



## 2009 Federal Law Update: What You Need to Know

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## Federal Employment Litigation Statistics

### Cases Filed in Federal Court

Twelve-Month Period	Number of Employment Discrimination Cases Filed in these 12 Months
1997 (12 mos. to 12/31/97)	24,174
1998 (12 mos. to 12/31/98)	23,299
1999 (12 mos. to 12/31/99)	22,412
2000 (12 mos. to 12/31/00)	21,111
2001 (12 mos. to 12/31/01)	21,062
2002 (12 mos. to 12/31/02)	20,972
2003 (12 mos. to 12/31/03)	20,040
2004 (12 mos. to 9/30/04)	19,746
2005 (12 mos. to 9/30/05)	16,930
2006 (12 mos. to 9/30/06)	14,353
2007 (12 mos. to 12/31/07)	13,107



## Federal Employment Litigation Statistics

### EEOC Charges

Category	FY 2007	FY 2008	Percent Change
Total charges	82,792	95,402	15.2%
Race	30,510	33,937	11.2%
Retaliation	26,663	32,690	22.6%
Sex	24,826	28,372	14.3%
Age	19,103	24,582	28.7%
Disability	17,734	19,453	9.7%
National Origin	9,396	10,601	12.8%
Religion	2,880	3,273	13.6%
Equal Pay Act	818	954	16.6%

## U.S. Supreme Court

Answering questions during employer's internal investigation is protected against retaliation.

- School district conducted internal investigation into rumors of sexual harassment by employee Hughes
- Investigators questioned Crawford, who said Hughes harassed her.
- School district fired Crawford, no action against Hughes.
- Court unanimously said this is retaliation.

## U.S. Supreme Court

### What this means to you...

- Retaliation is always an issue when you make an employment decision adverse to an employee shortly after that employee complains of discriminatory conduct. Document your decision-making and the employee's conduct.

## U.S. Supreme Court

### City of New Haven, Connecticut violated Title VII by discarding racially disproportionate test results.

- New Haven Fire Department administered civil servant tests for applicants for positions as captain and lieutenant.
- Test results showed disproportionately higher scores for white applicants than for minority applicants.
- City held hearings and ultimately decided not to certify the results because it feared it would be liable for disparate impact.
- Court said refusing to certify because white applicants scored highest is unlawful, intentional discrimination based on race.

## U.S. Supreme Court

- Court held in a 5-4 vote that the only time an employer can choose to intentionally discriminate based on race to avoid disparate-impact liability is if the employer has a “strong basis in evidence” to believe it will be subject to disparate-impact liability.
- Court held that, in this case, there was not a “strong basis in evidence” because City only had statistical evidence and a defense that the test was related to the job and was a business necessity.
- “Strong basis in evidence” not defined or elaborated upon.

## U.S. Supreme Court

### What this means to you...

- If you administer tests to screen applicants for employment or promotions, be sure that your tests reflect the actual skills the applicants need for the job and the actual tasks the employees will be performing.
- If the results of the tests show a disparate impact on a protected class (gender, race, etc.), be very careful with whether you certify the results.

## U.S. Supreme Court

A provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.

- Union was exclusive bargaining representative, agreed to collective bargaining agreement, which required union members to submit all claims of employment discrimination to binding arbitration.
- Security guards were reassigned, claimed age discrimination under ADEA. Employer sought to compel arbitration.
- Court, in 5-4 decision, held that the Union negotiated in good faith and that resolving ADEA claims by way of arbitration does not waive the statutory right to be free from workplace age discrimination.

## U.S. Supreme Court

What this means to you...

- At least ADEA claims can be compelled into arbitrations if there is an arbitration provision for employment-related claims.

## U.S. Supreme Court

Burden-shifting “mixed motives” instruction is never proper in an ADEA case.

- FBL hired Gross in 1971, and reassigned him in 2003 to new position with less responsibility and a manager who Gross had previously supervised.
- Gross claimed this reassignment was a demotion and sued under the ADEA claiming he was demoted because of his age (54).
- Court analyzed “mixed motives” instruction for Title VII cases and held, in a 5-4 decision, that the “mixed motives” instruction is never proper for ADEA claims.
- Court held that ADEA is different from Title VII and plaintiff must prove that he was fired because of age, not just that age was a factor among many.

## U.S. Supreme Court

What this means to you...

- The employee has a tougher burden to prove age discrimination because he must show that you terminated (or other adverse employment action) because of his age, not just that age played a role in the decision.

