

# *Employee Hiring/Firing*

## *Chapter 6*

## Don't Take Potential Employees at Face Value

Suppose you own a motel and a nice young man, Norman Bates (remember the movie *Psycho*?), applies to you for a job. His résumé looks fine (lots of experience in motel management) and he interviews well. Would you hire him without checking him out further? Hopefully not.

If you do not at least make a stab at checking his background, you could be held liable for the next Janet Leigh he cuts down to size. Here are cutting-edge approaches you can use to guide your hiring procedures.

### **Check them all out.**

Always check with an applicant's previous employers. Courts sometimes hold employers liable for negligent hiring when an employee injures someone and the employer did not conduct a background check.

### **A law—not a shot—for immunity.**

Ohio law gives former employers qualified immunity if they respond to your request and tell you about your applicant's past job performance with them. They do lose their immunity if they disclose false, misleading or malicious information. When in doubt, check with your lawyer.

### **A credit report for credibility.**

For applicants seeking jobs involving the handling of money or prescription drugs, entering customers' homes, working with children or the elderly, or driving company vehicles, you should consider a credit report or, at least, a criminal background check.

But do it right. The Fair Credit Reporting Act requires you to get written permission from applicants if you want to get credit reports or background checks for employment purposes.

### **Give fair warning.**

And before you turn down a job-seeker based on a credit or background check, you must give him or her a *pre-adverse action disclosure*. And you must include a copy of the Federal Trade Commission document, "Summary of Your Rights Under the Fair Credit Reporting Act."

But if your applicant is Norman Bates, you might want to mail these documents to him.

*—by Joseph B. Swartz, a partner with Weston Hurd Fallon Paisley & Howley, LLP, in Cleveland. This article is taken from an article in the Ohio State Bar Association's Labor and Employment News.*

## Managing the Hiring Process

One of the most significant steps you, as an employer, can take to ensure efficiency and effectiveness in product or services delivery is to hire and retain the right people to do the job. Despite this reality, many businesses, both large and small, do not take adequate steps during the hiring process to ensure they hire the right individuals. While the hiring process is not an exact science, there are measures you can take to remove some of the guesswork.

When beginning the hiring process, you should ask a few internal questions:

- What will the new employee do?
- What types of experience, skills and abilities should the person have?
- How will this person interact with other employees and customers?

Answering these basic questions will allow you to set a framework that will enhance the probability of hiring the right person.

On the job application form and during interviews, tailor your questions so they are job related. Ask all applicants the same basic questions. Be aware that federal and state laws place numerous restrictions on the types of questions that may be asked. For example, an employer cannot discriminate based on certain characteristics such as age, race, color, gender, religion, disability, marital status or national origin, so inquiries in the interview process must avoid these subjects. (Sexual orientation is another characteristic that is protected by city ordinance in some municipalities including Cleveland, Columbus and Toledo.)

Even casual questions about protected characteristics can potentially create liability. Further, if an applicant volunteers such information, the employer who uses the information to discriminate can be held liable. It is important that all those involved in the interview process understand these limitations, since the actions of employees can create liability for the business.

Do not make any promises during the interview process. Employers should not bind themselves to conditions regarding discharge, benefits or policies and procedures. In Ohio, the general rule is that employees serve at the will of the employer, although numerous judicial decisions over the past 20 or so years have created many exceptions to this doctrine. Any promises could create an implied contract or a legal promise known as *promissory estoppel* that could bind the employer to the promise.

Make sure you request and follow up with references. This may seem obvious, but it is often overlooked. In addition to asking general questions, a reference check with previous employers should always include the question, "Would you re-hire this person?" Under Ohio law, employers are entitled to immunity concerning information they provide in response to a reference check in most situations, so long as the information given is true and accurate.

A successful interview process requires advance planning, so you should spend adequate time preparing for the entire process. Your business should have an outline of interview questions and should be prepared to ask the tough questions. With this advance preparation, a business can go a long way toward getting the right person while avoiding costly and time-consuming legal action.

*—by Marc A. Fishel, a partner in the Columbus law firm of Downes Fishel Hass Kim LLP.*

## **Know the Law When Using an Outside Agency To Do Background or Credit Checks**

***Q: Can I order a credit check on an applicant before I make an offer of employment?***

**A:** Yes, if the employee consents in writing. Oftentimes an employer will review a consumer credit report of an applicant for employment as part of a background check. The Fair Credit Reporting Act (FCRA) permits an employer to request such a report for employment purposes, which may include evaluation of an individual for employment, promotion, reassignment, or retention.

You must make clear and conspicuous disclosure of your intent to get the report to the prospective employee, who must consent in writing. This writing must be separate from the employment application.

If the employer denies employment even in part based on the information in the credit report, the employer must inform the applicant of this fact before taking any such action based on the report. The employer must provide to the prospective employee: 1) a copy of the report; and 2) a written description of the prospective employee's rights (often referred to as the Consumer Bill of Rights).

The employer cannot request the report after the employee ends his or her employment. An employer is permitted to obtain consumer reports containing additional information, such as reputation and personal characteristics, but only upon notice to the employee. Employers who unlawfully obtain credit reports can be liable to the employee for actual damages, punitive damages and attorney fees as well as subject to criminal liability. Be aware that even the lawful use of credit reports may nonetheless run afoul of the civil rights laws. If an employer's use of credit reports consistently impacts the hiring of minorities in a negative way, for example, the employer may be liable for discrimination.

***Q: Can I order a criminal background check on an applicant for employment?***

**A:** Yes, if the employee consents in writing and receives the same protections as he or she would with a credit background check. As confusing as it may seem, Congress regulates criminal reports as part of the FCRA.

***Q: Do you mean that the FCRA regulates criminal background checks as well as reference checks?***

**A:** Yes. Congress originally enacted the FCRA in 1971 to protect individuals from abuses by private companies that created huge databases on individual credit histories. In the years since, these and other businesses have compiled or gained access to criminal records and other information about individuals. Congress responded to this development with an amendment to the FCRA to cover criminal background checks by outside agencies.

***Q: So what, exactly, are the restrictions on criminal background checks?***

**A:** When you use an outside agency to gather information about an individual for employment purposes, you must: 1) make a clear and conspicuous disclosure to the individual of your intent to get the report; and 2) obtain his or her authorization in writing

in order to get the report. This written authorization must be separate from the employment application.

***Q: What if the background information is negative? Can I refuse to hire the person?***

**A:** In order to use information obtained from an outside agency for employment purposes, you must:

- 1) inform an applicant if employment is denied, at least in part, due to the information in the report; and
- 2) provide to the prospective employee a copy of the report and a description in writing of the rights of the prospective employee (Consumer Bill of Rights) before taking any such action based on the report.

You may obtain consumer reports containing additional information, such as reputation and personal characteristics, but only upon additional notice to the prospective employee.

***Q: What happens if I do not follow the procedures properly?***

**A:** You could be liable to the employee for actual damages, punitive damages and attorney fees, and even criminal liability. In other words, you may obtain and use background checks, but you must do so properly.

***Q: Do employers have other options for gathering background information on applicants or employees?***

**A:** Yes. Employers can conduct background and reference checks themselves. If you do not use an outside agency, you can gather information without the restrictions discussed above. In fact, an Ohio law will protect you from lawsuits by employees claiming that you gave or obtained a poor reference about them (see article on reference-checking law).

***Q: What could happen if I decide not to conduct any reference checks at all?***

**A:** Two things, neither of which is good. First, you may hire an unfit employee. Second, you could face a suit for negligent hiring if the employee hurts someone.

You may be liable for negligent hiring if:

- you hire an unfit employee;
- you fail to make reasonable inquiry into the employee's background;
- a reasonable inquiry would have led to rejection;
- you knew or should have known that your employee's contact with others created a risk of harm; and
- you fail to conduct a background check that would have led you to reject the employee, and he or she harms another person while in your employ.

***Q: It sounds like I can get into trouble no matter what I do. What is the best course of action?***

**A:** Be careful, but do not become paralyzed. First, always conduct reference checks. At a minimum, contact the former employer. If you hire an agency to give you a background check, whether credit or criminal, follow the FCRA procedures (outlined above). Finally, use the reference information wisely. If the candidate is unfit, do not hire him or her.

*—by Neil E. Klingshirn, partner in the Akron-based firm of Fortney & Klingshirn, and Maribeth Deavers of Critchfield Critchfield & Johnston LTD in Mt. Vernon.*

## Reference-Checking Law Benefits Employers

**Q: Why was Ohio's reference-checking law enacted?**

**A:** In 1996, a reference-checking law was enacted to help protect employers from frivolous lawsuits sometimes brought by disgruntled former employees. Most Ohio employers engage in a form of *due diligence* as part of their hiring process by investigating the backgrounds of prospective employees. Due to the onslaught of workplace violence, employers may face *negligent hiring* suits if they fail to request or obtain accurate information about the job history of potential employees. At the same time, employers who are asked to provide information about former employees are concerned about being sued by the former employees over the release of information. This latter threat has kept many employers from providing detailed reference information about former employees. The intent of the reference-checking law was to ease this “catch-22” situation for employers.

