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**GROWING PAINS: AN EMPLOYMENT COMPLIANCE PRIMER
FOR SMALL EMPLOYERS**

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ABSTRACT

Small employers often have an advantage over their larger counterparts in that they are not subject to certain regulatory compliance requirements. However, as small employers' workforces expand, the organizations become subject to various federal employment statutes. This paper reviews the primary federal employment laws that are likely to impact small firms as they grow. It also provides suggestions for dealing with these mandates.

INTRODUCTION

There is a distinct advantage to being a small organization, especially in the realm of regulatory compliance. Most federal employment statutes apply only when an employer's workforce reaches a minimum threshold. Those who operate below that threshold are not under the jurisdiction of the statutes and, therefore, are not legally obligated to comply with their provisions. Most small businesses begin below this threshold (and as will be seen, this threshold does vary from law to law). However, as many small businesses prosper and grow, expanding workforces (sometimes as few as four employees) often cross the invisible line into regulatory compliance obligations. Figure 1 provides a list of the major federal employment laws and the minimum number of employees that identifies employers who are covered under them.

The purpose of this paper is to address the range of employment laws that are likely to affect successful small businesses as they grow. In doing so, the employer size requirements that impose compliance obligations under each specific act and the act's major provisions are

outlined. Additionally, the penalties for noncompliance authorized under each statute are discussed. Although our review of these laws is extensive, it is only cursory.

Figure 1 - Major Compliance Laws Affecting Small Employers

Age Discrimination in Employment Act (ADEA) of 1976 (as amended)	≥ 20 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year
Americans with Disabilities Act (ADA) of 1990	≥ 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year
Civil Rights Act of 1964, Title VII (as amended)	≥ 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year
Civil Rights Act of 1991	≥ 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year
Fair Labor Standards Act (FLSA) of 1938 (as amended)	Employers who engage in interstate commerce, produce goods for interstate commerce, or handle, sell or work on goods or materials that have been moved in or produced for interstate commerce. For most firms, a test of not less than \$500,000 in annual dollar volume of business applies
Family and Medical Leave Act (FMLA) of 1993	≥ 50 full-time employees within 75 miles of facility
Immigration Reform and Control Act (IRCA) of 1986	All employers regardless of size
Immigration Reform and Control Act (IRCA) of 1986 Nondiscrimination Provision	Employers ≥ 4 employees
Worker Adjustment and Retraining Notification Act (WARN) of 1988	≥ 100 full-time employees who have worked at least 6 months in the previous 12 months

FAIR LABOR STANDARDS ACT

The first body of employment law of importance to small employers is the Fair Labor Standards Act (FLSA). Enacted in 1938, the FLSA governs three aspects of employer-employee relations: (1) the federal minimum wage, (2) overtime, and (3) child labor.

Minimum Wage

The FLSA requires all covered employers (includes most employers) to pay nonexempt employees at least \$5.15 per hour. *Nonexempt employees* are those employees who are

covered by the FLSA's minimum wage and/or overtime provisions. Failure to provide minimum wages and overtime payments to nonexempt employees will result in a FLSA violation. Shortly, *exempt employees*, those for whom minimum wage and overtime do not apply, will be discussed. First, however, two variants of minimum wage for nonexempt employees are addressed: (1) tipped employees and (2) compensatory time.

Tipped Employees

Since many small employers are in the hospitality industry and employ tipped employees (like wait staff), it is important to understand the employer responsibilities under the FLSA for such employees. Under the FLSA, tipped employees are entitled to the federal minimum wage. Though employers may credit a certain amount of the tips received by employees against the minimum wage obligation, an employer is obligated to pay tipped employees not less than \$2.13 per hour in wages (U.S. Employment Standards Administration, *Fact Sheet No. 15*, 2002). Provided that the \$2.13 per hour wage plus tips equals or exceeds the federal minimum wage, the employer is not required to provide any additional wage to tipped employees. In the event that an employee's cash wage *combined* with tips does not equal the minimum hourly wage, the employer must make up the difference (U.S. Employment Standards Administration, *Fact Sheet No. 002*, 2001).

Compensatory Time

Compensatory time is time off in lieu of overtime compensation. If an employer offers compensatory time to employees, there are two issues of concern. First, any compensatory time off must be calculated at a rate not less than one and one-half hours for each hour of employment for which overtime compensation would have been paid (fair labor standard Act, 29 U.S.C. § 201 et seq.(2001). For example, if an employee worked 46 hours in a 168 consecutive hour work week, that employee would be entitled to 9 hours compensatory time (46 hours - 40 hours of standard work week = 6 hours overtime; 6 hours * 1½ = 9 hours compensatory time).