## Legislation and Regulation

### Employee Free Choice Act Will Change Labor-Management Relations.

- Labor unions initially sought a card-check provision, which would allow employees to unionize simply by having a majority of employees sign a card declaring they favor a union, rather than a secret ballot election.
- Senators dropped the card-check provision of the bill in late July and instead will seek shorter unionization campaigns and faster elections (5 to 10 days)
- Senators also considering measures to mandate that union organizers have access to employers' property and ban "captive audience meetings."

## Immigration Issues

### DHS Intends to Rescind 'No-Match' Rule and require all employers with federal contracts to use E-Verify.

- Department of Homeland Security plans to rescind SSA "No Match Rule."
- Instead, DHS is focusing on E-Verify.
- As of September 8, 2009, all government contracts will be awarded to those employers who verify their employees' work status through E-Verify.
- Arizona requires all employers to use E-Verify, remains to be seen if other states will follow.



Thank you!

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Annual *Winds of Change* Employment Law Seminar  
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2009 State Law Update:  
What You Need to Know

Gulliver A. Swenson – Ryan, Swanson & Cleveland, PLLC

## Wrongful Termination

- *Brundridge v. Fluor Services* – Public policy prevents employer from firing employees for raising safety concerns at Hanford Nuclear.
- *Danny v. Laidlaw Transit Services* – Improper to fire employee for taking time off related to domestic violence case.

## Disability and Discrimination

- *Hale v. Wellpinit School Dist.* – Retroactive application of disability definition from RCW 49.60.
- *Havlina v. Dept. of Transportation* – No duty for state agency (or segmented employers) to look for positions for disabled workers at other agencies.
- *Townsend v. Walla Walla Sch. Dist.* – Use of hearing aids at work was not substantially disabling as to require employer to accommodate.
- *Dumont v. City of Seattle* – “Pretext” claim survived summary judgment for white firefighter passed up for promotion.

## Wages

- *Morgan v. Kingen* – Bankruptcy does not excuse officers from personal liability for wages.
- *Teamsters Local 117 v. Dept. of Corrections* – Union has standing to bring claim on members behalf; time carrying pager may be compensable.
- *Duncan v. Alaska USA Fed. Credit Union* –

## Employer Negligence

- *Smith v. Sacred Heart* – Negligent Supervision regarding duty to protect.
- *Rucshner v. ADT Security* – Negligent hiring related to failure to conduct a criminal background check.

## Odds and Ends

Thank you!

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## Employee Screening: How Much Do You Really Want To Know?

James M. Shaker – Ryan, Swanson & Cleveland, PLLC

### Introduction

- Large number of applicants due to high unemployment rates
- Opportunity for employers to develop strategies to improve and streamline the process for hiring employees
- Pre-employment screening can ensure that an organization hires the right individuals for the right position



## The Benefits and Drawbacks of Pre-Employment Screening

### Benefits

- Pre-employment screening allows an employer to “screen in” employees who are a good fit for the organization
- Screening techniques can also help an employer “screen out” potential employees that do not meet the requirements of the position
- Screening procedures can help an employer reduce its exposure to a later “negligent hiring” claim
- Certain types of pre-employment screening procedures are statutorily required of employers

## The Benefits and Drawbacks of Pre-Employment Screening

### Drawbacks

- Some techniques are time consuming and/or expensive
- If screening procedures are numerous or invasive, qualified applicants may choose not to go through the process
- Employers can open themselves up to liability, depending upon the way the pre-employment screening procedures are performed

## Methods of Screening

- Simplest technique is the interview
- Employers should consider using the application form to screen employees, check references, test applicants, and perform background checks

## Methods of Screening

### ***The Application as a Screening Tool***

Every application should ask for two things:

1. A complete work history, including explanations for gaps in employment
2. A release that authorizes the employer to contact and obtain information from former employers and indemnifies former employers for any responses given

## Methods of Screening

### ***Testing Job Applicants: Will your test make the grade?***

- Employers are allowed to utilize tests during the pre-employment application period
- Tests can be a good resource for determining the hard skills, soft skills, or physical strength of an applicant
- the employer should verify that it is in compliance with all state and federal regulations
- The four most common types are ability tests, personality tests, medical tests and polygraph tests