**Q: What does the reference-checking law say?**

**A:** Under this law, anyone who employs one or more persons within the state of Ohio (including private as well as public employers), or acts directly or indirectly in the interest of such a person, is considered an employer. An employer who provides job performance information for either a current or a former employee is not liable to that employee, or to the prospective employer, or to anyone else for any harm that may result from disclosing this information *unless* the greater weight of the evidence shows that the employer:

- 1) knowingly disclosed false information with the intention of misleading a prospective employer (or anyone else) in *bad faith* or with *malicious purpose*; or
- 2) disclosed information which constitutes unlawful discrimination against the individual's protected class status (such as race, color, religion, sex, national origin, disability, age, or ancestry), or violated the employee's rights under Ohio's Credit Transaction Act (regarding credit checks).

**Q: How does the reference-checking law differ from the law used to govern these situations in the past?**

**A:** Before this law was enacted, the common law standard used in Ohio made it easier for employees to win suits against employers because they only needed to show the court that the employer acted with *actual malice*, meaning that the employer either “knew or should have known” that he or she was providing false information.

Under this law and subsequent case law, employees are required to prove that the employer *actually knew* the information he or she was providing was false or acted with reckless disregard for the truth of the information provided. This standard was set to make it more difficult for employees to win suits against employers. Also, the law allows employers to collect reasonable attorneys' fees and court costs if the lawsuits brought against them are found by the court to be *frivolous* or unwarranted.

Employers are expected to be careful and prudent in their selection of employees due to the threat of negligent hiring suits in the event a bad hiring decision is made. Quality hiring decisions are enhanced through detailed information of a prospective employee's

prior job history. The reference-checking law makes it less dangerous for employers to provide detailed information in response to reference-check requests.

*—by Donald R. Keller, Jerry E. Nathan, and Betsy A. Swift, attorneys with the Columbus firm, Bricker & Eckler LLP, and Timothy J. Owens of the Columbus firm, Christensen Christensen Donchatz Kettlewell & Owens LLP.*

## Employers Have “Qualified Privilege” When Conveying Information about Employees

***Q: My employee has accused me of including false information in his performance review. Does he have any legal recourse?***

**A:** As long as you did not know the information was false and did not act with reckless disregard as to its truth or falsity, you are generally free to express your opinion in a performance review, even if that information is false. In Ohio, employers are protected by what is called a *qualified privilege*. This privilege generally allows employers to freely communicate their thoughts about employees.

***Q: What is a qualified privilege?***

**A:** Qualified privilege means that the employer’s communication is protected by law unless:

- it was not for a legitimate purpose; or
- it was communicated to a person without a need to know; or
- it was made with actual knowledge that it was false or with reckless disregard as to its truth; or
- it was made for a discriminatory reason related to an employee’s race, religion, age, disability, national origin or gender.

***Q: If an employer knowingly communicates false information about an employee, is it considered defamation?***

**A:** Possibly. Defamation is a false publication (either orally or in writing) to a third party that:

- causes injury to a person’s reputation; and
- exposes the person to public hatred, contempt, ridicule, shame or disgrace; or
- affects the person adversely in their trade or business.

However, defamation does not include opinions unless they involve or imply false statements of fact.

***Q: I own a small business, and one of my employees is asking to see a copy of her personnel file. Am I obligated to provide it?***

**A:** If you are an employer in private industry, Ohio law does not require you to provide copies of personnel files unless there is an employment contract, employee handbook or collective bargaining agreement that says otherwise.

—by Frederick M. Gittes, a partner in the Columbus firm of Gittes & Schulte.

# Employee or Independent Contractor?

## Know the Difference

Perhaps no issue of law or business has been as controversial or as pervasive as determining whether workers should be treated as employees or independent contractors. Regardless of the efforts of Congress, the IRS, industry associations and the courts to streamline an approach, this complex issue will continue to require the careful factual and legal analysis of a professional. Safe harbors provided by Congress in the 1978 Revenue Act remain available, but were hotly contested by the IRS on an industry-specific basis through the '90s. Well-intentioned efforts to provide preliminary guidance on this issue to businesses by the IRS through its SS-8 program have provided disappointing and often costly outcomes, because even when the facts strongly indicate independent contractor status under accepted public rulings and procedures, those who apply are almost always determined to be employees.

The issue of the independent contractor/employee dichotomy is contentious because much is at stake. Employees can be much more expensive than contractors, especially for small businesses. Compliance costs in establishing a payroll system, withholding income and employment taxes and filing employment tax returns, depositing payments and issuing W-2s in a timely fashion, almost always require the services of an accountant, even for domestic workers and in-home caregivers. In addition, a business must contribute to the employment taxes for its employee workers, but not for independent contractors. The employer's portion of FICA, FUTA, Medicare tax, state unemployment tax and workers' compensation insurance may put a business at a competitive disadvantage against businesses operating with independent contractors. Some businesses use independent contractors to reduce the cost of labor by contracting at rates other than those provided under collective bargaining agreements and reducing the cost of employee benefits such as vacation/sick pay, health insurance, and pension/profit-sharing contributions. With this many opportunities and separate laws in play, businesses have been known to make costly mistakes.

The business owner should be aware that there are positives and negatives when contracting with independent contractors or hiring employees. The purpose of this article is to sensitize the reader to some of the issues so that he or she will better recognize when and how to seek appropriate counsel.

***Q: I am starting up a new business. How do I know whether my workers are employees or independent contractors?***

**A:** The best time to deal with this issue is when you are forming your business. You will need an accountant to set up a bookkeeping system, project working capital needs, and establish tax return and other compliance systems. Ask your accountant first. Do not rely on what you hear that "everyone else is doing." An experienced certified public accountant (CPA) will be familiar with the 20 common law factors, safe harbor under Section 530 of the 1978 Revenue Act, and the different tests used by the state. Your CPA also should know how competitors treat their workers. Your control over the worker, as well as whether the worker has a significant economic capital investment, licenses, or takes a meaningful risk of loss in connection with his or her services, have an important impact on the answer. There is usually a conservative approach. Your CPA should be able to help.

There are often alternative strategies. Some of these are legal, safe, and can save significant operating costs. Others are reckless or overly aggressive. A good tax, labor or employee benefits attorney is your best choice if you are in a gray area or have special business needs. Many local bar associations have lawyer referral services, and can provide you with information about attorneys who have the appropriate expertise and practice in your geographical area.

Attorneys or CPAs can help you best if they are part of your professional team. Involve them in your decision-making and know when and how to use them.

Remember, attorney-client communications are confidential and *privileged*. The IRS cannot compel your attorney to disclose the facts you provide, the questions you have, or the advice given. While the advice of an accountant also must be kept confidential, and has limited privilege, communications with an accountant are *not privileged in the same way*. Any information used to prepare a tax return can be compelled to be provided to the IRS in an exam. This means that the IRS can, during an examination, compel an accountant to disclose information pertaining to the preparation of tax returns, including the reporting positions taken on employment tax returns. When in doubt, explore any questions involving material risks with an attorney advisor first.

***Q: I was examined by the Ohio Bureau of Employment Services or Workers' Compensation. The agent concluded that my workers are independent contractors and not employees. The IRS can't require me to treat them as employees, can they?***

**A:** Unfortunately, the IRS can, and in many circumstances, it has. The approaches of the state and federal governments are not identical. Even the approaches within the federal government between the IRS and the Department of Labor are not identical.

***Q: I am incorporated and my workers all signed agreements stating that they are independent contractors. If the IRS examines my tax returns and reclassifies my workers, can I be held liable if they failed to pay their taxes?***

**A:** It is very possible. The IRS generally can examine and adjust tax returns within three years after the due date or actual filing, whichever is later. If your business has no employees, it may never have filed an employment tax return. Theoretically, all years remain open to adjustment, regardless of the passage of time. Therefore, if you have treated all your employees as independent contractors, you may effectively have no statute of limitations and your risk-exposure may be great.

If your workers are treated as independent contractors but are truly employees, the law imposes an obligation on your corporation to withhold and pay federal employment taxes to the IRS/Treasury even if the workers may have paid these taxes directly (as if they were self-employed workers). Your corporation can be required to pay the taxes again and the employees may be able to apply for a refund of a portion. The IRS is not bound by the contract between your corporation and its workers, although the contract can provide important evidence of your workers' status. Unfortunately, if your contract is not carefully worded, your workers may not be classified as you intend.

Many IRS reclassifications have led to the bankruptcy of businesses. Some of the important cases interpreting employee status are decisions made by federal bankruptcy courts. Withholding taxes are *not* dischargeable in bankruptcy. The IRS can assess the withholding taxes of the corporation against any officer, director or other person who has authority to pay, knows that the tax is due and willfully fails to pay it. Such personal

liability can be used as a collection approach for some of these employment taxes in connection with a reclassification of workers. This personal liability is *not* dischargeable in bankruptcy.

These are extreme examples of what can happen. If you have a reasonable, but mistaken, belief that your workers were independent contractors and issued 1099 forms as required, there are statutes covering such situations, and your corporate obligation can be reduced. There is a government settlement program which may substantially reduce your exposure. Separate opportunities are available for taxpayers who voluntarily convert contractors to employees, and other, less beneficial opportunities are available even upon audit. The tax and penalties, perhaps even interest, may be reduced or eliminated, but to do so usually requires prospectively treating these workers as employees. If your workers cooperate with you to provide affidavits that they have paid their taxes, you may be able to take credit for some, though not all, of the employment taxes.

In short, it is important to have good advice when establishing your business. If you are examined on an employment tax reclassification issue, involve an attorney early; it can make all the difference.