The second concern relates to the limitation currently placed on private sector employers that the compensatory time must be used within the pay period it was accrued. For example, assume that an employee is paid twice monthly (the first and fifteenth of each month). During the week of June 1-7, the employee worked 50 hours. The employee would be entitled to 15 hours compensatory time (50 hours - 40 hours of standard work week = 10 hours overtime; 10 hours * 1½ = 15 hours compensatory time) but would have to use the compensatory time the following week because the pay period expires on June 15. The compensatory time cannot be accrued (like it is in the public sector) and used at a time that is convenient for either the employer or employee. This also means that compensatory time is not a viable option for employees who are private sector employees and paid on a weekly basis. Interestingly, there is currently a bill in Congress to remedy this situation, but it has yet to be enacted.

Overtime

The FLSA establishes the standard employee's workweek at a fixed period of 168 consecutive hours, or 7 consecutive 24-hour periods. Note that in the health care industry for certain health care professions this has been extended to a fixed period of 336 consecutive hours, or 14 consecutive 24-hour periods. In most instances, any overtime pay accrued in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned. Whatever the employee's regular rate of pay is, it cannot be less than the minimum wage. The regular rate (straight-time rate) does not include reimbursement for expenses incurred on the employer's behalf, premium payments for overtime work, special premiums

paid for work on weekends and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness (U.S. Department of Labor, *Fact Sheet No. 23*, 2002).

Once the employee's regular rate or straight-time rate has been determined, nonexempt employees are entitled to one and one-half times that rate for each hour worked in excess of 40 (80 in healthcare professions) during the 168 consecutive hour (336 in healthcare) work week. However, no overtime is required for exempt employees.

Exempt Employees

Exempt employees are those employees who are specifically excluded from the FLSA's protection for minimum wage and overtime. The fact of the matter is that so many classes of employees are covered by the FLSA (nonexempt employees), that it was easier for Congress to identify those who were not protected under it (exempt employees). The FLSA provides exemptions from minimum wage and overtime payments as well as some partial exemptions from overtime only. The most common exemptions are as follows: (1) Commissioned sales employees of retail or service establishments are exempt from overtime provided that more than half of their earnings come from commissions and these earnings average at least one-half times the minimum wage for each hour worked; (2) Computer professionals who are paid at least \$27.63 per hour are exempt; (3) Salesmen, partsmen, and mechanics employed by automobile dealerships are exempt; (4) Seasonal and recreational establishments are exempt from both the minimum wage and overtime pay provisions of the FLSA; and (5) White collar employees employed in executive, administrative, professional, or outside sales positions (as defined by the Department of Labor (DOL)) who are paid on a salary basis are exempt from both the minimum wage and overtime.

Note that, particularly regarding white-collar employees, it is not what the employer calls an employee that counts. Calling an employee an "executive" does not make that employee a bona fide executive. The only operative definition is the DOL's definition. For example, a bona fide executive is one who spends no more than 20 percent of his or her time in nonmanagerial activities (no more than 40 percent of his or her time in the retail and service industries), supervises at least two employees, and receives a salary of not less than \$345 per week (fair labor standard Act 29 C.F.R. § 541.1). If these three conditions cannot be met, the DOL will not consider the employee in question to be a nonexempt employee, and that individual will be entitled to overtime compensation under the FLSA.

Child Labor Limitations

Employers may assign employees who are 18 years or older to any position in the workplace, to work at any time, and to work in virtually any context (provided that the working conditions are in compliance with the Occupational Safety and Health Act). But, applicants or employees under age 18 are restricted in some or all of these categories. Workers 16 and 17 years old may work for unlimited hours, but only in nonhazardous jobs. Hazardous jobs are enumerated by the Secretary of Labor and are off limits to all workers younger than 18 years of age (fair labor standard Act, 29 U.S.C. § 212). Among the jobs identified as hazardous are: manufacturing or storing explosives, driving a motor vehicle, operating

power-driven wood-working machines, meat packing or processing, wrecking, demolition, and ship-breaking operations, and roofing operations (fair labor standard Act 29 C.F.R § 570.33).¹

For workers between 14 and 15 years, there are also limitations on both the hours that can be worked and the time of day that the work may occur. During periods when school is in session, these workers are permitted to work outside school in nonmanufacturing, nonmining, and nonhazardous jobs within specific hourly and time limits. For example, on school days, 14 and 15 year-olds are restricted to working no more than 3 hours per day and may only work within a time frame between 7 a.m. and 7 p.m. Furthermore, the total number of hours that can be worked in a school week is capped at 15 (fair labor standard Act 29 U.S.C. § 212.).