## Methods of Screening

### ***Testing Job Applicants: Will your test make the grade?***

#### Ability Tests

- Helpful if a job requires certain technical knowledge or cognitive skills
- Employers must ensure that it does not violate the anti-discrimination statutes
- Cannot disproportionately disqualify applicants of a protected class status “unless the employer can show that the test results are job-related and consistent with business necessity”
- Employers with disparate-impact tests must conduct validation studies to prove that the test has a predictive relationship to future job performance
- Validation is costly, so employers should carefully consider the use of disparate-impact tests

## Methods of Screening

### ***Testing Job Applicants: Will your test make the grade?***

#### Personality Tests

- Test should be compliant with both the Americans with Disabilities Act (ADA) and the EEOC guidelines
- Questions that would require the applicant to disclose the “existence, nature or severity of a disability” would be a violation of the ADA
- Questions related to religion or sexual orientation would likely violate discrimination laws
- Psychological exams that might reveal an applicant’s mental disorder or impairment would also be improper under the ADA
- Tests that are designed only to assess an applicant’s honesty, preferences, and habits and do not include any of the negative factors described above are likely acceptable

## Methods of Screening

### ***Testing Job Applicants: Will your test make the grade?***

#### Polygraphs

- Both federal and state law prohibits the use of pre-employment polygraph tests
- The State of Washington banned private employers and state and local government employers from directly or indirectly requiring a prospective employee “take or be subjected to any lie detector or similar tests as a condition of employment

## Methods of Screening

### ***Testing Job Applicants: Will your test make the grade?***

#### Medical Tests

- The ADA prohibits pre-employment medical tests because there is a risk that employers will use the exams to discriminate against disabled individuals
  
- Medical tests can include physical fitness tests, psychological evaluations, HIV testing, genetic screening, tests for alcohol use, and vision tests

## Methods of Screening

### ***Testing Job Applicants: Will your test make the grade?***

#### Medical Tests

- Employers can give employment offers conditional upon the completion of a medical exam if
  1. all applicants are subject to the test
  2. the results of the tests are confidential and are separately filed and stored
  
- Pre-employment drug tests are allowed if all applicants are subject to them at the same stage of the application process

## Methods of Screening

### ***Background Checks: Do you really need to know?***

- Background checks can also be a good way to screen potential employees
- There are many types of background checks that can be performed
- Credit checks are heavily regulated and fairly complicated
- Criminal record or internet search ok

## Methods of Screening

### ***Background Checks: Do you really need to know?***

#### Criminal Records

##### Legal pitfalls:

- Use of a criminal record check to disqualify applicants may be unlawful if it disparately impacts applicants from a protected class
- Conviction records, rather than arrest records, should be the basis for a decision
- Use of an arrest or conviction record should occur only when the information is a “business necessity”

## Methods of Screening

### **Background Checks: Do you really need to know?**

Using the Internet: To “Google” or not to “Google”?

- By 2007, “roughly half of U.S. employers [were] using the Internet to vet job applicants”
- May not be the best screening method for several reasons:
  - “allow[s] prospective employers to discover information about candidates that would otherwise be prohibited in traditional applications and interviews such as the age, marital status, or religious affiliation of an applicant”
  - Some states prohibit employers from making adverse employment decisions based upon an applicant’s lawful off-duty conduct
  - employers who gain access to private information by circumventing security blocks could be in trouble
  - Information on the internet may be untrue

## Methods of Screening

### **Background Checks: Do you really need to know?**

Using the Internet: To “Google” or not to “Google”?

Measures that an employer can take to decrease liability related to using the internet to screen job applicants:

- Set up a process for using the internet
- Have a non-decision maker perform the search
- Keep records of the searches performed and their results

## Methods of Screening

### **Background Checks: Do you really need to know?**

Using the Internet: To “Google” or not to “Google”?

Measures that an employer can take to decrease liability related to using the internet to screen job applicants:

- Use other screening methods to verify and supplement information found on the internet
- Ask applicants to sign a waiver authorizing and acknowledging use of information from the internet in the employment application
- Make an offer of employment conditional upon the successful completion of a search, rather than conducting pre-employment searches

## Conclusion

- Carefully analyze the job and develop a list of desirable traits an ideal employee would have
- Determine whether those qualifications can be adequately screened for before employment and if the cost of developing screening mechanisms is a necessary investment
- Consider which methods are best suited to identify or weed out applicants based upon the qualifications and traits already identified

## Conclusion

Also important to establish a general employment screening policy that includes:

- Reason for the policy and specific references to any state or federal laws the policy is meant to comply with
- Who the policy will apply to, assuming that different employment positions require different screening methods
- The types and scope of procedures to be performed
- The specific process to be followed for each screening method used
- The individual or department responsible for enforcing the policy

Thank you!

