

- *Summary Plan Descriptions (SPD)*—Within 90 days after employee becomes participant in plan, or 120 days after plan becomes subject to ERISA. Updated SPD must be provided every 5 years if amendments made to plan or 10 years if no amendments made. Note: The Pension Welfare Benefits Administration has become the Employee Benefits Security Administration.
- *Summary of Material Modifications*—210 days after the end of the plan year in which the modification or change was adopted.
- *Summary Annual Reports*—Within 9 months after the close of the plan year. Model notice available.
- *Notice to Participants of Underfunded Plans*—Defined benefit plans that are less than 90% funded 2 months after the deadline for filing Form 5500 for such plan. Model notice available.
- *Notice of Right to Diversify Investments*—Public companies that provide for investment in employer stock under a defined contribution plan must provide notice of the participant's right to diversify investments out of employer stock.
- *COBRA Notices.*
- *Blackout Period Notices*—30 day advance notice, with limited exceptions.
- Plan documents upon request.

IRS/DOL

- Form 5500.

PBGC

- Premiums—defined benefit plans only.

Penalties

- Daily penalties for failure to file required reports or provide required disclosure.
- Penalties for failure to provide required participant disclosure—generally $110/day per participant.
- DOL/IRS penalties range from $25 per day to $110 per day for delinquencies.
- Criminal penalties can apply.
- DOL delinquent filer program available with reduced set penalties.

FIDUCIARY DUTIES

- Plan assets held exclusively for the purposes of providing benefits to participants and beneficiaries.
- Prudent person rule.
- Investment diversification.
- Must abide by plan document.
- Participant-directed accounts.
- Plan assets must be invested as soon as possible, but no later than 15 business days after the end of the month in which payroll withholding occurs.
- Prohibited Transactions:

  —Loans.

  —Sales/purchases.

  —Providing services.

  —Using plan assets for own account.
- Breach of fiduciary duty is a personal liability. Make sure to have indemnification!

GENERAL WELFARE PLAN ISSUES

- *Severance Plans*—ERISA plans if they have an "administrative scheme." If not, then no.
- *Cafeteria Plans*—Not ERISA plans but still subject to IRS Form 5500 reporting (waived at this time). Cafeteria plan contributions not subject to FICA.
- *Disability*—When is an employee no longer "employed" once on disability? ADA concerns.

GENERAL PENSION PLAN ISSUES

- *401(k) Plans*—Nondiscrimination/plan operation issues. Investments in employer stock. Fees regarding administration and investment management.
- *Cash Balance Plans*—Age discrimination and funding issues.
- *Defined Benefit Pension Plans*—Funding and cost of administration issues.

Source: By Robin L. Struve, "What Everyone Should Know About ERISA." © 2008 Reprinted with permission of the author.

not a fiduciary, as well as whether such fiduciaries have an affirmative duty to disclose information that may be relevant to a participant regarding his or her benefits. Generally, these cases find that a fiduciary will be *anyone who has functional discretionary control over the plan.* In addition, these cases generally hold that fiduciaries have a duty to be truthful, under the *Varity* standard discussed earlier, but may not always have an affirmative duty to disclose all financial details of the company merely due to the ability of participants to invest in company stock.[15]

The plaintiffs in the cases found in the notes all alleged that the fiduciaries of the plans breached their fiduciary duties under ERISA in one of the following forms:

- Allowing the plan to continue to acquire and hold employer stock after the defendants knew or should have known it was an imprudent investment;
- Failing to disclose to plan participants facts that would have enabled them to make an informed judgment regarding their continued acquisition and holding of employer stock; and/or
- Affirmatively inducing participants to continue to invest in employer stock after the defendants knew or should have known it was an imprudent investment.

Some of the more interesting claims in the stock drop cases surround the issue of who are the fiduciaries of the plan. Most of these plans gave fiduciary responsibility either to the company and/or to an administrative committee made up of individual employees appointed by the company.

Until Enron and its progeny, the traditional rule was that individuals acting in the scope of their employment were not personally liable for actions of the corporation. For example, the Third Circuit in *Confer v. Custom Engineering Co.*[16] held that, "when an ERISA plan names a corporation as a fiduciary, the officers who exercise discretion on behalf of the corporation are not fiduciaries within the meaning of [ERISA] unless it can be shown that these officers have individual discretionary roles as to plan administration." But other courts such as the Fifth Circuit in *Musmeci v. Giant Super Markets, Inc.,*[17] have adopted the functional approach to determining fiduciary status, where the court held officers and employees performing fiduciary acts on behalf of a corporation that is a fiduciary will be fiduciaries themselves.

This functional approach is the position taken by the Department of Labor and by the Enron court when it wrote, "[i]n view of the broad language [and] the functional and flexible definition of 'fiduciary' . . . this Court agrees with those courts which reject a per se rule of non-liability for corporate officers acting on behalf of the corporation and instead make a functional, fact-specific inquiry to assess 'the extent of responsibility and control exercised by the individual with respect to the Plan' to determine if a corporate employee . . . has exercised sufficient discretionary authority and control to be deemed an ERISA fiduciary and thus personally liable for a fiduciary breach."[18] Most of the stock drop cases followed a similar approach.

Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)

The problem of an employee losing workplace healthcare coverage when the employee stopped working or switched jobs was addressed by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and was codified in ERISA and the tax code.[19] COBRA applies to group health plans provided by employers with 20 or more employees on a typical working day in the previous calendar year. COBRA gives participants and beneficiaries the right to maintain, at their own expense, coverage under their health plan that would be lost due to a change in circumstance such as termination of employment or divorce. However, many states have similar laws governing smaller employers. A small employer should not assume that they do not have continuation requirements if they are otherwise not covered by COBRA.

If a worker's employment terminates or she or he loses benefit coverage due to a reduction in hours, COBRA requires that employers extend employee health insurance coverage for up to 18 months and may charge up to 102 percent of the rates originally charged while the individual was still working for the employer. While the coverage is paid for by the employee, COBRA provides guaranteed coverage for an employee who leaves employment for a relatively short time where that person may have difficulty obtaining coverage. COBRA also requires employers to extend coverage to dependents who would otherwise lose coverage due to divorce or ceasing to be a dependent. General notice informing the covered individuals must be given informing them of their rights under COBRA and describing the law.