During nonschool days, the 14 or 15 year-old employee may work up to 8 hours, and during the nonschool week, he or she may accrue up to 40 total hours (fair labor standard Act 29 U.S.C. § 212). During the period June 1 to Labor Day, the time frame during which 14 and 15 year-olds may work is expanded from 7 a.m. to 9 p.m. Again, 14 and 15 year-olds are excluded from hazardous jobs even during the summer months.

There is encouragement for small employers trying to give their own children an early start in the family business. Individuals who work for their parents or spouses are exempt under the FLSA.

Commonly Held Myths About The FLSA

There are many misconceptions, especially among employees, about pay and benefits mandated by the FLSA. Beyond the previously discussed minimum wage, overtime, and child labor restrictions, the FLSA imposes no other requirements on covered employers. Since there are so many misconceptions arising from the FLSA's requirements, here are just a few examples of compensation requirements that the Act *does not* really mandate. Nothing in the FLSA imposes any obligation on employers to provide employees with vacation, holiday, severance, or sick pay. The FLSA does not require an employer to furnish employees with meal or rest periods, holidays off, or vacations, paid or not. These are strictly at the option of the employer, unless otherwise required under state law. Neither does the Act obligate employers to provide premium pay for working on weekends, at night, or on holidays. Employers are not required to offer pay raises or fringe benefits. Finally, the FLSA does not impose any obligation to provide terminated employees with a discharge notice, reason for discharge, or immediate payment of final wages. Many employees believe that they must be paid in full all accrued wages immediately upon discharge. In most instances, final payment can be made at the next normally scheduled pay period, unless required under state law or local ordinance.

IMMIGRATION REFORM AND CONTROL ACT

Because it applies to all employers, even small employers should have knowledge of the Immigration Reform and Control Act (IRCA) of 1986. IRCA was enacted for the expressed purpose of curbing illegal immigration into the United States. The rationale behind its enactment was simple--remove the incentive for illegal immigrants to come to the United States by making it illegal to hire them. Prior to 1986, it had been illegal for undocumented aliens to be in the United States, but it was not against the law to hire them. Now, this has

¹For a complete list of hazardous occupations, consult The Department of Labor Regulations, *Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age or Detrimental to Their Health or Well-Being*, 29 C.F.R. §§ 570.50-570.68.

been corrected. Any employer who knowingly hires an illegal immigrant may be subject to a schedule of fines ranging from \$275 to \$10,000 for each unauthorized alien depending on the severity of the offense and number of previous offenses (8 C.F.R. § 274a.10(b)(1)). There are even criminal penalties authorized under IRCA that carry imprisonment for up to 6 months for any person who engages in a pattern or practice of violations (8 C.F.R. § 274a.10(a)). Figure 2 details the penalties for noncompliance under IRCA.

Figure 2 - Penalties for Noncompliance Under the Immigration Reform and Control Act

Knowingly Recruiting and Hiring an Undocumented Workers		Failure to Comply with Documentation/ Verification Requirements
1 st Offense	\$ 275 - \$2,200	\$ 110 - \$1,100
2 nd Offense	\$2,200 - \$3,300	
3 rd Offense	\$3,300 - \$11,000	
Pattern of Offenses	\$3,000 and 6 Mo. Imprisonment	

Source: 8 C.F.R. § 274a.10.

Interestingly, most violations connected with IRCA do not arise from hiring undocumented workers. Most violations arise from failing to comply with the Act's employment verification procedures. Fines for failure to prove that an employee's employment status was done in accordance with the Immigration and Naturalization Service (INS) regulations may range from \$110 to \$1,100 for each employee for whom verification was not performed (8 C.F.R. § 274a.10(b)(2)) (see Figure 2).

Since 1986, all employers, regardless of size, are required to verify the employment eligibility of all applicants by requiring the applicant to complete the Form I-9, "Employee Information and Verification" (8 C.F.R. § 274a.2(b)). In addition to having the applicant complete the I-9, the employer is required to request documentation from the applicant to establish his or her identity and employment eligibility. This verification must be accomplished within three days of the hire. Employers are encouraged to keep on file photostatic copies of the employee's Form I-9 in order to prove that the documents were physically examined. The documents that the INS accepts for verification purposes are listed in Figure 3.