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## The Electronic Tsunami: Don't Get Caught in This Wave!

Thao Tiedt – Ryan, Swanson & Cleveland, PLLC

Twitter, FaceBook, MySpace, and other  
social networking at work, on company  
equipment ...

*are you prepared?*



## Where can a company draw the line?

- Employer has the right to control and monitor an employee's use of the employer's communication devices
- However the employer should have a carefully drafted policy that informs employees of the company's ownership of anything

## What employee rights may be implicated?

- Freedom of speech and a right to privacy?
- A private employer can limit free speech in the workplace
- The right to privacy is a more delicate matter

What liability could the company have for an employee's harassing, offensive or defamatory comments using company devices?

- Employers can be held accountable for such information sent by an employee if done on a company electronic service
- Liability is much less clear if the employee's communications are from a personal electronic device during personal time
- Company could be implicated if the employee is utilizing information gleaned from the company in the personal communication

What about messages/cartoons/pictures that espouse particular religious, political, ethnic, gender or racial opinions or viewpoints?

- Such items have no place on company electronic devices

Can't employees, including managers and executives, send the above type messages to their "safe list" of people who they know have the same opinions or viewpoints?

- No such thing as a "safe" list within a company or when using a company provided electronic service

Can the company restrict the employee's references to the company when it's on the employee's own time and personal e-mail?

- Yes, regardless if it's on a company provided device or a personal device
- Employees must sign confidentiality/trade secrets policy or agreement

What if the company does not mind if an employee discusses by whom he or she is employed but only if the site is appropriate?

- Restricted unless it is on a company approved site such as LinkedIn
- However, enforcement of this policy would be difficult
- Employment counsel should be contacted before the company issues such a prohibition –some states have statutes that protect employees' private activities

What if the employee is trashing other employees or the company on a social network?

- Company should investigate the situation and take appropriate action against the employee
- Lack of loyalty and judgment would warrant termination

What if the company is sued by someone who has been libeled or otherwise defamed on a social network by an employee using the company electronic services?

- Company should immediately contact its insurer – General Liability coverage usually contains a provision for Personal and Advertising injury
- A wise company will consult its insurance broker before such a claim is made

Thank you!

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## Reductions in Force and Other Cost Savings

Rick Lentini – Ryan, Swanson & Cleveland, PLLC

## Unique Washington Rules Relating to Terminations

- Last paycheck due at next regular payday
- Cannot deduct amounts owed from employee's paycheck unless employee has agreed (have it in writing)



## Unique Washington Rules Relating to Terminations

- If requested, must provide written reasons for termination within 10 days of request
- If requested, must provide copy of personnel file

## Unique Washington Rules Relating to Terminations

- Severance pay not required, unless pursuant to company policy
- Pay for accrued vacation not required, unless pursuant to company policy

## Reductions in Force

- Elimination (temporary or permanent) of positions for valid financial reasons

## Reductions in Force

- Evaluate needs – Document
- Evaluate positions for reduction – Document
- Evaluate actual cost savings – Document
- Evaluate employees in positions for reduction – Document

## Reductions in Force

- Articulate selection criteria (performance, seniority, etc.)
- Evaluate appearance of discrimination or retaliation

## Reductions in Force

- Are affected employees in protected classes (age, race, national origin, religion, sex, sexual orientation, marital status, pregnancy, disability, armed service member)?
- Evaluate make-up of work force, and how it is affected by RIF
- Have affected employees recently engaged in protected activity (complaints of discrimination, workers' compensation claims, wage claims, union activity, medical or family leave, accommodation request)

## Reductions in Force

- WARN Act
  - 100 or more employees
  - 50 or more lost jobs at a site
  - 60 days notice required

## Reductions in Force

- Consider reducing hours/compensation of more employees (perhaps as alternative to elimination of positions)
- Consider alternative cost-cutting measures

## Cost-Cutting Measures

- Suspension of bonuses
- Reductions in compensation/commissions
- Elimination of discretionary expenditures
- Reduction/Elimination of benefits

Thank you!