The Health Insurance Portability and Accountability Act (HIPAA)

The Health Insurance Portability and Accountability Act (HIPAA) is a federal law that amended ERISA in 1996 to promote standardization and efficiency in the healthcare industry.[20] HIPAA accomplishes several goals including protecting individuals from discrimination based on their health status because it restricts exclusion from coverage due to preexisting medical conditions (employers are prohibited from denying coverage or charging more for coverage based on an individual's past or present poor health); it created a uniform system for processing, retaining, and securing healthcare information by encouraging the use of electronic technology, mandating standardization of health-related transactions, and promoting security precautions to maintain the privacy of health information; and perhaps, most importantly, it protects the privacy of individuals with respect to their healthcare data, and the sharing of such data. Other HIPAA protections relate to the portability of medical coverage by individuals who experience a job loss or job change. When such an event occurs, HIPAA may increase the ability to obtain or maintain health coverage for oneself or one's dependent's if the election is made within a certain time frame.

HHS delegated responsibility for enforcing the HIPAA's privacy rules to the HHS Office for Civil Rights (OCR). HIPAA does not provide a private right of action for individuals to sue covered entities for alleged violations. However, covered entities may be subject to private lawsuits borne under tort or other legal theories. For example, individual state laws may offer relief that can be invoked by private plaintiffs. Further, some situations may be governed by ERISA, which would allow participants and beneficiaries to sue for enforcement of the applicable plan document.

HIPAA violations are subject to civil and criminal sanctions enforced by the Department of Justice. For instance, HHS may impose civil monetary penalties on a covered entity of $100 per failure to comply with HIPAA's privacy rules. A person who knowingly obtains or discloses individually identifiable health information in violation of HIPAA faces a fine of $50,000 and up to one year of imprisonment. The criminal penalties increase to $100,000 and up to $250,000 and up to 10 years of imprisonment if the wrongful conduct involves the intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm.

HIPAA does not preempt all state privacy laws. Furthermore, there are no provisions in HIPAA that exempt an employer from complying with other federal laws such as ERISA, ADA, and FMLA. In jurisdictions where the state privacy laws are more stringent than HIPAA, those laws or the relevant portions thereof are preserved and should be applied instead of HIPAA.[21] Therefore, a state privacy law that provides more privacy protections or greater individual rights than provided by the federal HIPAA privacy rules will generally govern the situation. Employers should initially determine whether and to what extent they are required to follow state law (including local statutes and regulations) instead of the requirements of HIPAA. The HHS Web site, http://www.hhs.gov, contains numerous links and technical assistance on HIPAA-related topics.

HIPAA Privacy Rules

HIPAA's privacy rules specifically address the permitted and prohibited use(s) and disclosure(s) of health information by organizations subject to it.[22] A covered entity is generally permitted (but not required) to use and disclose protected health information, *without* an individual's authorization, for the following purposes or situations: to the individual for "treatment," "payment," and "healthcare operations" as defined in the rule; to certain governmental authorities if abuse, neglect, or domestic violence is at issue; for many law enforcement activities pursuant to court orders and/or subpoenas; to funeral directors, coroners, or medical examiners to identify a deceased person or to determine the cause of death; to the U.S. Department of Health and Human Services (HHS) when it is undertaking a compliance investigation, review, or enforcement action.

Generally, covered entities may use or disclose protected health information only if the use or disclosure is permitted or required by these privacy rules.[23] In very general terms, a group health plan may use protected health information internally or disclose it externally only under the limited circumstances and for the specific purposes articulated in the privacy rules. Otherwise, group health plans may use or disclose protected health information only with the specific permission of the individual who is the subject of the protected health information. Such permission is manifested in the form of a signed, valid authorization form. No doubt, you have signed at least one such form in the past couple of years if you have visited a doctor. Such forms must be written in plain language and they must include a number of elements, including the following:[24]

- A description of the protected health information to be used and disclosed.
- The person(s) authorized to make the use or disclosure.
- The person(s) to whom the covered entity may make the disclosure.
- An expiration date or event.
- The purpose for which the information may be used or disclosed.
- A notice of the individual's right to revoke the authorization.

In some circumstances, it may be necessary to include additional information for the authorization to be valid. There are special rules, for instance, that apply to psychotherapy notes and the use of health information for marketing purposes. The validity of an authorization also may be subject to various state laws and may be further varied depending on the subject of the health information that is being used or disclosed. Additional privacy requirements may be imposed by state law in jurisdictions where the state law provides greater protections for health information.

These privacy rules attempt to strike a balance between permitting important uses of information and protecting the privacy of people who seek medical treatment. The rule is supposedly flexible and comprehensive enough to cover the variety of uses and disclosures that need to be addressed while still promoting high-quality healthcare.

HIPAA applies to any entity that is a healthcare provider that conducts certain transactions in electronic form, a health care clearinghouse, or a health plan. Entities that fall within one or more of these categories are referred to as *covered entities.* Many varied organizations (in addition to hospitals) *may* be considered a covered entity due to the activities they conduct. For instance, a university might be considered a covered entity if it has a student health center or a mental health center that provides healthcare. A grocery store may be considered a covered entity if it has a group health plan managed by the benefits office for its employees.

General Obligations of Covered Entities

In general, HIPAA requires covered entities to notify patients of their privacy rights and to explain how their personal health information can be used or disclosed by the organization or its business associates. To this end, they must prepare and distribute a Notice of Privacy Practices to their patients or employees depending on the activities that they regularly conduct.

Covered entities are required to adopt and implement privacy policies and procedures. These policies should be widely publicized and distributed to all individuals within the organization. Individuals who work closely with health information or who are responsible for securing this information should receive detailed training on the organization's established policies and procedures.

All covered entities should make an effort to prevent unauthorized viewing or access to (electronic and paper) health records in their care. To this end, administrative, physical, and technical safeguards should be implemented. Specific protective steps may include the establishment of regular and ongoing training sessions for new and current employees who handle health information; documentation of office procedures for managing health information; creation of firewalls between departments to shield those departments that maintain health information from, for example, individuals who make human resources decisions; addition of locks to file cabinets that house medical information; and use of passwords and timed screen savers on all computers of individuals whose jobs require them to regularly come into contact with health information.

Organizations also must designate a privacy officer who has responsibility for ensuring that the above steps are adopted and followed, and that complaints regarding privacy violations are addressed through the organization's established procedures. The privacy officer should use a monitoring plan to randomly check on the effectiveness of the organization's privacy practices. (See Exhibit 15.9, "Sample Monitoring Plan.")