In addition to prohibiting the hiring of illegal aliens, IRCA also prohibits discrimination in hiring and discharge based on national origin (as does Title VII of the Civil Rights Act of 1964 (addressed in the next section of this paper)) and on citizenship status. These antidiscrimination provisions are intended to prevent employers from attempting to comply with the Act's work authorization requirements by discriminating against foreign-looking or foreign-sounding job applicants. Of particular concern for smaller organizations is that IRCA's antidiscrimination provisions apply to even smaller employers than those covered by Equal Employment Opportunity Commission-enforced laws (discussed later in this paper). IRCA's national origin discrimination provisions apply to employers with between 4 and 14 employees (those employers who would not be covered by Title VII) (8 U.S.C. § 1324b(a)(2)(B)). IRCA's citizenship discrimination provisions effectively extend protection against discrimination based on national origin to all workplaces with at least 4 employees.

Figure 3 - Verification Requirements Under the Immigration Reform and Control Act

Documents Establishing Both Employment Authorization and Identity	Documents Establishing Only Employment Authorization	Documents Establishing only Identity
U.S. Passport	Social Security Card	State Driver's License
Certificate of U.S. Citizenship	U.S. Birth Certificate	State Identification for those under Age 16
Certificate of Naturalization	Other Documentation Authorizing Employment in the U.S. Approved by the Attorney General	
Resident Alien Card (if card contains photo of individual)		
Foreign Passport with the authorization of the Attorney General to work in the U.S.		

Source: 8 U.S.C. § 1324a(b)(1)(B).

Because lawmakers were concerned that the verification process and penalties for hiring undocumented workers might cause employers to be reluctant to hire applicants of Hispanic origin, IRCA contains provisions making an unfair immigration-related employment practice for:

... a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-- "(a) because of such individual's national origin, or (b) in the case of a citizen or intending citizen (as defined in paragraph (3)) because of such individual's citizenship status (8 U.S.C. § 1324b(a)).

CIVIL RIGHTS ACT OF 1964

The Civil Rights Act of 1964's Title VII is the foundation of most of the laws and regulations that affect equal employment opportunity (EEO) in the workplace. It applies to a small business once that business employs 15 or more employees during any 20 weeks during the preceding year. Title VII is enforced by the Equal Employment Opportunity Commission (EEOC). Specifically in Section 703 of the Act:

It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin (42 U.S.C. § 2000e-2(a)).

This section forbids a covered employer from taking into consideration any applicant's race, color, religion, sex, or national origin when making any employment-related decision. For example, if an employer considered an applicant's ethnicity in making a decision, then Title VII is violated. If the fact that an applicant is a female affects a promotion decision, Title VII

is violated. Title VII's purpose is to get employers to make employment decisions based only on an individual's qualifications. Figure 4 provides a list of typical employment decisions that may result in Title VII violations. In short, *different* treatment of anyone in the workplace because of race, color, religion, sex, or national origin is an unlawful activity.

Figure 4 - Employment Practices that May Result in Unlawful Discrimination

<ul style="list-style-type: none"> • Recruiting • Selection • Promotion • Transfers • Layoffs 	<ul style="list-style-type: none"> • Training • Wages • Benefits • Terminations • Work Assignments 	<ul style="list-style-type: none"> • Working Conditions • Apprenticeships • Performance Appraisal
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There are two basic theories of unlawful discrimination under Title VII: (1) disparate treatment and (2) disparate impact. *Disparate treatment* results from treating individuals in the workplace differently because of their membership in a protected class. It is intentional and is characterized by imposing different standards on different people. The other theory, *disparate impact*, focuses the small employer's concerns to statistical imbalances in the workforce. Quite often it is unintentional and is characterized by imposing the same standards on all people with different outcomes for different groups. Although a discussion of the legal proofs for each of these theories is beyond the scope of this paper, it is important for small employers to understand that there are differences. If charges of unlawful discrimination arise, small employers should consult appropriate legal counsel.

National Origin as a Protected Class

Much has been written about race, color, religion, and sex as protected classes. However, as a result of the events of September 11, 2001, significant attention has been focused on national origin as a protected class. It is for this reason that we are devoting specific attention to this issue.

Though Title VII prohibits employers from considering a candidate's national origin when making *any* employment decision, there are some employment discrimination issues that are unique to national origin that must now be addressed. Because members of some ethnic groups often display nationality-specific characteristics (religious affiliation, speech patterns, languages, surnames, e.g.), Title VII can be violated when a connection can be made between those characteristics and unfavorable treatment in the workplace. Three specific areas related to national origin discrimination are: (1) IRCA-related issues, (2) language, and (3) English-only work rules.