***Q: I am a general contractor. One of my subcontractors on an important job is having cash flow problems with his payroll. To keep his workers on the job, he has asked me to either loan him the net payroll or pay his workers directly. If I decide to help him out, could I be held liable for his employees' employment taxes?***

**A:** Yes. Either of these accommodations can leave you liable for the employment taxes of the subcontractor if the subcontractor does not deposit the employment taxes on time.

***Q: I am buying an incorporated business and the seller has extensively used independent contractors. If I buy his stock and these workers were actually employees, can I be held liable? What if I just buy his assets?***

**A:** If you buy his stock, the IRS and the state of Ohio can still examine, re-determine employment status, and collect against the corporate assets. Sometimes, careful examinations of the facts and a properly collateralized indemnity agreement will suffice. For example, filed tax returns may be examined, and other federal and state records may be examined by the buyer with the seller's consent. Sometimes enough of the purchase price can be retained by the buyer to cover the potential tax exposure or other seller collateral can be retained by the buyer for a reasonable audit period, during which the seller agrees to hold the buyer harmless from loss. Other times, not. For example, it may be impossible to hold the buyer harmless if the seller must spend all of the proceeds to pay its known obligations.

Buying assets instead of stock can help. However, it is important to check for federal and tax liens and to inquire into pending examinations. Some of these federal and state employment taxes can follow the assets, in some instances even without the filing of a notice of lien.

In buying a business, there are not substitutes for careful examinations of liens, reviews of tax returns, careful evaluations, and well-drafted and collateralized purchase agreements.

—by Gary M. Harden, an attorney with the Toledo firm, Eastman & Smith, LTD.

## Employment-at-Will Doctrine Has Limitations

***Q: Due to a loss of business, I need to terminate a long service employee with health problems. Can I do it?***

**A:** Except under certain circumstances, an Ohio employer generally has the right to fire an employee without cause according to the *employment-at-will* doctrine. Employment is generally *at will*, unless the employer has agreed to continue an employee's employment for a specific period of time or has agreed to terminate employees only for just cause, such as in the case of employees who are covered by a collective bargaining agreement. Employees who are employed at will may quit at any time, but may also be fired at any time. There are, however, some important limitations on an employer's ability to fire workers (see below).

***Q: I always gave a particular employee good reviews and once told him he would always have a job here if he kept up the good work. Does he have a contract?***

**A:** Yes, but the term of the contract is probably still *at will*.

Every employee has a contract, including the employee in your example. The employment contract covers what you will pay for work performed. Employment contracts are generally informal and do not have to be in writing.

The question remains, though, whether this employee has a contract for a specific term of employment. If not, the employment is *at will*, meaning either one of you can terminate the employment contract at any time.

In your case, you told your employee that he would always have a job if he kept up his good work, which he did. Although you meant it at the time, your circumstances have changed and you would like to terminate his employment. Can you do so?

The answer is probably "yes," because you did not commit to employing him for a specific period of time. While a promise of this nature may invite litigation, Ohio courts will *not* assume, in such a case, that the employer meant to continue the employment forever. Rather, courts will look at all of the circumstances, and not just the one statement you made. For example, a court may consider statements in an employee handbook or a promise such as, "You will have a job until the plant closes," especially if made with an employee whose job was necessary for closing the plant.

Standing by itself, though, a promise of employment for "so long as you do a good job" is probably not specific enough to alter the at-will status of employment.

***Q: I hired a senior executive from California and paid to relocate her family to Ohio. She agreed to repay her moving expenses if she leaves before two years. She also agreed not to compete against me for two years after she leaves. Do these two agreements mean I cannot fire her for two years?***

**A:** No. You made two agreements for specific periods of time, but neither one of them promised employment for a specific period of time. The non-compete agreement does not cover her employment; rather, it covers the period after her employment ends.

Your promise to repay relocation benefits might look like an agreement to continue employment, but Ohio courts have generally concluded that such a promise defines the time required for an employee benefit to vest and not the length of time of employment.

**Q: *What if my employee also belongs to a union? Is he or she an “at-will” employee?***

**A:** Probably not. Employees covered by collective bargaining agreements generally can only be terminated for *just cause* under the terms of the agreement.

Lack of work, documented poor performance or employee dishonesty may be *good cause* to terminate an employee. If you cannot convince the judge or arbitrator of this, however, the judge or arbitrator can order you to put the employee back to work with lost wages and benefits. In other words, the union could file a grievance challenging this termination, and the union may choose to take that grievance to arbitration, where a neutral third party will take evidence and decide whether your reason for the termination is for just cause. You will have to convince an arbitrator that your business conditions gave you just cause to terminate an employee, and that this was the proper employee to terminate.

**Q: *My employee has no contract and is not in a union. Can I fire him for any reason?***

**A:** No. You cannot fire an employee for an unlawful reason. Under various state and federal laws, unlawful reasons include terminations:

- 1) because he/she supports or opposes a union;
- 2) because he/she complained to you, in concert with at least one other employee, about his/her wage, hours or other terms and conditions of employment;
- 3) based on race, color, religion, sex, or national origin;
- 4) because you want a younger work force;
- 5) for having a handicap that does not interfere with your employee’s job;
- 6) for refusing to break the law;
- 7) because a single creditor garnished the employee’s wages;
- 8) because he/she complained about illegal or unsafe activities;
- 9) for complaining to appropriate government agencies about safety matters;
- 10) for serving on a jury or testifying at a civil rights hearing;
- 11) for filing a worker’s compensation claim; or
- 12) to prevent her/him from receiving a pension.

This is not a complete list of unlawful reasons. Check with an experienced employment lawyer if you are not sure whether your reason for terminating an employee may be unlawful.

If a reason is not unlawful, you can legally terminate an employee even if the reason is unwise or unfair. For example, if you do not like an employee or the way he or she dresses or acts, you may lawfully terminate him or her.

**Q: *If my employee is in a protected group or has engaged in protected conduct, does that mean I cannot fire him?***

**A:** Not necessarily. While you cannot fire the employee *because* he is in a protected group or engaged in protected conduct, you may nonetheless terminate that employee for a legitimate reason. The problem you may run into, however, is that the retaliation and discrimination laws allow employees to ask juries to second-guess employer motives. Thus, if you terminate an employee right after he or she complained about a co-worker’s sexually harassing conduct, a jury may believe that the complaint caused the termination.

As another example, if an employer suspends an employee for a long-standing attendance problem several days after he said he could not come to work because of poor air quality in the shop, a jury might believe that the suspension had more to do with the complaint of poor air quality than with the employee's poor attendance.

At bottom, treat employees in a protected group or employees who engaged in protected conduct as you would treat any other employee. Apply discipline even-handedly. That way, if you need to take an adverse action against a protected employee, you can show that you dealt with that employee's performance problem the same way you handled similar problems with non-protected employees.

*—by Neil E. Klingshirn, partner in the Akron-based firm of Fortney & Klingshirn.*

## **Know the Law before Hiring or Relocating Employees for Work in Ontario, Canada**

Whether you already have operations in Ontario, Canada, or you are thinking of embarking on operations there, you should be aware of important differences in the labor and employment laws that will apply.

***Q: Our company will be sending a few of our employees to work at our branch in Ontario, Canada. Won't American labor and employment laws simply apply to them while they are relocated?***

**A:** Generally, no. As the law stands right now, United States labor and employment laws will not typically apply to issues that may arise during the Canadian phase of their employment, but that may depend on the circumstances of their employment. For instance, if they are not simply *on loan* to the Canadian branch for a short period of time (*i.e.*, in the role of a consultant), if they are going to be on the payroll of the Canadian branch employer, and if they are paying Canadian income taxes, the terms of their employment will most likely be governed by Ontario and Canadian laws.

***Q: Are there any laws in Ontario we should know about like the Fair Labor Standards Act here that deal with issues like minimum wage, overtime, and hours of work?***

**A:** Yes. Employment in Canada is regulated by the province in which the employee is working, unless the employer is a federal corporation (*e.g.*, banks, post offices). That means every province has legislation designed to protect all employees working in that province regarding issues like minimum wage, overtime, hours of work, statutory holidays, benefit plans, vacation, pregnancy and parental leave, and termination issues. In Ontario, this legislation is called the Employment Standards Act of 2000 (ESA).

***Q: Is there anything special that our company should know about in advance if we have to terminate an employee who is working in our Ontario branch?***

**A:** Yes. There are many differences between Canadian and American employment laws. For instance, *employment-at-will* does not exist in Canada. That means that Canadian courts insist that the relationship between an employer and an employee is a binding contract (even if there is nothing in writing). While either the employee or the employer can break that contract for any reason that is not discriminatory, and at any time during the employment relationship, prior notice must be given of either party's intention to break that contract. If no notice is given, money damages (or *notice pay*) must be paid, with some exceptions, for willful misconduct, disobedience and willful neglect of duty. There are numerous specific rules for dozens of industries, from IT professionals to trade show representatives to salespersons.

***Q: What is notice pay?***

**A:** *Notice pay* is the equivalent to the compensation the employee would have received had he or she been given sufficient notice of the employer's intention to break the contract.

***Q: How much notice is enough?***

**A:** This varies with the length of service and the precise occupation involved, and can be as long as eight weeks. Special rules requiring eight or more weeks' notice also apply in the case of mass termination of 50 or more employees.

***Q: Isn't notice pay the same as severance pay?***

**A:** No. In Ontario, notice pay is different from severance pay. In almost all cases, any employee who is not being terminated for cause will be entitled to notice pay. Under the ESA, whether or not a terminated employee is entitled to severance pay depends on length of service; how much money your company spends a year on its Canadian payroll; or how many employees are being simultaneously terminated. So, under certain circumstances, an employer may have to pay *both* notice pay and severance pay to terminated employees.