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## Ten Tips for Avoiding Legal Trouble with Employees

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### 1. Hire the Right Employee

- Check out that resume – over a third of resumes contain some untruth
- Check references, consider a background check
- Do not discriminate – race, color, religion, sex, marital status, national origin, age, disability, and in King County sexual orientation
- In the interview, ask open-ended, probing questions dealing with job-related issues
- Match the candidate's business style with the company's business style
- Avoiding the wrong employee can help you avoid legal trouble



## 2. Culture: Establish It and Live It

- Every company has a culture whether established on purpose or by happenstance
- Take the opportunity to create the culture you want in your company, then follow it
- Culture results from assumptions and understandings that underlie behavior and actions within the work environment
  - Examples of negative culture
  - Examples of positive culture
- Culture affects every part of your business, so use it to your advantage

## 3. Don't Forget Your Employee Handbook

- Use the handbook to inform and notify
- Policies should be reasonable, understandable, and explained
- Distribute the handbook to all employees
- Hold people accountable to the policies in the handbook
- Apply the policies evenly
- Make sure the handbook has a clear, unambiguous, and conspicuous disclaimer stating that the handbook is not a contract
- Have the employee sign an acknowledgement form

(cont.)

### 3. Don't Forget Your Employee Handbook

- Keep up to date and follow the law, especially related to employee leaves of absence
  - Example: law on family military leave now provides 15 days of unpaid pre-deployment leave for the spouse of the person being deployed
  - Example: employee victim of domestic violence, sexual assault, or stalking, or an employee who is a family member of such victim, may take unpaid reasonable leave from work on a continuous or intermittent basis
- Policies are not just for employees, but also for the employer to follow

### 4. Properly Classify your Employees

- Independent contractor or employee?
  - At-will employment is most common
  - If an independent contractor, must state the worker will not be treated as an employee for federal tax purposes and specify company's lack of control
- Exempt or non-exempt?
  - Employees are presumptively entitled to overtime
  - Exceptions: "white collar"; computer professional; outside sales; etc.
- In your offer letter, state the type of employment
- Erroneous classification can lead to liability for uncollected tax, issues with employee benefit plans, reporting and employer issues, liability for unpaid overtime, etc.

## 5. Communicate

- Communication is a two-way street
- Communicate often
- Communicate performance expectations
- Communicate how management is responding to problems/complaints
- Communicate policies and procedures
- Allowing issues to escalate by not responding creates more trouble

## 6. Give Feedback, Including Reviews and Discipline When Necessary

- Clearly articulate performance expectations and give feedback on whether those expectations are being met
- Follow up on consistently poor performance – taking the time and pains to honestly evaluate an employee's performance and document it will prevent future legal trouble
  - Example: many employers have problems arise when they terminate an employee who has had performance problems but a seemingly spotless record
- Do not surprise employees at year end evaluations or upon termination

(cont.)

## 6. Give Feedback, Including Reviews and Discipline When Necessary

- Have a second set of eyes review a performance evaluation
- Keep all evaluations, warnings, memoranda, etc. in the employee's personnel file
- Consider a probationary period for new hires to see if the employee is well suited to the company and position
- Make sure the employee fits into the company culture
- When employees do a good job, tell them

## 7. Do Not Ignore Discrimination or Harassment

- Include anti-discrimination and anti-harassment policies in the employee handbook
- Dissemination of the company's policy against harassment and discrimination is essential to any company's defense if trouble arises
- Policies should include reporting methods for harassment, including methods for bypassing a harassing supervisor
- Promptly follow up on complaints with thorough investigations and appropriate discipline
- In some cases, employers may be liable for harassment by supervisors
- Provide training to supervisors
- It is in everyone's best interest to not allow discrimination or harassment

## 8. Train Your Employees

- Help improve and update their skills
- Train them when hired, after a promotion
- Train managers to manage performance, get help with certain behavioral challenges
- Train employees on policies, expectations of behavior, and how to address issues
- Training benefits them and you – the company will be better able to defend itself in litigation and some problems may be avoided altogether by:
  - reducing or eliminating harassment
  - complying with FMLA and ADA requirements
  - establishing and consistently using sound hiring and evaluation practices

## 9. Terminate and Layoff Employees the Right Way

- Think through terminations and layoffs and plan ahead
- Document and support the decision – this will significantly reduce legal problems by helping dispel the notion that discrimination was at the root of the termination or layoff
- Do not discriminate
- For severance packages, make sure to get waivers/releases (and that they comply with all applicable laws)
  - Example: employees over 40 being terminated must be allowed 21 days to consider the agreement and 7 days after signing to revoke the agreement
- Take advantage of the exit interview

## 10. Shift Focus

- Shift company's focus from staying out of trouble to optimizing employee performance

Thank you!

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