IRCA-Related Issues

Title VII may be violated during the IRCA verification process (discussed in the previous section of this paper) if individuals of one national origin group (like Hispanics) are subjected to greater scrutiny than individuals from other groups. For example, an applicant with a Hispanic surname is given a thorough background investigation while a candidate with a Western European surname only has her driver's license and social security card photocopied. This would be a Title VII violation because the individual with the Hispanic surname was subjected to different treatment (a more rigorous application process) because of his national origin.

In complying with IRCA's verification requirements, it is important to treat all employees the same. If thorough background checks are initiated, they must be initiated on *all* applicants,

not just those of one particular national origin. It should be noted that IRCA does permit employers to give preference in hiring and recruiting of American citizens over foreign nationals *if the two individuals are equally qualified* (8 U.S.C. § 1324b(a)(4)).

Interestingly, national origin discrimination is not merely limited to members of the ethnic group against whom discrimination is directed. If an employer punishes nonethnic employees for associating or fraternizing with members of an ethnic group whom the employer finds distasteful, Title VII has been violated. If an employee is subjected to adverse employment outcomes because he or she is married to a member of an ethnic group the employer finds offensive, Title VII is again violated on the basis of national origin. To illustrate, assume that a white nonHispanic male employee has a wife who is of Cuban ancestry. Also assume that his employer disapproves of mixed marriages between "Anglos" and Hispanics. As a result of this attitude, the employee is continually passed over for promotion and receives no merit pay raises. The white male employee is being discriminated against on the basis of the nationality of his wife. This is unlawful discrimination under Title VII.

Language

A potential problem related to ethnicity is language proficiency. A substantial proportion of the workforce's projected growth is from immigration (Bowman, 1997). Many newly-arrived legal immigrants to the United States have limited language proficiency. In some parts of the nation, languages other than English are spoken. The language of preference for the local population may be Spanish, Russian, Vietnamese, or a combination thereof. As the United States is becoming increasingly diverse, it is also becoming increasingly multilingual.

Employers who base employment decisions on language proficiency (whether it is English, Spanish, Russian, Mandarin, etc.) must be able to justify such preferences as being related to job performance. This language requirement also encompasses accents. To illustrate this point, assume that an applicant is applying for a position as a driver for a small parcel delivery service. The female applicant speaks conversational English but with a thick French accent. Can she be denied the job based upon her accent? What information would you have to possess to make that call? How critical is speaking English without an accent to the performance of the essential job functions of a parcel delivery person? If your job analysis² shows that it has little, if any, impact on job performance, then rejecting the applicant based on her accent could be unlawful discrimination based on national origin.

Now assume that the position for which the heavily accented job candidate has applied is that of a dispatcher for a small ambulance service. Based upon job analysis that may indicate that clearly enunciated communications between the dispatcher and ambulance personnel is an essential component of the job, can the employer now disqualify the applicant because of her accent? If the employer can demonstrate that her accent is so heavy it affects comprehension then she is being denied employment based on a job-related reason rather than her nationality.

English-Only Work Rules

English-only work rules require employees to speak English during work hours as a condition of employment. This creates a problem for employers as the EEOC's *Guidelines on Discrimination Because of National Origin* (2000) currently declare that employer policies prohibiting employees from speaking their primary language at *all* times may create an "atmosphere of inferiority, isolation and intimidation which could result in a discriminatory

²For a thorough discussion of job analysis, see Gatewood, R. D. and Feild, H. S. (2001), *Human Resource Selection* (5th ed.), Fort Worth, TX: Harcourt College Publishers.

working environment". Consequently, any language policy that creates a complete bar to speaking languages other than English is likely to be interpreted by the EEOC as a potential Title VII violation and, therefore, is subject to very strict scrutiny.

While the EEOC has created disincentives to drive employers away from English-only policies, except where business necessity can be demonstrated, the EEOC also requires employers to maintain a working environment free from harassment on the basis of race (U.S. EEOC, 2000, § 1603), sex (U.S. EEOC, 2000, § 1604.11), and national origin (U.S. EEOC, 2000, § 1606.8(a)). Here arises the dilemma for the small employer. What happens when an employer implements an English-only rule in response to a racial or sexual harassment complaint? Will the federal government conclude that the employer is merely meeting its obligation to maintain a harassment-free workplace, or will it conclude that the employer is discriminating against nonEnglish speakers on the basis of nationality?