***Q: What if one of our employees becomes disabled while working in Canada? Are we obliged to follow any laws like the Americans with Disabilities Act (ADA) here?***

**A:** Yes. The Ontario Human Rights Code (OHRC) is the law that protects individuals in Ontario from different types of discrimination (race, age, gender, national origin, etc.) and includes disability discrimination. The OHRC imposes an onerous duty on employers to accommodate physically and mentally disabled employees "to the point of undue hardship."

***Q: What is undue hardship?***

**A:** If the Ontario branch of your company finds itself in a situation where one of its employees is unable to work due to medical reasons, the company will generally be expected to accommodate the employee's disability unless it can quantifiably demonstrate that the burden is so heavy that it will substantially alter the nature of the operation or substantially affect its viability. This is a heavy burden that goes far beyond comparable ADA duties of reasonable accommodation under United States law.

***Q: If an employee who is working in Canada accuses the company of discrimination, can that employee file a lawsuit?***

**A:** No, but the employee can file a complaint with the newly established Human Rights Tribunal of Ontario, an administrative agency with broad remedial powers. The *Ontario Human Rights Code* recognizes a very broad range of impermissibly discriminatory categories, including race, ancestry, place of origin, color, ethnicity, citizenship, religion, gender (including pregnancy), sexual orientation, disability, age, marital status, financial status, receipt of public benefits and even record of offenses.

*—by Cindy-Ann L. Thomas, a Columbus attorney with the firm of Littler Mendelson, who is admitted to the bars of Ohio and Ontario, Canada. Updated by Jeffrey S. Moeller, an attorney practicing immigration and employment law at Hermann, Cahn & Schneider in Cleveland.*

## **Employers Must Take Steps To Avoid Hiring Illegal Aliens**

***Q: I own a restaurant, and often am approached about offering jobs to aliens. What does the law say about whom I can and cannot hire?***

**A:** Ever since passage of the Immigration Reform and Control Act of 1986 (IRCA), it has been a violation of federal law for any employer (even of one employee) to knowingly employ an alien not authorized to work in the United States, or to hire anyone (citizen or alien) without keeping special records that verify the employment status of all employees. Some states (but not Ohio) have passed laws that create obligations and liability relating to the employment of illegal aliens.

***Q: What steps do employers have to take to avoid employing illegal aliens?***

**A:** Under the IRCA, employers generally must require every new hire, even U.S. citizens, to complete a Form I-9, titled the “Employment Eligibility Verification Form,” published by the U.S. Citizenship and Immigration Services (USCIS). The I-9 was updated in June 2007 and all employers were required to be using the new form as of December 26, 2007.

If you hire someone who is not a United States citizen or lawful permanent resident, that employee likely has authority to work in the United States only until a defined end date. For these employees, the employer must pull their I-9 Form before the expiration date and obtain from them a new work authorization document showing that their entitlement to work in the United States has been extended. Employers need to establish a reliable tickler system to prompt this re-verification process.

The I-9 process requires employers to maintain a difficult balance made even more difficult in the aftermath of the events of September 11, 2001. On one hand, IRCA requires employers to insist that all new hires present documentation to verify their identity and work eligibility. On the other hand, the Form I-9 requirements are designed to prevent unnecessary or discriminatory inquiry into the employee’s nationality, and IRCA generally prohibits employers of more than three employees from discriminating against non-citizens who are eligible to work.

As of November 2008, 25 states (but not Ohio) have passed laws that address the employment of unauthorized foreign nationals. Generally speaking, these laws fall into three categories: 1) those requiring all employers to take more steps than IRCA requires to verify the employment authorization of new hires; 2) those requiring state contractors to take special steps to confirm the employment authorization of their employees as a condition of their contracts; and 3) those which impose sanctions for employing unauthorized aliens beyond those imposed by IRCA. Most of these states require or recommend that employers use the electronic system called *E-Verify* to confirm the employment eligibility of new hires. E-Verify is administered by USCIS and the Social Security Administration, and is the subject of considerable controversy.

***Q: What documents must employers review to complete the Form I-9?***

**A:** To fulfill its I-9 obligations under IRCA, employers must require new hires to supply documents to establish their identity and their employment eligibility. Most new hires will need to supply one document to establish their identity (a driver’s license or any other document found on “List B”) and another to establish their employment eligibility (a birth certificate or any other document found on “List C”). A few documents establish

both identity and employment eligibility (such as a passport or some other document found on “List A” on the back of the Form I-9).

***Q: Are photocopied documents acceptable?***

**A:** No, with one exception: certified copies of birth certificates are acceptable.

***Q: What are the earliest and latest dates for completing an I-9 Form?***

**A:** The form cannot be completed until the applicant is offered a job, and should not be completed until the new hire starts work. It **MUST** be completed no later than three days after the employee starts working, unless the employee is an alien who submits a receipt showing an application to the USCIS for a valid employment authorization document, and then supplies the document within 90 days.

In October 2004, legislation was enacted that allows for the I-9 to be completed, signed and stored on a computer. In June 2006, regulations were issued implementing the new statute that set forth the rules and standards for completing forms electronically and also for the scanning and storage of existing I-9 forms.

***Q: Do I, as an employer, need to keep a copy of the documents presented to verify identity and employment eligibility?***

**A:** No, but you can, and many (but not all) immigration lawyers think you should. Keep in mind, however, that if you choose to keep a copy for one new hire, you must keep copies for all new hires, and you **MUST** keep them all in a file or files separate from any employee’s personnel file.

***Q: Where and for how long must I keep I-9 forms?***

**A:** Keep all I-9s and supporting documentation in a file that is separate and apart from any personnel file for a period of three years after the date of hire or one year after the termination of the employment relationship, whichever is later.

***Q: Is it my responsibility to determine whether or not the documents presented to me are authentic?***

**A:** If the new hire presents qualifying documentation that reasonably appears genuine and relates to the person presenting it, the employer **MUST** accept it; the employer cannot discriminate against non-citizens by insisting on any particular form of documentation or on additional documentation requirements for proof of identify or employment authorization beyond those established by IRCA. If the documentation turns out later to be fraudulent, and you have otherwise complied with the I-9 rules, you will not be subject to sanctions.

***Q: If a graduating foreign student applies for an opening for which he or she is clearly qualified, but can obtain employment eligibility only if I apply to the USCIS on his or her behalf, am I legally required to submit the application?***

**A:** No. An employer has no obligation to obtain permission to employ an otherwise ineligible foreign national.

***Q: What should I do if I rehire a person who previously filled out a Form I-9 for me?***

**A:** You can use the old Form I-9 if you rehire the person within three years of the date the original I-9 was completed. You may also choose to complete a new I-9 instead. Also, it is not necessary to complete a new I-9 after:

- an employee completes paid or unpaid leave (such as for illness or a vacation);

- a temporary lay-off;
- a strike or labor dispute;
- gaps between seasonal employment.

***Q: What are the penalties for failing to prepare or maintain a Form I-9?***

**A:** Under the IRCA, an employer can be fined anywhere from \$275 to \$16,000 per unauthorized alien, depending upon the severity of the offense. Fines for record-keeping violations can range from \$100 to \$1,100 per individual. There is even the possibility of criminal penalties (imprisonment for up to six months) for *pattern and practice* violations or knowingly accepting fraudulent documents.

***Q: What are the penalties for discrimination based on citizenship status?***

**A:** IRCA prohibits employers with four or more employees from discriminating on the basis of citizenship status, which occurs when adverse employment decisions are made based upon an individual's real or perceived citizenship or immigration status. Examples of citizenship status discrimination include employers who hire only U.S. citizens or U.S. citizens and green card holders; employers who refuse to hire asylees or refugees because their employment authorization documents contain expiration dates; and employers who prefer to employ unauthorized workers or temporary visa holders rather than U.S. citizens and other workers with employment authorization. IRCA penalties for discrimination range between \$275 and \$2,200 for each victim for the first offense; \$2,200 to \$5,500 for the second offense; and \$3,300 to \$11,000 for the third offense.

*–by Barton A. Bixenstine, shareholder at Ogletree, Deakins, Nash, Smoak & Stewart, PC, in Cleveland.*

## **U.S. Immigration Laws Allow Treaty Trader Visas**

### **E-2 treaty investors**

The United States has reciprocal trade treaties with many countries, allowing persons to enter and establish a variety of businesses in each country. A person from another country may be able to obtain a visa to enter the United States as an *E-2* treaty investor if he or she is coming to develop and direct the operation of a business in which the person has invested (or is about to invest) a substantial amount of capital. There must also be a trade treaty with the person's home country in place. For a list of treaty countries, visit: [http://travel.state.gov/visa/frvi/reciprocity/reciprocity\\_3726.html](http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3726.html).

Unlike most non-immigrant categories, the U.S. consulates abroad, rather than the U.S. Citizenship and Immigration and Services (USCIS), usually process applications for E status in the first instance. The method of processing E-2 visas can vary, depending upon where the person is located when applying for the status. E-2 visas can be obtained by petitioning USCIS or by applying for the status at a U.S. consulate or embassy abroad. Note, however, that not all U.S. consulates and embassies process E-2 visas, and that research on a particular consulate or embassy should be conducted before an appointment is scheduled.