Enforcement of ERISA

Employers have the right to reduce or modify employee benefits (unless prohibited by contractual obligations), as long as similarly situated plan participants are treated alike. For instance, the employer may not reduce benefits for one full-time employee without similarly reducing the benefits for all similar employees. In order to prevail on a claim of a violation of section 510 of the act, in the case of discharge, the employee must prove that the employer terminated her or his employment with the "specific intent" to interfere with her or his benefit rights.

In *Owens v. Storehouse, Inc.,*[25] the court was asked to consider the employer's (Storehouse) choice to limit coverage for specific types of claims, a choice that could adversely impact certain employees. Specifically, the employer's insurance company notified Storehouse that it intended to cancel the firm's policy because of the high incidence of AIDS in the retail industry generally, and among Storehouse's employees specifically (five employees had AIDS at the time). Eventually, Storehouse convinced the company to continue the contract, but there was now a \$75,000 deductible for AIDS-related claims, while other coverage began at \$25,000. As it looked for another insurer, Storehouse considered placing a \$25,000 lifetime cap on all AIDS-related claims. Owens, an employee, sued, claiming that this modification lowering the cap violated ERISA. The court held that there is no "vested" interest in the type of coverage an employer provides, even once someone begins to take advantage of that coverage, as long as the employer reserves the right to change or terminate its terms. As there was no specific intent to violate ERISA (i.e., denial of coverage in retaliation for exercising an ERISA right), the employer prevailed. (Note: This type of arrangement would now be prohibited by the ADA as it would be discriminatory against someone with a disability.)

Exhibit 15.9 *Sample Monitoring Plan*

Specific Risk (1)	Operating Control (2)	Monitoring Control (3)	Evidence of Control	Oversight Control (4)	Evidence of Oversight Control
Complaint of inappropriate use/disclosure of their PHI.	HIPAA policy forbids this action by personnel.	Violations of HIPAA policy are subject to disciplinary action.	Policy that supports disciplinary action for violation of HIPAA policy.	Complaint procedure, as outlined in university HIPAA policy.	Periodic check by component areas of complaints logged by privacy office.
New employees in component areas are not trained on HIPAA protocol.	Policy officials within each component area should train new employees in their respective areas.	Written training procedures developed by departments that handle PHI.	Training attendance forms signed by training participants once training is completed.	Training attendance forms are returned to privacy officer once training has been completed.	Training attendance forms are filed in privacy office.
Notice of privacy practices is not distributed in accordance with HIPAA.	Component areas set up procedures that govern the designated times and manner when notice is to be distributed.	Random (annual), periodic auditing/monitoring by privacy office of organization's privacy practices.	Schedule of random/periodic monitoring.	Complaint procedure, as outlined in university HIPAA policy.	Periodic check by complaints logged by privacy office.
"Business associates" are not bound by agreement with the organization before they access PHI.	Component areas identify vendors and any others who may have access to PHI and provide this information to privacy officer.	Privacy officer contacts vendor and memorializes terms of agreement.	Business associate agreements.	Business associate agreements are cataloged in organization's database.	Random audits of database.
PHI is not protected by administrative, physical, and technical safeguards.	Component areas set up procedures that determine the minimum necessary disclosures to make pursuant to valid requests; in addition, component areas have to identify physical safeguards to protect PHI locks on file cabinets, passwords on computers.	Review departmental procedures and establish random, periodic auditing/monitoring by privacy officer.	Schedule of random/periodic monitoring.	Complaint procedure, as outlined in HIPAA policy.	Periodic check by component areas of complaints logged by privacy office.

Case 6

In *Central Laborers' Pension Fund v. Heinz,* provided for your review, the Supreme Court evaluated a similar claim with regard to the amendment of a pension plan that expanded the definition of disqualifying employment and resulted in a suspension of early retirement benefits to some participants, in possible violation of ERISA's prohibition against reducing an accrued right or benefit under a pension plan (the "anticutback" rule), an issue not addressed in *Owens* because those benefits were welfare benefits not protected by ERISA's accrual rule.

It should be noted that some ERISA claims also may be asserted under the Age Discrimination in Employment Act (ADEA). For instance, since benefits are more likely to become vested as a worker gains seniority and as seniority may be more likely with advancing age, employers attempting to avoid paying benefits may be more likely to terminate older workers, giving rise to a claim under both ERISA and the ADEA.

Chapter Summary

We have covered a lot of ground in this chapter.

- Employers must be aware that employees have certain rights due to them under various statutes, including the right to a minimum wage and to be paid time and a half for hours worked over 40.
- Children below a certain age may not be employed except as specified by law, and there are only certain hours they can work and certain jobs they can do.
- By law, employees who have worked for an employer for at least 12 months are entitled to take up to 12 weeks' unpaid leave for illness or to care for their children, parents, or a returning war veteran, without fear that their job will be taken from them or that their benefits or seniority will suffer.
- In addition, employees have a right to a safe workplace. Employers have a general duty to provide a safe workplace for their employees, in addition to any specific workplace safety regulations that have been developed by OSHA. OSHA inspectors have the authority to conduct unannounced inspections of a workplace, either without a warrant if the employer agrees or with a warrant if the employer insists upon one. Employers may be fined for violations of the safety regulations.
- And while employers are not required to provide workplace benefits and retirement plans for their employees, if they choose to do so, they must carefully follow the applicable laws, including allowing employees to have interim coverage if they leave the job and protecting any medical information the employer may have for the employee. In providing benefits, the employer is under a duty to disclose relevant facts to employees, including contemplated changes, and to safeguard the employees' contributions from unethical or illegal interference.
- An awareness of these workplace rules is a must for an employer who wishes to avoid federal and state liability for violations.