The apparent solution to this dilemma was offered in the Ninth Circuit case, *Garcia v. Spun Steak Company* (1993). Spun Steak Company, a California poultry and meat processor, implemented an English-only rule for the expressed purpose of promoting racial harmony in the workplace. The company's policy had been initiated in response to complaints that some Hispanic workers were using their bilingual capabilities to make "derogatory, racist" comments about an African American coworker in Spanish. As a repercussion of perceived racial harassment, the employer imposed a new policy that only English would be spoken in the company during work periods. It is important to note that this policy was not an all inclusive prohibition; Spanish could still be spoken during lunch breaks and on the employees' own time. However, no language but English could be spoken in work areas during work times.

The Spanish-speaking employees then argued that the language policy was discriminatory on two points: (1) it denied them a privilege enjoyed by English-only speakers: the ability to talk in the language with which they felt most comfortable and (2) it created an atmosphere of inferiority and intimidation (*Garcia v. Spun Steak Company*, 1993). The Ninth Circuit observed that Title VII is not intended to protect employees from policies that "merely inconvenience" them, rather it exists to protect them only against practices that have a *significant* impact. Because the employees in this case were bilingual, the Ninth Circuit concluded that the English-only rule did not preclude conversation on the job, merely Spanish conversation while engaged in normal work activities. Bilingual employees could still converse in English.

Because there was substantial evidence that the policy was a business necessity, it was justified in order to prevent certain employees from using their fluency in a language other than English to intimidate monolingual coworkers who were members of other ethnic groups. Thus, the Ninth Circuit concluded that the policy did not violate Title VII.

When language restrictions are necessitated in the workplace, it becomes incumbent upon the employer to ensure that the following general guidelines are observed. First, and foremost, is there any alternative to resolving the problem without resorting to limiting use of a given language (Piatt, 1993)? If not, then the employer *must* ensure that the English-only policy is justified by "business necessity" (U.S. EEOC, 2000, § 1606.7(b)). This means ensuring that this rationale is documented and that the policy is implemented with the expectation that the offended employees will challenge it. If it cannot be readily and reasonably justified, you should not have an English-only policy.

In addition, care must be taken to ensure that the policy does not create a universal prohibition throughout the place of employment. Rather, the English-only provisions should be limited to

those activities and during those times that are mandated by the previously established business necessity (U.S. EEOC, 2000, § 1606.7(b)). Invariably, this means limiting the language restrictions to work-related communications and work settings. Requiring employees to speak English only in conversations in nonwork areas during nonwork times should be avoided. Finally, before any English-only policy is enforced, it is absolutely imperative that the employer first makes the affected employees aware of the policy and the consequences for not obeying it. In its *Guidelines on Discrimination Because of National Origin* (2000), the EEOC asserts that any employer's failure to notify its employees of the consequences of violating the English-only requirement would result in the Commission concluding "the employer's application of the [English-only] rule as evidence of discrimination" if it then took disciplinary action. As always, documentation of both the business justification for the policy and the specific notification process are highly recommended.

CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 was signed into law on November 17, 1991. This Act not only provided for punitive and compensatory damages in specific cases of intentional employment discrimination (42 U.S.C. § 1981(a)), it also permitted employment discrimination cases to be heard by a jury. Prior to the Civil Rights Act of 1991, victims of intentional discrimination were not entitled to punitive and compensatory damages, and all Title VII suits were heard before a federal judge only.

Interestingly, whenever punitive and compensatory damages are imposed, they are limited by ceilings (maximum amounts that can be imposed). The ceilings are based on the number of workers an employer employs and are provided in Figure 5. These ceilings are the maximum monetary awards that federal judges may impose for punitive and compensatory damages for each victim of discrimination.

Figure 5 - Maximum Awards for Punitive and Compensatory Damages Under the Civil Rights Act of 1991

Size of Employer's Work Force	Maximum Combined Punitive and Compensatory Damages per Complaining Party
15-200	\$50,000
201-300	\$100,000
301-500	\$200,000
>500	\$300,000

Source: 29 U.S.C. § 1981a.

To demonstrate how this works, assume that a company which employs 43 workers has been found to have intentionally violated Title VII by terminating two employees because of their national origin. Based on the evidence, the judge has decided that the employer's actions violated Title VII and were callous enough to justify punitive and compensatory damages. The judge may award any amount up to \$50,000 in damages to each of the two employees. The judge also has the discretion to award different amounts to each party (i.e., \$50,000 to one worker and \$25,000 to the other). The maximum penalty that the employer could face is \$100,000 if the judge determined that both employees could be entitled individually to the maximum penalty. If the employer had 213 employees, then the highest potential penalty

would be \$200,000 because *each aggrieved employee* could be awarded individually the \$100,000 maximum by the court.