*You should know:*

- Employees of an E-2 treaty investor who share the same nationality as the primary investor may also be admitted, if they will perform duties requiring special qualifications necessary for the efficient operation of the business.
- The primary investor is initially admitted for two years, but this period can be renewed repeatedly. A spouse and children may be admitted as well. Spouses may apply for work authorization.
- The funds to be invested must be committed at the time the visa is issued. The amount varies widely depending on the type of business and the consulate involved. It is difficult for a person to obtain an E-treaty visa for investment funds of less than \$100,000 in U.S. currency, however.
- The business needs to be something more than a self-employment mechanism; showing how the business will create jobs for U.S. workers greatly improves the chance for success.
- As long as the amount of capital at risk is substantial, the type of business is not important. Many motels and small businesses are operated by E-2 treaty traders.
- If the treaty trader is a business rather than an individual, at least 50 percent of the business must be owned by citizens of the treaty nation. The place of incorporation does not matter.

### **E-1 treaty traders**

A person may qualify as an *E-1* treaty trader if he or she is coming to the United States to carry on substantial trade in goods or services between the United States and that person's own treaty nation. More than 50 percent of the international trade must be with the applicant's nation. For instance, if the treaty trader is from Canada, more than 50 percent of the international trade must be between the United States and Canada.

*You should know:*

- These E-1 businesses may be smaller and have less money at stake than E-2 companies.
- The trade can be in goods (such as an import/export business) or services (such as a special company catering to tourists from one particular nation).

*–Jeffrey S. Moeller is an attorney with the Cleveland firm of Hermann Cahn & Schneider LLP.*

## Protect Your Interests with Non-Competition Agreements

Employees today are ready, able and willing to leave your job for one with your competitor, who may even have recruited them. Small business owners are particularly vulnerable to “employee raiding” by larger competitors.

To protect their investment in employees, small business owners increasingly turn to non-competition agreements. Through such agreements, employees must, in exchange for their employment, accept reasonable restrictions on their ability to compete for a period of time after the termination of their employment. For example, a Columbus-based employer may require its employee not to compete within a five-mile radius of downtown Columbus for one year following the termination of employment.

***Q: Are non-competition agreements enforceable?***

**A:** Courts generally will enforce non-competition agreements if:

- 1) the employer proves it has a legitimate business interest to protect;
- 2) the employee’s right to compete is restricted only enough to protect the employer’s business interest;
- 3) the employer gave the employee something in exchange for the non-competition agreement; and
- 4) the agreement does not injure the public.

Most courts will enforce a non-competition agreement for a year or two in the same geographical area that the employee worked.

CAVEAT: If you do business outside Ohio, some other states refuse to enforce such covenants.

***Q: What are some examples of an employer’s legitimate business interests?***

**A:** An employer can legitimately prevent an employee from taking advantage of relationships or information acquired as a result of the employment. If an employer gives a new employee its confidential customer list, for example, the employer can enforce an agreement preventing the employee from contacting those customers on behalf of a competing business.

***Q: Must I give my employees anything in return for signing non-competition agreements?***

**A:** Yes. To enforce such a contract, you should give the employee something for signing it. The best thing to give in exchange for a non-competition agreement is a job. In other words, if you require a non-compete at the time of employment and as a condition of employment, you have given the employee enough to make the agreement enforceable. If the employee is *at will*, meaning that you have not agreed to employ him or her for a specific period of time or to discharge him or her only for just cause, then continuing the employment is also sufficient consideration for a non-competition agreement.

***Q: How can a non-competition agreement injure the public?***

**A:** The public may be harmed if there is an undersupply of the service your employee provides. For example, a physician’s group cannot prevent a doctor it employs from treating patients who might not otherwise receive medical help due to a shortage of doctors.

***Q: What if my employees refuse to sign?***

**A:** You might consider hiring other employees. You must weigh the risk that an employee might use information to compete against you against the cost of hiring a new employee. If the risk of competition is too great, ask all future employees to sign the agreement as a condition of their continued employment. Ohio law allows you to fire or refuse to hire an employee who does not sign a non-competition agreement.

***Q: I need to terminate an employee who I have reason to believe might compete against me. Can I get a non-competition agreement from that employee before the termination?***

**A:** Yes, if the employee agrees and you provide something of value for it, such as severance benefits. However, such an individual is in a very good bargaining position and may demand more than you are able or willing to pay.

***Q: Is there any other way I can protect myself if I do not have non-competition agreements with my employees?***

**A:** Yes. Ohio prohibits employees from misappropriating *trade secrets* from former or current employers. Examples of trade secrets include confidential customer lists and pricing information and secret formulas and methods.

***Q: Can I do anything to stop another employer from hiring my employee to compete against me?***

**A:** Yes. If the other employer knowingly causes the employee to breach a non-competition agreement, you can take legal action against the new employer for unlawful interference with the non-competition agreement between you and your former employee.

*–by Neil E. Klingshirn, partner in the Akron-based firm of Fortney & Klingshirn.*

## Know How To Handle Retaliation and Whistle-Blowing

**Q: Why should I worry about retaliation suits?**

**A:** If employees engage in *protected conduct*, they can claim *retaliation* for later discipline or termination. If successful, they can recover significant monetary damages.

To survive the threat of retaliation claims employers must:

- 1) recognize protected conduct when they see it;
- 2) respond properly to the protected conduct; and
- 3) base all adverse employment decisions on legitimate business reasons.

**Q: What is retaliation?**

**A:** The gist of a retaliation claim is that an employer “gets back” at an employee for doing something that is protected by law. To win a retaliation claim, an employee must prove that:

- 1) he/she engaged in protected conduct;
- 2) he/she was demoted, disciplined, fired or otherwise suffered some adverse employment action; and
- 3) his/her protected conduct was a cause of the adverse employment action.

**Q: Is whistle-blowing the same thing?**

**A:** Not quite. Whistle-blowing is a form of protected conduct (*i.e.*, reporting an employer for alleged violations of law or safety regulations). For an employee to win a retaliation suit against an employer, the employer would have to respond to the whistle-blowing or other protected conduct by doing something that adversely affected the employee’s job (such as demoting or firing that employee).

**Q: What are some other examples of protected conduct?**

**A:** Other examples of protected conduct include:

- 1) asking for overtime pay;
- 2) filing a complaint with the U.S. Department of Labor;
- 3) reporting sexually harassing conduct;
- 4) serving for the armed forces or reserve; and
- 5) applying for medical benefits or leave.

A less obvious example occurs when an employee complains about general working conditions on behalf of others, even if the conditions comply with the law. Federal labor law prohibits retaliation against an employee who engages in such *concerted activity*.

**Q: How do I know what conduct is protected?**

**A:** Get to know your employees’ rights. When employees exercise their rights, they engage in protected conduct. They also engage in protected conduct by doing things valued by the public, such as reporting wrongdoing or serving their country or community.

**Q: What should I do if my employee engages in protected conduct?**

- A:**
- 1) Do not get angry.
  - 2) Address the complaint made by the employee.
  - 3) Make future employment decisions as if the employee had not engaged in the protected conduct.

***Q: Does this mean I can't fire someone after he or she does something protected?***

**A:** Not at all. It means you cannot fire someone *because* he or she did something protected. So long as your reason for terminating an employee's employment is legitimate, you have not broken the law. The problem for employers is that retaliation suits let juries second-guess your motives. If, for example, you terminate your employee very shortly after that employee engages in protected conduct, juries will be inclined to believe that the protected conduct caused the termination.

***Q: What if the employee engaged in so-called protected conduct with no basis whatsoever. Can they really sue me?***

**A:** Maybe not. The U.S. Supreme Court once ruled that an employee could not win a suit claiming retaliation for complaining about sexual harassment where the alleged harassing conduct was such that a reasonable person would not consider it to be sexual harassment. Therefore, the court held, the employee had not engaged in protected conduct at all and therefore could not pursue a retaliation claim.

As a practical matter, if it appears that the employee has engaged in protected conduct, respond to the conduct in good faith, without getting angry or straying from sound business justifications for any employment action. Theoretically, you can lawfully discipline an employee for making a completely groundless, bad faith complaint. You should, however, contact legal counsel beforehand and expect a challenge from the employee.

***Q: How can I survive the threat of a retaliation suit?***

- A:**
- 1) Recognize protected conduct and respond to it properly.
  - 2) Always base employment decisions on a good business reason. Test yourself by asking whether you would do the same thing if the employee had *not* engaged in the protected conduct.
  - 3) Document (write down) the reasons leading up to adverse employment actions. If the reason is discipline for poor performance, write down the fact of poor performance before you discipline the employee.
  - 4) Finally, consult legal counsel in a close case. Legal counsel can show you how to demonstrate your good intent and negate the suggestion of unlawful retaliation.

Remember, if it looks like you got mad and then got even, you are fair game for a retaliation suit.

*—by Neil E. Klingshirn, partner in the Akron-based firm of Fortney & Klingshirn.*

## **EEOC and Civil Rights Commission**

### **Address Workplace Discrimination**

**Q: What does the EEOC (U.S. Equal Employment Opportunity Commission) do?**

**A:** The EEOC and a similar state agency, the Ohio Civil Rights Commission (OCRC), enforce laws that prohibit employment discrimination based on age (for employees over 40), sex, pregnancy, race, national origin, disability, creed or religion.