Chapter-End Questions

1. No employer intends to harm its employees. How would you define the term "willful" that would give rise to penalties of up to $70,000?
2. Worcester Polytechnic Institute (WPI) hired Francis Harvey & Sons as a general contractor. SGH, an engineering firm, was hired to do certain structural engineering services in connection with the project. After a Harvey employee expressed concern to SGH via a telephone call about a potentially dangerous structural defect in the concrete flooring, he was told to continue his work. Later, the flooring collapsed and five workers were hurt. No SGH employees were working at the worksite. After a complaint was filed against SGH, SGH defended, claiming that the worksite was not a "place of employment" of the structural engineering firm and, consequently, OSHA did not apply. Do you agree? [*Reich v. Simpson, Gumpertz & Heger, Inc.,* 3 F.3d 1 (1st Cir. 1993).]
3. General Dynamics manufactures M-1 Abrams tanks for the Department of Defense. The tanks have internal hydraulics that leak during assembly so the workers use a solvent called Trichloro to clean up spills. In its gaseous state, the solvent may cause serious illness or death. The manner in which the tank repairers performed the cleanups was essentially a matter of the cleaning team's discretion, except that the tanks be ventilated when using more than one pint of solvent since all tank repairmen were highly skilled. After a plant employee was overcome by fumes, and another died, OSHA issued a citation, claiming that General Dynamics violated the general duty clause. General Dynamics defended against the citation because it was acting in complete conformance with a separate OSHA section, which specifically set forth the limitations of employee exposure to Trichloro. Is General Dynamics free from responsibility under the general duty clause where it is in compliance with a more specific proscription? [*International Union, UAW v. General Dynamics Land Systems Division,* 815 F.2d 1570 (DC. Cir. 1987).]
4. Allbright finds that Benito, Juana, and Lao Tsu, three of his employees, were the cause of the discovery of FLSA violations. As a result, he terminates them. Do the employees have any recourse? Explain.
5. Sasha is employed as the Winstons' babysitter when they must occasionally stay over in town because of their jobs. Sasha is becoming increasingly discontented with her wages, which are below minimum wage. What relief does the FLSA provide for Sasha?
6. A Christmas tree grower used seasonal help to assist in harvesting Christmas trees and did not pay them overtime wages since the growers deemed the employees as engaged in agriculture, which is exempted from the overtime provisions. DOL argued that the planting, fertilizing, and all other tasks relevant to growing the trees was performed by others who were agricultural workers exempted from the overtime provisions. However, they argued, since the seasonal employees only harvested the trees, they were not engaged in agriculture, but rather in forestry and lumbering, which requires the payment of overtime wages. Which view prevails? [*DOL v. N.C. Tree Growers Association, Inc.,* 377 F.3d 345 (4th Cir. 2004).]
7. Titanium Metals produces titanium ingots in Nevada. Titanium is a highly flammable substance during processing and can be ignited by heat, sparks, friction, or striking

other small particles. To minimize dust accumulation, the company installed a collecting tube on its machines and periodically washed the entire area surrounding the machines. One day, while a machine operator was using the machine in the normal way, an explosion and fire erupted and another employee was burned to death. The company was served with two OSHA violations: (1) for failure to provide nonsparking tools and equipment and (2) for allowing flammable accumulations of titanium. The company claims that the hazard posed by the metal is not a *recognized hazard,* which would trigger the employer's general duty. The titanium industry is still in its infancy (less than 30 years old) and no precise standards exist respecting the appropriate levels of dust accumulation. Also, never in its eight-year history had the company had such an explosion, so it was unprepared and it would have never expected death or serious injury. Are these acceptable defenses? [*Titanium Metals Corp. of America v. Usery,* 579 F.2d 536 (9th Cir. 1978).]

8. Lactos Laboratories is an interstate manufacturer of animal feed concentrates. In the course of its manufacturing process, the company uses fish parts that are treated with sulfuric acid when packaged. One night, a truck delivering the fish parts deposited the mixture into a Lactos tank, which overflowed into an adjacent room in the basement and filled it to a depth of 31 inches. The company used a pump to get rid of most of the overflow but ordered the employees to enter the room when the level had decreased 3 to 4 inches to clean up the remaining debris and to repair some pumps. The employees who entered were almost immediately overcome by hydrogen sulfide gas (caused when the sulfur came into contact with iron sulfide particles that had fallen from the ceiling), as were those who tried to help them. Lactos had no emergency equipment available and had taken no safety precautions to cope with accumulations of the gas. In the end, three employees died and two were seriously injured. Lactos defended itself against violations cited by OSHA by claiming that the sulfide gas was an unforeseeable hazard. Do you agree? [*Brennan v. OSHA Review Commission,* 494 F.2d 460 (8th Cir. 1974).]
9. Jared requested FMLA time off from his job to care for his partner, Samuel, who was suffering from a particularly acute case of adult mumps. Is the leave likely to be granted?
10. When Sarah was diagnosed with breast cancer, the prognosis was not good. Sarah underwent surgery and a chemotherapy regimen that physically depleted her. When Sarah's sick leave was used up, Sarah asked her employer for 12 weeks of FMLA leave. At the time of the request, Sarah had been working for the employer for nine months. Will Sarah be granted the FMLA leave for her health?

End Notes

1. http://www.dol.gov/opa/media/press/esa/ESA20071952.htm.
2. *Chou v. Starbucks,* No. GIC 836925 (Cal. Super. Ct. Mar. 19, 2008).
3. 871 F. Supp. 1471 (D.D.C. 1994).
4. http://oversight.house.gov/story.asp?ID=1878.
5. Society for Human Resource Management, "FMLA and Its Impact on Organizations," July 2007.