Newspaper stories sometimes report multimillion-dollar punitive and/or compensatory damages awarded by juries. Such awards are often misleading if the charge, as it was in this case, was exclusively a Title VII violation. The maximum amount that can be awarded by a court for such a violation is \$300,000 (42 U.S.C. § 1981(b)(3)(D)). It is a peculiarity of the system that when a jury is requested to hear a Title VII case, the court is required not to inform the jury of the limitations of the compensatory and punitive damages (42 U.S.C. § 1981(c)(2)). Because of this oddity, juries may award substantial damage awards that the judges must then reduce to the maximum limits shown in Figure 5.

This Civil Rights Act of 1991 also expanded the jurisdiction of Title VII to the overseas plants, offices, and facilities of American-owned companies. Previously, Title VII only had the force of law within the United States and its territories.

AGE DISCRIMINATION IN EMPLOYMENT

An employer is required to conform to the provisions of the Age Discrimination in Employment Act (ADEA) once the workforce reaches 20 or more employees for at least 20 weeks during the previous year. Under the ADEA, an employer cannot discriminate against any employee in the terms and conditions of the individual's employment on the basis of his or her age, provided that the individual is 40 years of age or older.

In order for an employee to establish the possibility that he or she is a victim of age discrimination, the employee must satisfy four preestablished conditions or proofs. First, he or she was a member of the class of employees protected under the ADEA. Thus, the applicant or employee must show that he or she is 40 years of age or older. Second, the applicant or employee must be minimally qualified for the job in question, meet minimum job requirements. Third, the employee must have suffered an adverse employment action (i.e., discharge, demotion, denial of a pay raise, not hired, etc). Fourth, it must be shown that younger employees were treated more favorably (*Meziere v. Dearborn Crane & Engineering Co.*, 1998). In regard to this fourth factor, it is important to understand that the term favorably treated "younger employee" is not restricted to employees who are outside the protected age group, those under the age of 40. A "younger employee" may also be an individual who is over 40 but substantially younger than the complaining party (*Kralman v. Illinois Dept. of Veteran's Affairs*, 1994; *O'Connor, v. Consolidated Coin Catering*, 1996).

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) of 1990 was enacted to prevent discrimination in employment against a qualified individual on the basis of a real or perceived disability (Title I), prohibit discrimination against individuals with disabilities in public transportation (Title II), and provide for public accommodation and access for persons with a disability (Title III). In regard to employment, the most important thing to remember is that the ADA only protects *qualified individuals* with a disability from discrimination. It does not protect *unqualified* individuals with a disability any more than the other EEO laws protect such individuals.

To fall under the provisions of the ADA, a small business must have 15 or more employees. If covered, the Act states that no entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures,

the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment (42 U.S.C. § 12112(a)).

To determine whether an applicant or current employee is protected under the ADA, two basic questions must be answered: (1) is the individual disabled? and, if so, (2) is the individual qualified? The ADA defines the term "disability" to mean: a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such impairment, or regarding an individual as having such an impairment. This means that those who currently are disabled are protected under the ADA. Additionally, those who were disabled but have since recovered or have been rehabilitated are covered. Surprisingly, applicants or employees who are not now, nor have they ever been, afflicted with a mental or physical disability covered under the ADA may still be protected if the employer thought that they had a disability and discriminated against them because of the imagined disability. As strange as this may sound, an employer may violate the ADA by erroneously assuming a nondisabled individual is disabled.

An employer runs the risk of triggering an ADA claim any time an employment decision is determined based on an individual's perceived disability. In one case, an employer refused to hire an applicant for the position of electrician because a drug test indicated that his blood sugar was high, and it was assumed he was diabetic. The employer's action was based on the assumption that the applicant had an impairment that would substantially restrict his ability to perform the essential functions of the job. However, this was a false assumption, and the applicant, who was not disabled as defined under the ADA, was able to perform all essential functions of an electrician. Because the applicant was perceived to be disabled and the decision not to hire him was based on that perceived disability, the employer violated the ADA (Robinson, Franklin, & Wayland, 2002).

The meaning of "disability" under the ADA entails having a physical or mental impairment that substantially limits one or more of the *major life activities*. Major life activities include such activities as: caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working (29 C.F.R. § 1630.2(I) (1997)). As for *physical impairment*, this can be any physiological condition, disfigurement, or loss of one of eleven body systems.