**Q: Is all discrimination unlawful?**

**A:** No. For example, you can discriminate against a lesser-qualified employee by selecting the better-qualified employee for hire or promotion. You could even discriminate against someone born under the sign of Aquarius without breaking the law.

Why?

Discrimination laws respond to specific, invidious biases that history shows have worked their way into employment decisions to the disadvantage of certain groups of people. These biases lack any valid business justification and have been used to deny people employment opportunities because of the bias.

While a bias against people born under the sign of Aquarius lacks any business justification, it is not so widespread that Aquarians generally are at a disadvantage when it comes to employment opportunities. Congress has thus only authorized the EEOC to investigate and remedy discrimination based on age, sex, pregnancy, race, national origin, disability, creed or religion.

**Q: Can I refuse to hire someone who is not qualified?**

**A:** Yes. Moreover, as the employer, you can decide what qualifications are necessary for your job. You cannot, however, use different qualification standards for protected and non-protected class members (for example, women but not men must pass a skills test) or set qualifications that exclude a disproportionate number of protected class members (for example, minimum lifting requirements that disqualify a greater percentage of women than men), where such requirements are not necessary to perform the job in question.

**Q: Could I be charged with employment discrimination even if I do not discriminate?**

**A:** Yes. Applicants or employees can file a charge of discrimination with the EEOC or the OCRC even if you based your decision on a legitimate, non-discriminatory reason. Once a charge is filed against you, the EEOC or the OCRC will investigate your hiring practices.

**Q: Does the EEOC investigate anything other than discrimination?**

**A:** Yes. The EEOC also investigates charges of *retaliation*. An employee can claim retaliation if:

- 1) he or she files or helps investigate a charge of discrimination;
- 2) you take an adverse employment action (fire, demote or discipline the employee);  
and
- 3) the employee can show a causal connection between the two.

(For further information about retaliation suits, see, “Know How To Handle Retaliation and Whistle-Blowing,” also in this handbook.)

***Q: What should I do if I am charged with discrimination?***

**A:** Consult legal counsel. You need to give the EEOC a thorough explanation of your employment decision. This explanation must balance the EEOC’s need to investigate the charge with your interest in keeping confidential employment decisions confidential. Legal counsel can help you balance these interests.

Make sure you do not give the EEOC a false explanation for what you did. You are better off if you give no reason for taking an adverse employment action than if you give a false reason. If the EEOC discovers that the reason you gave was false, it can find you liable for discrimination on that basis alone.

*–by Neil E. Klingshirn, a partner in the Akron-based firm, Fortney & Klingshirn.*

## **Employers Must Comply with the Americans with Disabilities Act (ADA)**

***Q: What employers are covered by the Americans with Disabilities Act (ADA)?***

**A:** Private employers, state and local government employers, employment agencies and labor unions with 15 or more employees are covered. (Federal employees and employees of federal contractors may be covered under a different law, the Rehabilitation Act of 1973. This act has some different requirements, including a 30-day time limit for filing complaints about rights violations.)

***Q: What employment activities are covered by the ADA?***

**A:** The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

***Q: What is the definition of “disability” under the ADA?***

**A:** The definition of *disability* has changed through the Americans with Disabilities Act (ADA) Amendments Act of 2008, effective as of January 1, 2009.

The ADA Amendments Act retains the definition of disability as a physical or mental impairment that substantially limits one or more major life activities. However, the new act makes major changes to the way that definition of disability is to be interpreted.

The ADA Amendments Act states that the Equal Employment Opportunity Commission (EEOC) regulations that defined “substantially limits” as a “significant restriction” set too high a standard and are inconsistent with Congressional intent. The act directs the EEOC to revise its definition of “substantially limits.” At the time this article was written, the EEOC was working on the revision.

The act also explicitly rejects U.S. Supreme Court decisions that applied a strict and demanding standard for disability.

Among the major changes in the act are:

- The effects of mitigating measures (medications, hearing aids, etc.) other than ordinary glasses or contact lenses now cannot be considered in assessing whether a person has a disability.
- An impairment or condition that is in remission or episodic in nature (cancer or depression, for example) now is a disability if the impairment or condition substantially limits a major life activity when it is active.
- The definition of *major life activities* is now expanded to include major bodily functions such as immune system functions, circulatory and reproductive functions, endocrine system functions, bowel, bladder and digestive functions and circulatory functions, among others.

The act emphasizes that the definition of disability must be interpreted broadly and should not require extensive analysis. This act’s more expansive definition means that

employers will now have to engage in the interactive process to identify accommodations for a broader range of employees with disabilities.

The act also retains the definition of disability that includes those who have a “record of” disability and those who are “regarded as” having a disability. The act provides that a person who is discriminated against because of an actual or perceived impairment meets the “regarded as” definition of disability unless the impairment is either transitory or minor. The act also clarifies that an employee who is “regarded as” disabled is not entitled to a reasonable accommodation.

***Q: Can a person with a psychiatric diagnosis be excluded from coverage for other reasons?***

**A:** There are several *exclusions* from coverage. People who use controlled substances for unlawful purposes, including those who take any prescribed drug without the required supervision of a licensed health care professional, do not have a disability under the ADA. However, the ADA protects people who participate in or have completed a supervised drug rehabilitation program and no longer use illegal drugs. The ADA also excludes sexual compulsions, preferences and disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current use of illegal drugs.

Alcoholism, but not on-the-job drinking or working while alcohol impaired, is a covered disability.

People who have disabilities, but pose a “direct threat to health and safety” that cannot be eliminated by reasonable accommodations, are not covered by the ADA. People with mental disabilities cannot be excluded based on general, stereotypical assumptions about dangerousness. Any threat must be based on sound medical judgment and objective evidence of factors such as the duration of the risk, the nature and severity of the potential harm, the likelihood that harm will occur, and the imminence of the harm. Of course, a person with a disability must be able to perform the essential job functions with or without reasonable accommodations in order to be covered by the ADA.

***Q: Does the ADA protect people who do not have disabilities but have a relationship to or association with a person with a disability?***

**A:** Yes. The ADA prohibits discrimination based on “relationship or association” in order to protect people from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning disabilities. For example, the ADA would protect a person with a disabled spouse or child from being denied employment because of an employer’s unfounded assumption that the applicant would use excessive leave to care for the disabled spouse or child. It also would protect a person who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

***Q: Can a potential employer make inquiries about an applicant’s disabilities?***

**A:** Employers may not ask any questions about the presence or nature of a disability on job applications or during job interviews. Instead, the employer should define the essential functions and conditions of the job and then ask the applicant about his or her qualifications to perform the job. Employers *can* ask disability-neutral questions such as questions about job history (*e.g.*, gaps in employment). For more detailed information

about what questions are appropriate for employers to ask, consult the Job Accommodation Network's Web site: [www.jan.wvu.edu](http://www.jan.wvu.edu) or contact that organization at (800)526-7234. (The Job Accommodation Network in the United States is a service of the President's Committee on Employment of People with Disabilities. In Canada, the Job Accommodation Network is a service of Human Resource Development Canada/ Canadian Council on Rehabilitation and Work.)

***Q: Does a person with a mental disability lose the right to get a reasonable accommodation for the mental disability if he or she fails to disclose the existence of a disability during the hiring process?***

**A:** No. Employees may disclose that they have a disability after many years on the job and request reasonable accommodation at that time. Of course, an employer is only required to make accommodations for *known* disabilities of applicants or employees.

***Q: Once a person with a mental disability has been offered a job, can the employer require a "post-offer medical examination"?***

**A:** Yes, as long as all applicants in the job category, and not just those suspected of having a disability, are required to be examined. After a "conditional job offer" has been extended, there are no limits on inquiries about the presence or nature of a disability. However, the employer may only withdraw a job offer if the applicant cannot perform the essential functions of the job *with or without reasonable accommodations*.

***Q: Does an employer have the right to require documentation of the employee's disability and the need for accommodations?***

**A:** Once on the job, the employer may ask questions that are "job-related and consistent with business necessity." When an employee asks for reasonable accommodations, the employer is entitled to information to substantiate that request and to work out an effective accommodation.

***Q: What is a reasonable accommodation?***

**A:** Reasonable accommodation is a modification or adjustment to a job or work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. It includes adjustments in policies or procedures and other modifications to assure that qualified people with disabilities have rights and privileges in employment equal to those of non-disabled employees.

***Q: What kinds of actions are required to make reasonable accommodations?***

**A:** Examples of reasonable accommodation include making facilities readily accessible and usable by a person with a disability; job restructuring; modifying work schedules; acquiring or modifying equipment; reassigning an employee to a vacant position for which the person is qualified; or providing private or quiet work space. To find a list of possible reasonable accommodations for people with physical and psychiatric disabilities, consult the Job Accommodation Network's Web site at: [www.jan.wvu.edu](http://www.jan.wvu.edu).

***Q: Are there limitations on the duty to provide accommodations to employees?***

**A:** Yes. Employers are not required to lower quality or quantity standards in order to make an accommodation, nor are they required to provide personal use items such as

glasses or hearing aids. Employers are not required to create new job positions, or to find a position for an applicant who is not qualified for the position sought.

In addition, an employer is not required to make an accommodation if it would impose an undue hardship on the business. *Undue hardship* is defined as “an action requiring significant difficulty or expense” when considered in light of the overall resources, size, nature and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.

***Q: How might my employees enforce their rights under the ADA?***

**A:** Employees likely will try to resolve disputes with the employer before taking formal action. Sometimes questions about the existence of a disability or the necessity for an accommodation may be resolved if the employee provides the employer with documentation. If informal measures fail, federal law requires that the person with a disability file an administrative complaint before a lawsuit can be filed.