6. Occupational Safety and Health Administration, "OSHA Enforcement: Vital to a Safe and Healthy Workforce," 2007, http://www.osha.gov/dep/enforcement/enforcement_results_06.html.
7. http://www.osha.gov/recordkeeping/new-osha300form1-1-04.pdf.
8. U.S. Dept. of Labor, "U.S. Department of Labor's OSHA proposes $2.78 million fine against Cintas Corp." *OSHA Press Release* (Aug. 16, 2007), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table-NEWS_RELEASE&p_id-14397.
9. Tom Parsons, "Tyson Foods Fined," Softcom.com/Associated Press, April 9, 2004.
10. However, note that, though permitted in some states, many states do not allow a tort action on the basis of an OSHA violation (see, for example, *Morocco v. Rex Lumber Co.,* 72 Conn. App. 516 (2002)).
11. 445 U.S. 1 (1980).
12. 528 F.2d 564 (5th Cir. 1976).
13. See Maureen Milford, "UC Takes Charge of Enron Suit," *National Law Journal,* March 7, 2002.
14. See *In re WorldCom Inc. ERISA Litig.,* 263 F. Supp. 2d 745 (S.D.N.Y. 2003); *In re Polaroid ERISA Litig.,* 362 F. Supp. 2d 461 (S.D.N.Y 2005); *In re McKesson HBOC, Inc. ERISA Litig.,* 291 F. Supp. 2d 812 (N.D. Cal. 2005); *In re Goodyear Tire & Rubber Co. ERISA Litig.,* 438 F. Supp. 2d 783 (N.D. Ohio 2006); *DiFelice v. US Airways,* 436 F. Supp. 2d 756 (E.D. Va. 2006); *In re Electronic Data Systems. Corp "ERISA" Litig.,* 305 F. Supp. 2d 658 (E.D. Tex. 2004); *In re Sears Roebuck & Co. ERISA Litig.,* No. 02 C 8324, 2004 U.S. Dist. LEXIS 3241 (N.D. Ill. Mar. 3, 2004); *In re Tyco Int'l Ltd., Multidistrict Litig.,* 2004 U.S. Dist. LEXIS 24272 (D.N.H. Dec. 2, 2004).
15. See *Kelley v. Household International, Inc.,* 312 F. Supp. 2d 1165 (N.D. Ill. 2004), and *Hill v. Bellsouth Corp.,* 313 F. Supp. 2d 1361 (N.D. Ga 2004).
16. 952 F.2d 34 (3d Cir. 1991).
17. 332 F.3d 339, 350–52 (5th Cir. 2003).
18. *Title v. Enron Corp.,* 2003 WL 22245394 at 85 (S. D. Tex. September 30, 2003).
19. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. Law No. 99-272 (April 7, 1986).
20. Health Insurance Portability and Accountability Act of 1996, Pub. Law No. 104-191 (August 21, 1996).
21. For instance, Illinois has more stringent requirements regarding use and disclosure of genetic health information. See 410 Ill. Comp. Stat. 513/15 et seq.—the Genetic Information Privacy Act—regarding the use and disclosure of mental health information. See also 740 Ill. Comp. Stat. 110/1 et seq., the Mental Health and Developmental Disabilities Confidentiality Act.
22. Though certain information may be released pursuant to permitted uses and disclosures, the amount of released information should be limited to the "minimum necessary" that is needed to accomplish the intended purpose of the use, disclosure, or request, as defined in the rules.
23. See 45 C.F.R. § 164.502(a).
24. See 45 C.F.R. § 164.508.
25. 984 F.2d 394 (11th Cir. 1993).

Cases

Case 1 Reich v. Circle C Investments, Inc. *998 F.2d 324 (5th Cir. 1993)*

The court analyzes whether topless nightclub dancers who received no compensation except tips from customers are employees subject to FLSA or "business women renting space, stages, music, dressing rooms and lights from the club," not subject to the law. The court determined that they were, in fact, employees for FLSA purposes.

Reavley, J.

The secretary of labor alleges that a topless nightclub has improperly compensated its dancers, waitresses, disc jockeys, bartenders, doormen, and "housemothers," and has failed to keep accurate records of the hours worked by its employees. The district court determined that the topless dancers and other workers are "employees" under the FLSA and that the club willfully violated its minimum wage, overtime and record-keeping provisions.

The dancers receive no compensation from the club. Their compensation is derived solely from the tips they receive from customers for performing on stage and performing private "table dances" and "couch dances." At the end of each night, the dancers must pay the club a $20 "tip-out," regardless of how much they make in tips. The club characterizes this tip-out as stage rental and argues that the dancers are really tenants. According to the club, the dancers are neither employees nor independent contractors, but are business women renting space, stages, music, dressing rooms, and lights from the club.

To determine employee status under the FLSA, we focus on whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services, or in business for herself. To make this determination, we must analyze five factors.

The first factor is the degree of control exercised by the alleged employer. The district court found that the club exercises a great deal of control over the dancers. They are required to comply with weekly work schedules, which the club compiles with input from the dancers. The club fines the dancers for absences or tardiness. It instructs the dancers to charge at least $10 for table dances and $20 for couch dances. The dancers supply their own costumes, but the costumes must meet standards set by the club. The dancers can express a preference for a certain type of music, but they do not have the final say in the matter. The club has many other rules concerning the dancers' behavior; for example, no flat heels, no more than 15 minutes at one time in the dressing room, only one dancer in the restroom at a time, and all dancers must be "on the floor" at opening time. The club enforces these rules by fining infringers.

The club attempts to de-emphasize its control by arguing that most of the rules are directed at maintaining decorum or keeping the club itself legal. The club explained that it publishes the minimum charge for table and couch dances at the request of the dancers to prevent dancers from undercutting each others' prices. Finally, it stresses the fact that it does not control the dancers' routines. We believe, however, that the record fully supports the district court's findings of significant control.

The second factor is the extent of relative investments of the worker and alleged employer. The district court found that a dancer's investment is limited to her costumes and a padlock. The amount spent on costumes varies from dancer to dancer and can be significant. The club contends that we should also consider as an investment each dancer's nightly tip-out, which it characterizes as rent. The district court rejected this argument, and so do we. It is the economic realities that control our determination of employee status.

Third, we must look at the degree to which the workers' opportunity for profit and loss is determined by the alleged employer. Once customers arrive at the club, a dancer's initiative, hustle and costume significantly contribute to the amount of her tips. But the club has a significant role in drawing customers. Given its control over determinants of customer volume, the club exercises a high degree of control over a dancer's opportunity for "profit." Dancers are far more closely akin to wage earners toiling for a living than to independent entrepreneurs seeking a return on their risky capital investments.

The fourth factor is the skill and initiative required in performing the job. Many of the dancers did not have any prior experience with topless dancing before coming to work at the club. They do not need long training or highly developed skills to dance at the club. A dancer's initiative is essentially limited to decisions involving costumes and dance routines. This does not exhibit the skill or initiative indicative of persons in business for themselves.

Finally, we must analyze the permanency of the relationship. The district court found that most dancers have short-term relationships with the club. Although not determinative, the impermanent relationship between the dancers and the club indicates non-employee status.

Despite the lack of permanency, on balance, the five factors favor a determination of employee status. A dancer has no specialized skills and her only real investment is in her costumes. The club exercises significant control over a dancer's behavior and the opportunity for profit. The transient nature of the workforce is not enough here to remove the dancers from the protections of the FLSA. AFFIRMED.

Case Questions

1. Does any of the case surprise you? Explain.
2. If you were the club owner and did not want the dancers to be employees, after receiving this decision, how would you change things?
3. Do you think the dancers should have been considered employees? Why or why not?

Case 2 Kilgore v. Outback Steakhouse of Florida, Inc. *160 F.3d 294 (6th Cir. 1998)*

Employee servers who were required to pool their tips and have them redistributed to other types of employees who were not paid minimum wage challenge this practice as a violation of the minimum wage provision of the FLSA. The court permitted the arrangement.

Kennedy, J.

Outback's tip pooling arrangement requires its servers to contribute a share of their tips to a tip pool, which the restaurant distributes to hosts, bus persons, and bartenders. The servers' mandated contribution is three percent of their "total gross sales," which includes not only food and beverages, but also gift certificates and merchandise such as steak knives and T-shirts sold to customers at a server's assigned tables.

The restaurant paid its hosts and servers $2.125 per hour—one half the minimum wage at the time in question—with the required minimum wage difference made up through the tip pool arrangement. It was undisputed that hosts and servers never received less than the minimum wage for a workweek under this arrangement. Servers testified, however, that customer tips often fell short of the fifteen percent industry standard, and that Outback's tip pool requirement "routinely" required them to "tip out" more than thirty-five percent of the tips they actually received.

The FLSA, at 29 U.S.C. § 203(m), permits employers to use a tip credit to account for up to fifty percent of the minimum wage but only with respect to "tipped" employees. The statute defines a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Section 203(m) also states that use of the tip credit this way "shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips."

Employee servers and hosts allege that the required tip-out amount was impermissibly excessive, and, therefore, not "customary and reasonable" as required under Labor Department interpretations of the relevant statutory sections. They also contended that Outback's use of the tip credit to calculate the minimum wage was unlawful with respect to hosts because they did not qualify as "tipped employees."

Even though Outback prohibits hosts from accepting tips, they receive more than $30 a month in tips if tip pool receipts are included. Employees who receive tips from a tip pool are employees who "receive tips" according to Department of Labor regulations, case law, and Department of Labor practices. Accordingly, the hosts meet the qualifications of Sections 203(t) and 203(m).

The hosts perform services to customers—greeting and seating, giving out menus, and sometimes "enhancing the wait" by serving food. These activities constitute sufficient interaction with customers in an industry where undesignated tips are common. Accordingly, the hosts are engaged in an occupation in which tips are customarily and regularly received and thereby qualify as tipped employees. AFFIRMED.

Case Questions

1. Do you consider the restaurant's pool tipping policy to be fair to the servers who received the tips? Explain.
2. Does the court's analysis make sense to you, that if hosts receive tips from the tip pot, then they are employees who routinely receive tips? Explain.
3. Why do you think the employer uses this method of payment?

Case 3 Reich v. Newspapers of New England, Inc. *44 F.3d 1060 (1st Cir. 1995)*

In this case the court determines whether reporters who do general reporting for a small local newspaper are subject to the FLSA overtime pay requirements.

Torruella, J.

The Monitor is an award-winning small-city newspaper with a daily circulation in excess of 4,000 copies. Its reporters are assigned to tasks ranging from writing features to covering legislative, municipal, and town governments and agencies. The reporters work essentially unsupervised, have authority and discretion over what they do and write, and decide how their assignments should be executed. Most of their time, however, is spent on "general assignment" work, and their writing is mainly focused on "hard news."

Even though its reporters work extended hours, management at *The Monitor* discourages overtime. Rather, it prefers that its employees seek compensatory time. The secretary of labor asserts that *The Monitor*'s overtime policy violates the FLSA, and seeks a permanent injunction and back pay for the employees. *The Monitor* responds that the employees are exempt professionals.

The FLSA's overtime compensation provisions do not apply to professionals. The specific requirements of the exemption are not set forth in the statute. Rather, they are articulated in Department of Labor regulations and interpretations.

The regulation enumerates several types of professional exemptions, but only the "artistic professional" exemption, which applies to professionals working in a "recognized field of artistic endeavor," applies here. The regulation outlines both a short and long test for determining whether an employee qualifies as an artistic professional. The long test is applied to employees who earn weekly salaries of at least $170 but less than $250. Both tests demand that the employee's "primary duty" consist of work requiring "invention, imagination, or talent." The long test also requires that the employee's primary duty consist of "[w]ork that is original and creative in character." 29 CFR 541.3(a)(2).

The Monitor maintains that the district court erroneously applied the long test to three reporters whose weekly salary qualified them for analysis under the short test. This issue is not dispositive, however, because we believe the employees are exempt under either test.

The relevant portion of the short test requires us to determine (1) the employee's "primary duty," and (2) whether the performance of that duty requires "invention, imagination, or talent." Because the secretary stipulated that writing was the primary duty of these employees, the only issue remaining is whether their writing required "invention, imagination, or talent."

The day-to-day duties of the three reporters consisted primarily of "general assignment" work. Among other things, their stories covered public utility commission hearings; criminal and police activity; city and state legislative proceedings; business events, including compiling a list of people who had been promoted; and local art events. Rarely were they asked to editorialize about or interpret the events they covered. Rather, in the words of one of the employees, the focus of their writing was "to tell someone who wanted to know what happened . . . in a quick and informative and understandable way." Thus, these reporters were like the majority of reporters in that their work "depends primarily on intelligence, diligence, and accuracy." They were not performing duties that would place them in that minority of reporters whose work depends primarily on invention, imagination, or talent. Although some of their work product demonstrated creativity, invention, imagination, and talent, their writing did not exhibit these qualities on a day-to-day basis.

Our decision should not be read to mean that all journalism work is non-exempt. The determination of whether the exemption applies to a given employee depends on the specific duties and characteristics required by the position rather than its actual title. AFFIRMED.

Case Questions

1. Are you surprised by this decision?
2. Does this decision make sense to you?
3. Why do you think the employer chose to interpret the regulation as it did?

Case 4 Spangler v. Federal Home Loan Bank of Des Moines

278 F.3d 847 (8th Cir. 2002)

The employee called in to her employer and left a message that she would not be in because of "depression again." The issue became whether this statement was sufficient to put the employer on notice that the employee was invoking the FMLA and taking FMLA leave. The district court held for the employer, but the court of appeals reversed, determining that given the employer's background and history with the employee, the employee's statement was sufficient.

Riley, J.

Theresa Spangler began working for the Bank in the Demand Services Department in 1982. Spangler suffers from dysthymia, a form of depression, along with phobia and bouts of more intense depression. Her former therapist first diagnosed Spangler with this mental illness in 1993. At that time, Spangler took a six-week leave of absence from the Bank and went through treatment. Spangler's current psychiatrist also diagnosed Spangler with dysthymia in 1997. At that time, she took another leave of absence to undergo treatment. After her 1997 diagnosis, Spangler informed her supervisor that she took this leave to obtain treatment for her depression. Spangler also recalls later telling a variety of other supervisors and Bank personnel about her depression.