An administrative complaint with the U.S. Equal Employment Opportunity Commission (EEOC) must be filed within 300 days of the date the violation occurred. Ohio law also allows the filing of a complaint with the Ohio Civil Rights Commission (OCRC). This must be done within six months of the date the violation occurred. If either agency investigates and determines that there has been a violation, the agency can negotiate a resolution or sue in court. If the agency fails to negotiate or concludes that there is no discrimination, it will issue a letter to the complainant, who may then sue in court.

Possible remedies include: hiring; reinstatement; back pay; court orders to stop discrimination; or orders to provide reasonable accommodation. Compensatory damages may be awarded for actual monetary losses and for future monetary losses, mental anguish and inconvenience. Punitive damages may be awarded as well, if an employer acts with malice or reckless indifference. Attorneys’ fees also may be awarded.

Under some circumstances, employment contracts (*e.g.*, union agreements) can limit the action an employee can take. For example, if carefully worded, an employment agreement might require that discrimination disputes be resolved through binding arbitration.

The administrative agencies can be contacted at:

U.S. Equal Employment Opportunity Commission (call to find out which office covers your county):

Cleveland Field Office  
Anthony J. Celebrezze Federal Building  
1240 E. 9th Street Suite 3001  
Cleveland, Ohio 44199  
(800)669-4000

Cincinnati Area Office  
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## Employers Must Understand Implications of Expanded Americans with Disabilities Act

On January 1, 2009, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) went into effect. Congress passed the ADAAA in response to federal court rulings that it believed substantially weakened important protections of the original Americans with Disabilities Act (ADA). The amendments (intended to restore the “spirit and intent” of the original ADA legislation) cause a much larger group of employees to be deemed disabled and, therefore, protected under the law. Employers now need to be even more careful when making decisions affecting applicants and employees who may have physical or mental impairments.

***Q: What is a “disability” according to the ADAAA?***

**A:** In assessing what constitutes a *disability*, the ADAAA requires courts construe that term “to the maximum extent permitted” under the law. This is significant because various other ADAAA revisions increase the number of employees protected by the definition of *disability*. The definition now includes any impairment that is episodic or in remission. Therefore, a condition, like cancer, that is not currently impairing the individual would still be a disability if it would substantially limit a major life activity (MLA) “when active.”

***Q: Are impairments considered disabilities if they are controlled?***

**A:** Under a prior U.S. Supreme Court decision, physical and mental impairments were not considered disabilities if controlled by *mitigating measures*, such as medication or corrective devices (*e.g.*, hearing aids or prosthetics). The ADAAA explicitly states that unless they are eyeglasses or contact lenses, such measures may *not* be considered when analyzing whether the impairment substantially limits a MLA. The employer must now consider whether the impairment is a disability *without* considering how much the mitigating measures correct the disability. Previously, certain employees whose impairments (*e.g.* asthma, diabetes or epilepsy) were controlled by medication and treatments could be excluded from coverage because their condition was not severe enough. Now, those employees are likely protected as disabled.

***Q: How does the ADAAA define “major life activities”?***

**A:** To be deemed disabled, an employee must have an impairment that substantially limits “one or more major life activities.” According to the ADAAA, these activities include: caring for oneself, performing manual tasks, seeing, hearing, breathing, lifting, bending, learning, reading, concentrating, thinking, communicating and working. Further expanding the definition of MLA, the ADAAA adds “any major bodily function” to the list, specifically enumerating coverage for immune system; cell growth; digestive, bowel, bladder, reproductive, and other bodily functions.

***Q: What does the ADAAA consider to be a “substantially limiting” impairment?***

**A:** The ADAAA rejects the U.S. Supreme Court’s stringent interpretation of the phrase, “substantially limits a major life activity,” which required an impairment to prevent or severely restrict an activity of central importance to the individual’s daily life. While the ADAAA rejects that pro-employer definition, it provides no alternative standard. Instead, the ADAAA requires the Equal Employment Opportunity Commission to define “substantially limits,” which likely will be less strict.

**Q: What happens under the ADAAA if an employer discriminates against someone “regarded as” having a disability?**

**A:** The ADAAA makes it easier to prove an employer discriminated against someone it wrongly “regarded as” having a disability. Under the original ADA, an individual bringing suit needed to prove that the employer regarded the employee as being substantially limited in a major life activity. This was a difficult standard to meet. Now, the individual only has to show that the employer perceived the individual as having a mental or physical impairment, regardless of whether the impairment substantially limits, or is perceived to limit, a major life activity.

**Q: I understand that it will be harder for employers to defend ADA claims. Does any part of the new ADAAA favor employers?**

**A:** The ADAAA does clarify that “regarded as” claims cannot be based on impairments that are minor or “transitory,” *i.e.*, expected to last less than six months. In addition, the ADAAA makes it clear that employers do not have to provide a reasonable accommodation to individuals who are “regarded as” disabled. Finally, the ADAAA prohibits “reverse discrimination” claims. Thus, a non-disabled employee may not claim discrimination if a disabled employee is favored in an employment decision.

**Q: What should our company do to respond to the ADAAA?**

**A:** If you have 15 or more employees, consider the following steps:

- Review and, if necessary, revise any applicable handbook policies, interactive process questionnaires and disability-related employment information.
- Train HR personnel, supervisors and interviewers on the ADAAA and how it applies to their daily operations.
- Be prepared to consider offering accommodations to a broader range of employees.
- When addressing specific disability determinations and accommodations concerns, include supervisors, HR personnel and legal counsel in the analysis and apply the revised disability laws.
- Manage litigation risks *proactively* by consulting now with your legal advisers to counteract the inevitable rise in the number and expense of disability lawsuits.

*—by Eric J. Johnson, a partner in the Cleveland firm of Walter & Haverfield LLP.*

## Law Bans Employers from Using Genetic Information To Make Employment Decisions

Perhaps you currently employ someone whose chronic disease has caused your group medical insurance rates to skyrocket. You would probably like to avoid hiring such a person in the future. If you learn, based upon genetic testing information, which of your potential hires is prone to develop a chronic illness in the future, can you legally use that information to make employment decisions? The answer is “no.”

The Genetic Information Non-Discrimination Act (GINA), effective November 21, 2009, makes it unlawful for employers with 15 or more employees, employment agencies, labor organizations and insurance carriers to discriminate against persons based upon genetic information indicating a predisposition to chronic diseases. Among other things, GINA prevents employers from making employment decisions based upon a concern that an applicant, employee or dependent with a genetic predisposition for certain chronic medical conditions will place a financial burden on the employer’s group medical insurance plan. Like most employment laws, GINA also prohibits employers from retaliating against employees who claim discrimination based upon the use of genetic information.

What, exactly, is *genetic information*? Genetic information is information gained from 1) an individual’s genetic tests; 2) genetic tests of family members; and 3) an individual’s family medical history. GINA makes it unlawful for employers to use such information as a basis for discharging or refusing to hire any applicant or employee, or for otherwise discriminating against an employee with respect to employment compensation, terms, conditions, or privileges.

GINA also makes it unlawful, with some exceptions, for employers to request, require, or purchase genetic information about an employee. For example, employers are not allowed to require employees to submit to genetic testing, although such tests may be allowed as part of a wellness program, medical monitoring as required by OSHA, or employer-sponsored medical examinations where the employer does not have access to the information.

The law also makes it illegal for insurance carriers (including self-insured employers) to discriminate against persons based upon genetic information that indicates predisposition to chronic diseases. Likewise, GINA prohibits health insurers from requesting or requiring an individual to take a genetic test. This means that health insurers may *not* raise premiums or deny coverage based on genetic information.

As a practical matter, GINA does not significantly impact most employers, but in order to make sure you are in compliance with the law, you should:

- separate your confidential medical and health records from all other records *and* limit access to these records as required by the Americans With Disabilities Act;
- ask health care providers to provide only *non-genetic* health information (pre-employment physicals, return to work exams, etc.) about your employees;
- keep in mind workers’ compensation records may have genetic data and treat them appropriately;
- take steps to make sure you do not *inadvertently* receive genetic information about your job applicants or employees.

In addition to addressing employment-related use of genetic information, GINA increases penalties for federal child labor law violations under the Fair Labor Standards Act (FLSA). Specifically, GINA increases the fine from \$10,000 to \$50,000 for *each* violation that causes death or serious injury to any employee who is under 18 years old. GINA increases other child labor law violations from \$10,000 to \$11,000 and increases the penalty for willful violations of FLSA minimum wage and overtime provisions from \$1,000 to \$1,100 for each violation.

The Equal Employment Opportunity Commission (EEOC) is charged with enforcing the employment provisions of GINA and the Department of Labor is responsible for enforcing the health insurance provisions. As of March 2009, the EEOC had proposed rules to implement GINA and was seeking written comments from the public.

*—by Patricia F. Weisberg, a partner in the Cleveland firm, Walter & Haverfield LLP.*

## **The Need for Layoffs: Legal and Practical Considerations**

One of the most difficult parts of managing a business is downsizing. In an economy where the daily headlines report layoffs by the thousands, this responsibility is not made any easier. There are a few items that employers should remember while contemplating and carrying out layoffs.