The Bank's attendance policy allowed supervisors to excuse occasional absences due to illness or injury depending on the circumstances and on the employee's past attendance. The Bank dealt with excessive absenteeism through counseling, warning, and, on occasion, termination if necessary. Employees were to arrange time off for personal business and medical appointments in advance. The Bank's FMLA policy required employees to request leave 30 days in advance or, if the leave was not predictable, the employee needed to provide as much notice as was practicable. The Bank posted this information about the FMLA in the employee break room and printed it on the back of employee time cards.

Bank records show a persistent pattern of absenteeism and tardiness throughout Spangler's employment with the Bank. Spangler was absent for family or medical reasons for 32 days in 1993, 17.6 days in 1994, 12.4 days in 1995, and 29.3 days in 1996.

One morning in September of 1997, Spangler left a voice mail message on a supervisor's machine in the morning stating she would not be at work that day, thus forcing the supervisor to do Spangler's work instead of attending a scheduled training session.

Throughout 1997 and 1998, Spangler's many unscheduled absences and her persistent tardiness were routinely noted by the Bank. Spangler used five days of unscheduled vacation for personal reasons from September 15 through 19, 1997. Each morning when she was absent, Spangler notified her supervisor by leaving a voice mail message. In September, Spangler was warned that she needed to be on time to work and to talk to someone instead of leaving voice mail messages when she was unable to make it to work. Her 1997 performance appraisal noted that her 21 absences that year were excessive and that absenteeism was a problem for Spangler.

Due to more absences, Spangler was again put on probation in January and again August 31, 1998. On September 15 she missed work because of transportation problems. The following day, a Bank employee noted in a memorandum to Spangler's manager that Spangler phoned and stated she would not be in that day because it was "depression again."

On September 17, when Spangler had not yet arrived at work in the middle of the morning, and had not yet called with any explanation, Spangler's manager terminated her employment.

Discussion

An employee is to provide his or her employer with 30 days notice or as much notice as is practicable of the intention to use FMLA leave, when the necessity for leave "is foreseeable." 29 U.S.C. § 2612(e)(2). Less than 30 days notice is permissible for reasons "such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency." 29 C.F.R. § 825.302(a). Notice is required "as soon as practicable," meaning "as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case." 29 C.F.R. § 825.302(b). "This ordinarily . . . mean[s] at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee." If the need for FMLA leave is not foreseeable, the employee "should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a).

Although "[a]n employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave," "failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice." 29 C.F.R. § 825.302(d). The acceptable ways for an employee to provide notice include, "in person, by telephone, telegraph, facsimile, . . . or other electronic means." 29 C.F.R. § 825.303(b).

Employee argues that by alerting the Bank of her need for time off due to "depression again" the day before her dismissal, she put the Bank on notice that she would need time off that would qualify under the FMLA. Spangler presented a great deal of evidence of the Bank's awareness of her mental condition. She informed several supervisors of her illness throughout the time she was employed with the Bank. Furthermore, it is undisputed that in her final request for time off work, she stated it was because of "depression again." We have held that "[a]n employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee's absence from work." "Under the FMLA, the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave."

We view Spangler's uncontroverted statement that it was "depression again" as a potentially valid request for FMLA leave. The Bank here knew Spangler suffered from depression, knew she needed leave in the past for depression and knew from Spangler specifically on September 16, 1998, she was suffering from "depression again."

When an employee provides the employer with notice that she may be in need of FMLA leave before the fact of the absence, it then becomes the employer's duty to determine whether or not the employee actually requires FMLA leave if there is some doubt as to whether or not the request would qualify. Once the employer is notified, it has a duty either to provide FMLA time or follow the procedures set forth in the statute and regulations to verify the validity of the employee's request for time off "by a certification issued by the health care provider." 29 U.S.C. § 2613(a). "The responsibility to request FMLA certification is the employer's."

We have noted that an employee "cannot claim protection from the FMLA for disciplinary action . . . as a result of absences that are not attributable to his serious health conditions." The Bank is free to present evidence before the jury of its legitimate disciplinary reasons for dismissing Spangler, reasons not attributable to any FMLA request.

Finally, we emphasize the FMLA does not provide an employee suffering from depression with a right to "unscheduled and unpredictable, but cumulatively substantial, absences" or a right to "take unscheduled leave at a moment's notice for the rest of her career." On the contrary, such a situation "implies that she is not qualified for a position where reliable attendance is a bona fide requirement. . . ." REVERSED.

Case Questions

1. Put yourself in the position of a manager. What would you do to cope with Spangler?
2. Do you understand the court's decision about Spangler's last phone message? Explain. Do you agree? Why or why not?
3. Do you understand why employers have so much trouble with the FMLA regulations and find them so bothersome? Explain.

Case 5 Varity Corp. v. Howe *516 U.S. 489 (1996)*

At the time employer Varity Corporation transferred its money-losing divisions in its subsidiary Massey-Ferguson, Inc., to Massey Combines, a separate firm (it called the transfer "Project Sunshine"), it held a meeting to persuade its employees of these failing divisions to change benefit plans. Varity conveyed the impression that the employees' benefits would remain secure when they transferred. In fact, Massey Combines was insolvent from the day it was created and, by the end of its receivership, the employees who had transferred lost all of their nonpension benefits. The employees sued under ERISA, claiming that Varity breached its fiduciary duty in leading them to withdraw from their old plan and to forfeit their benefits. The district court held for the employees, and the court of appeals affirmed.

Breyer, J.

. . . The second question—whether Varity's deception violated ERISA-imposed fiduciary obligations—calls for a brief, affirmative answer. ERISA requires a "fiduciary" to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not to act "solely in the interest of the participants and beneficiaries." As other courts have held, "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA."

Because the breach of this duty is sufficient to uphold the decision below, we need not reach the question of whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries.

We recognize, as mentioned above, that we are to apply common-law trust standards "bearing in mind the special nature and purpose of employee benefit plans." But we can find no adequate basis here, in the statute or otherwise, for any special interpretation that might insulate Varity, acting as a fiduciary, from the legal consequences of the kind of conduct (intentional misrepresentation) that often creates liability even among strangers.

We are aware, as Varity suggests, of one possible reason for a departure from ordinary trust law principles. In arguing about ERISA's remedies for breaches of fiduciary obligation, Varity says that Congress intended

ERISA's fiduciary standards to protect only the financial integrity of the plan, not the individual beneficiaries. This intent, says Varity, is shown by the fact that Congress did not provide remedies for individuals harmed by such breaches; rather, Congress limited relief to remedies that would benefit only the plan itself. This argument fails, however, because, in our view, Congress did provide remedies for individual beneficiaries harmed by breaches of fiduciary duty.

Case Questions

1. What should Varity have done in order to avoid liability under ERISA?
2. How can an employee ensure that she or he knows all of the facts relevant to a question such as the one present in this case?
3. Why do you think Varity handled this in the way that it did?

Case 6 Central Laborers' Pension Fund v. Heinz

541 U.S. 739 (2004)

Retirees who had been receiving early retirement benefits from a multiemployer pension fund sued the fund under ERISA's anticutback rule after their plan was amended to expand which types of postretirement employment triggered suspension of such benefits. Heinz understood that, if he were to work as "a union or non-union construction worker" ("disqualifying employment'), his pension would be suspended during that time. However, he also understood that they would not be suspended if he chose to work in a supervisory capacity. Heinz therefore took a job in central Illinois in 1996 as a construction supervisor after retiring, and the plan continued to pay out his monthly benefit.

In 1998, the plan's definition of disqualifying employment was expanded by amendment to include any job "in any capacity in the construction industry (either as a union or non-union construction worker)." The plan took the amended definition to cover supervisory work and warned Heinz that if he continued on as a supervisor, his monthly pension payments would be suspended. Heinz kept working, and the plan stopped paying.

Heinz sued to recover the suspended benefits on the ground that applying the amended definition of disqualifying employment so as to suspend payment of his accrued benefits violated ERISA's anticutback rule. The District Court granted judgment for the plan, only to be reversed by a divided panel of the Seventh Circuit, which held that imposing new conditions on rights to benefits already accrued was a violation of the anticutback rule. The Supreme Court granted certiorari in order to resolve the resulting Circuit Court split and affirms the Seventh Circuit in favor of the retirees.

Souter, J.

With few exceptions, the "anti-cutback" rule of the Employee Retirement Income Security Act of 1974 (ERISA) prohibits any amendment of a pension plan that would reduce a participant's "accrued benefit." The question is whether the rule prohibits an amendment expanding the categories of postretirement employment that triggers suspension of payment of early retirement benefits already accrued. We hold such an amendment prohibited.

* * *

II.

A.

There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them. "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.

ERISA does, however, seek to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits. . . . [W]hen Congress enacted ERISA, it wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it."

ERISA's anti-cutback rule is crucial to this object, and (with two exceptions of no concern here) provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan. . . ." After some initial question about whether the provision addressed early retirement benefits, a 1984 amendment made it clear that it does. Now § 204(g) provides that "a plan amendment which has the effect of . . . eliminating or reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits."

Hence the question here: did the 1998 amendment to the Plan have the effect of "eliminating or reducing an early retirement benefit" that was earned by service before the amendment was passed? The statute, admittedly, is not as helpful as it might be in answering this question; it does not explicitly define "early retirement benefit," and it rather circularly defines "accrued benefit" as "the individual's accrued benefit determined under the plan. . . ." Still, it certainly looks as though a benefit has suffered under the amendment here, for we agree with the Seventh Circuit that, as a matter of common sense, "[a] participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." Heinz worked and accrued retirement benefits under a plan with terms allowing him to supplement retirement income by certain employment, and he was being reasonable if he relied on those terms in planning his retirement. The 1998 amendment undercut any such reliance, paying retirement income only if he accepted a substantial curtailment of his opportunity to do the kind of work he knew. We simply do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits.

B.

The Plan's responses are technical ones, beginning with the suggestion that the "benefit" that may not be devalued is actually nothing more than a "defined periodic benefit the plan is legally obliged to pay," so that § 204(g) applies only to amendments directly altering the nominal dollar amount of a retiree's monthly pension payment. A retiree's benefit of $100 a month, say, is not reduced by a post-accrual plan amendment that suspends payments, so long as nothing affects the figure of $100 defining what he would be paid, if paid at all. Under the Plan's reading, § 204(g) would have nothing to say about an amendment that resulted even in a permanent suspension of payments. But for us to give the anti-cutback rule a reading that constricted would take textual *force majeure,* and certainly something closer to irresistible than the provision quoted in the Plan's observation that accrued benefits are ordinarily "expressed in the form of an annual benefit commencing at normal retirement age."

The Plan also contends that, because § 204(g) only prohibits amendments that "eliminat[e] or reduc[e] an early retirement benefit," the anti-cutback rule must not apply to mere suspensions of an early retirement benefit. This argument seems to rest on a distinction between "eliminat[e] or reduc[e]" on the one hand, and "suspend" on the other, but it just misses the point. No one denies that some conditions enforceable by suspending benefit payments are permissible under ERISA: conditions set before a benefit accrues can survive the anti-cutback rule, even though their sanction is a suspension of benefits. Because such conditions are elements of the benefit itself and are considered in valuing it at the moment it accrues, a later suspension of benefit payments according to the Plan's terms does not eliminate the benefit or reduce its value. The real question is whether a new condition may be imposed after a benefit has accrued; may the right to receive certain money on a certain date be limited by a new condition narrowing that right? In a given case, the new condition may or may not be invoked to justify an actual suspension of benefits, but at the moment the new condition is imposed, the accrued benefit becomes less valuable, irrespective of any actual suspension.

* * *

This is not to say that § 203(a)(3)(B) does not authorize some amendments. Plans are free to add new suspension provisions under § 203(a)(3)(B), so long as the new provisions apply only to the benefits that will be associated with future employment. The point is that this section regulates the contents of the bargain that can be struck between employer and employees as part of the complete benefits package for future employment.

The judgment of the Seventh Circuit is AFFIRMED. Justice Breyer, with whom the Chief Justice, Justice O'Connor, and Justice Ginsburg join, CONCURRING.

Case Questions

1. Notwithstanding the law as applied, do you believe an employer should be able to change the terms of pension plan qualifications once individuals have begun to avail themselves of the benefits? Can you think of *any* circumstances where you might be persuaded that the employer should be able to modify the plan in this regard?
2. The Court does not seem to be persuaded at all by the plan's arguments, though the district court found in its favor. Are you persuaded by *any* of the plan's arguments?