First, consider whether there are feasible alternatives to laying off employees. For example, the same goals may be achieved by reducing overtime allowances, temporarily shutting down or shortening work hours, instituting a salary or hiring freeze, implementing an across-the-board salary reduction, or asking employees to take voluntary early retirement or leaves of absences. If the employer decides to enter into a separation agreement with an employee, consult an attorney. Such agreements require the existence of certain provisions in order to be enforceable. If employees have an employment or union contract, the employer needs to verify that these options are available.

If layoffs are inevitable, consider the type of employment relationship the employer has with its employees. Is there an employment contract, union agreement or do employees have some reasonable expectation of continued employment? If so, determine the need to give advance notice and whether there is a specified procedure that must be followed in laying off employees.

Evaluate whether it would be wise to let employees know of the possibility of layoffs prior to making any final decisions. Doing so will give employees time to find new jobs, which may reduce resentment. Morale and productivity may decrease when employees are notified of this possibility, but if the rumor-mill starts, morale and productivity may sink even lower. Employees will perform better if they feel they can trust their employers to keep open lines of communication.

The employer should take the time to thoughtfully plan how to carry out the layoff. Layoffs must be conducted in a way that is not discriminatory. In determining which employees will be laid off, use objective, job-related criteria like seniority or job knowledge. Be consistent in how these criteria are implemented. Review the impact on protected classes of people, such as minorities and employees over forty years of age. Protected classes should not bear the most severe impact of a layoff. Have legitimate business reasons for the layoffs and maintain documentation to support these reasons. Also, have a clear idea of what the company will look like post-layoff and make sure the layoffs planned will mirror that idea.

In delivering the bad news to the employees, employers should be respectful and honest in explaining why the employees are laid off. Statements made regarding the need for layoffs should be consistent. When making announcements, address important issues such as severance, vacation payout, health care, job search assistance, and the employer's policy on providing references. In addition, management should be prepared to handle employee reactions to the notice.

Finally, one of the most frequent mistakes employers make in laying off employees is forgetting about the remaining employees. Anger and job insecurity can hinder job performance and morale in the remaining workforce. Employers should make sure the retained employees understand the

need for the layoffs and that the decision to do so was given due consideration. Doing so will hopefully help move the company back in the right direction.

*—by Stacy V. Pollock, an attorney with the Columbus firm Means, Bichimer, Burkholder & Baker Co., LPA.*

## What You Should Know about Severance Payments

**Q:** *Is there a law that requires employers to provide severance pay?*

**A:** No. An employer has no obligation to provide severance pay. The only benefit that employers must by law provide is unemployment compensation.

**Q:** *I have in the past paid severance to employees that I had to fire. Do I have to give the same severance to others?*

**A:** If you create a severance plan, employees covered by the terms of the plan are entitled to the benefits provided by the plan. However, you can create, modify or abolish a severance plan as you see fit. Most employers, particularly small employers, choose to have no severance plan at all.

In your case, the issue is whether you created a severance plan by having paid severance in the past. The mere fact that you gave severance payments to other employees in the past will not, by itself, create a severance plan. However, if you have written policy that says which employees will receive severance, how much, and when, such employees could make a claim for severance benefits. In such a case, you should consult legal counsel.

**Q:** *I am willing to pay severance, but I want my employee to promise not to sue me in exchange for it. Can I do that?*

**A:** Yes. So long as you do not have a plan in place that requires you to pay the same severance without getting a release, or so long as your plan conditions severance payments on a release of rights (*i.e.*, a promise not to sue), you can condition severance benefits on your employee's promise not to sue.

**Q:** *Why do I have to wait 21 days for the employee to accept the severance pay? Can she accept it before that time?*

**A:** The 21-day waiting period must be honored only if you want the employee to release you from her claim for age discrimination. That is, a court will enforce an employee's promise not to sue for age discrimination under the federal Age Discrimination in Employment Act only if the employer gave the employee 21 days to consider the offer and, among other things, advised the employee in writing to review the release with an attorney. This is to prevent employers from forcing an employee to make a decision about releasing her rights with a "gun to the head." Instead, the employee has 21 days to consider whether or not to accept the release. If the employee wants to accept the offer before the end of the waiting period, however, she can do so.

**Q:** *What happens to the waiting period if my employee counter-offers, asking for a better package?*

**A:** Technically, once the employee asks for a better package, she has made a *counter-offer*, which the law treats the same as a rejection of your original offer. Once the employee rejects your offer, it is no longer available unless you renew it.

**Q:** *How much should I offer as severance?*

**A:** In theory, an offer to pay an employee to release his or her rights is the same as an offer to buy a car or rent an apartment. As long as you offer what the thing is worth, the rational employee should be willing to accept it. Roughly speaking, an employee's claim is worth what the employee would receive if he or she took the claim to court and won,

discounted by the uncertainty of winning, and further discounted by the amount that the employee would have to pay in attorneys' fees and court costs to win the claim.

***Q: When should I negotiate a severance package with an employee?***

**A:** Severance typically will not come up until an employer makes a decision to terminate employment. At that point, put an offer on the table to start the discussion and negotiate to the best of your ability.

Another point to discuss severance is, ironically, at the beginning of employment. A valued prospect may be able to obtain an up-front commitment for severance pay in an employment agreement. If the price of severance is reasonable compared to the value of obtaining an employment agreement, consider agreeing to it. In addition, severance pay can be structured to cover some or all of a period of non-competition. If so, courts are much more willing to enforce the non-competition agreement, since the employee is receiving something to live on during the non-competition period.

***Q: Are there any rules of thumb for how much severance an employer will pay?***

**A:** Not really. Again, an employer generally has no obligation to provide severance payments. Experience shows that employers rarely offer severance pay to hourly workers. Employers who offer severance will typically provide one week per year of service to employees below the officer or executive rank, and up to a month per year of service to executives and officers. In addition, some severance plans cap benefits at a specified level.

For most small employers, severance pay comes up only in exchange for a release of rights or to help a valued employee make a transition to new employment after losing his or her job through no fault of their own. In those cases, you should look at what is fair and appropriate, and what the employee will accept.

*—by Neil E. Klingshirn, partner in the Akron-based firm, Fortney & Klingshirn.*

## **It's Just Not Working Out: How To Terminate that Problem Employee**

***Q: When can an employer terminate an employee?***

**A:** The type of employment relationship determines whether termination is an option, and the process that should be followed leading up to the termination. For example:

- Under an at-will employment relationship, an employer is permitted to terminate an employee for cause or for no cause at all. However, an employer is not permitted to terminate an employee for an unlawful reason. These reasons include discrimination, use of legally mandated leave like Family Medical Leave, or the filing of a workers' compensation claim. If there is an employee handbook, the handbook should make clear that employment is at-will. If the handbook suggests otherwise, the employee may argue that he or she had an implied right to employment.
- If the employee signed an employment contract with an employer, any contractual provisions regarding termination should be followed, including any progressive discipline before termination.
- If the employee is a member of a union, the employer must follow the collective bargaining agreement entered into with that particular union. The agreement will likely set forth very specific circumstances by which an employee may be terminated and procedures for terminating an employee.

***Q: What should an employer keep in mind when considering the termination of an employee?***

**A:** If an employee is at risk of being terminated for poor performance or for certain actions, employers should consider the following before proceeding with termination:

- First ask, "Does the employee have a legitimate reason for his/her actions or poor performance?" If the employee has a qualifying disability, employers are encouraged to discuss with the employee the concerns and whether an accommodation would be reasonable for both parties. The employee may have protected rights to an accommodation under the law.
- When considering terminating an employee, one key is to document performance and discipline issues. The employer should: consistently document the events and situations leading up to the termination as they happen; and document conversations with the employee, including who was present, when the conversation took place, and what was said. The employer should also prepare a summary of the meeting and have the employee sign an acknowledgment of the conversations and the employer's actions. This acknowledgement does not mean that the employee agrees with the employer's decision.
- The employer should consider whether the termination is consistent with how other situations have been handled in the past. While the employer is not necessarily bound by its past practice in handling similar situations, consistency is recommended in order to avoid claims of discrimination and retaliation. In termination, consider whether employees within protected classes (*i.e.*, age, race, sex, national origin, pregnancy) are treated the same as employees outside protected classes under similar circumstances.
- Employers must review any termination standards and/or procedures that may be set forth in a collective bargaining agreement, employment contract, or employee

handbook. There may be notice requirements or progressive discipline procedures that must be in place prior to termination.

***Q: How should an employer terminate an employee?***

**A:**

- One goal an employer should have when actually terminating an employee is to avoid giving inconsistent statements about why the employee was terminated. The employee should be told the reason for his or her termination without the sugarcoating. This reason must be consistent with the documentation leading up to the termination.
- If possible, have a witness present at the termination.
- Remind the departing employee of any confidentiality or non-compete agreements.

***Q: What must an employer consider after terminating an employee?***

**A:**

- Employers with 20 or more employees who offer group health benefits are required to offer terminated employees temporary extension of health benefits (known as COBRA benefits) where coverage would otherwise end. Employers should notify their plan administrators within 30 days of an employee's termination.
- It is generally permissible for an employer to provide negative employment references regarding a former employee to a prospective employer. Any negative references, however, should only contain honest statements given in good faith, and employers should not seek out a prospective employer of a former employee in order to give a negative employment reference. To avoid any potential liability with providing references of a terminated employee, employers often only provide dates of employment and positions held.

*–by Stacy V. Pollock, attorney with the Columbus law firm Means, Bichimer, Burkholder & Baker, Co., LPA.*