In a recent Supreme Court decision, *Sutton v. United Airlines, Inc.*, (527 U.S. 471 (1999)) it was concluded that individuals with impairments which are corrected by medical or other measures to normal functional levels are not "disabled" under the ADA. For example, individuals who have their eyesight corrected by glasses or persons with high blood pressure that is controllable with medication would not be considered as disabled under the ADA. In both instances, the physical impairment, because it was corrected, no longer substantially affects the individual's major life function. Though the individuals are impaired, they are not sufficiently impaired to be disabled as defined by the ADA.

Mental impairment encompasses any mental or psychological disorder that results in: mental retardation, organic brain syndrome, emotional illness, mental illness, or specific learning disabilities. These are very broad areas and encompass an extremely wide range of conditions.

Once the individual's "disability" has been established, the next question must be asked: is the individual with the disability qualified? If the individual can perform the essential job functions without any accommodation, he or she is qualified. If not, then what is the appropriate reasonable accommodation that would permit performance of these functions? Reasonable accommodation refers to modifications that would permit the individual with a

disability to perform the essential functions, provided that these modifications do not create an undue hardship for the employer.

In determining reasonable accommodation, the employer may ask the individual for reasonable documentation about the disability and functional limitations. But, employers should be careful. The ADA prohibits the employer from requesting medical information which is not pertinent to the accommodation (U.S. Equal Employment Opportunity Commission, 1999). This usually precludes employers from requesting complete medical records on the individual in question because such records would include a good deal of information not related to the accommodation. The EEOC recommends that when requesting medical information, employers should specify what types of information they need regarding the disability and the functional limitations it imposes (U.S. Equal Employment Opportunity Commission, 1999). Remember, once this information is obtained, the employer is responsible for keeping it confidential. As for making accommodation under the ADA, the EEOC has developed 3 categories of "reasonable accommodation." When attempting to accommodate an applicant or employee, an employer should consider: (1) modifying the job application process (i.e., providing readers for applications or employment exams), (2) modifying the work environment (i.e., flexible or part-time scheduling, job restructuring, reconfiguring work areas, etc.) or (3) modifying the benefits and privileges of employment (i.e., allowing employees to use vacation or personal leave to attend therapy sessions) (U.S. Equal Employment Opportunity Commission, 1999).

Employers, particularly small employers, are not required to provide any of these accommodations if they cause an *undue hardship*. If they create an undue hardship for the employer the applicant is not considered to be a *qualified individual with a disability*. For example, a paraplegic applies for the position of truck driver at a small delivery company. But, technology is not currently available that would permit the applicant to perform the essential functions of the job (*Stone v. Mount Vernon*, 1996).

In determining undue hardship, the ADA requires that four factors must be considered. First, what is the overall cost of the accommodation compared to the overall financial resources of the business, number of persons employed at the place of business, and its projected effect on the operating expenses of the facility? Second, the overall financial resources, number of employees, and number and location of all the facilities owned by the employer are considered in regard to the cost of the accommodation. Third, the accommodation must be considered in light of the type of operation in which the employer is engaged. This includes considering the organizational structure, the functions of the workforce, the geographic separateness of facilities, and the degree of administrative or fiscal interdependence between the facility and other operations of the employer. Fourth, the impact that the accommodation will have on the operation of the facility in question must be considered. All of these considerations are extremely broad and make developing viable human resource policies difficult. Finally, provided proper job analysis was performed on the job in question, the employer is not required to change the *essential job functions*. Unfortunately for small business owners, undue hardship is determined too often on a case-by-case basis.

FAMILY AND MEDICAL LEAVE ACT

Some small employers may have crossed the employee number "line" where they must comply with the Family and Medical Leave Act (FMLA) of 1993. Those small businesses subject to the FMLA must be engaged in commerce, or industries or activities affecting commerce, and employ 50 or more full-time employees working 20 or more weeks during the current or preceding calendar year (29 U.S.C. § 2611(4)(A)). Furthermore, in order for employees to be eligible for the FMLA leave benefit, they must work at a facility where the

employer has at least 50 employees within a 75-mile radius (29 U.S.C. § 2611(2)(b)(ii)). Eligible employees can receive a total of 12 weeks of unpaid leave in a 12-month period for the following reasons (29 U.S.C. § 2612(a)(1)): (1) the birth and care of the employee's newborn child, (2) the adoption or foster care of the employee's son or daughter, (3) a serious health condition of the employee's spouse, child, or parent, or (4) the employee's own serious health condition. In order to qualify for the above mentioned benefit, the employee requesting the FMLA leave must have worked for a covered employer for at least 12 months *and* must have worked for that employer for at least 1,250 hours during the previous 12 months (29 U.S.C. § 2611(2)(A)).

During the FMLA leave period, the small business would be required to maintain the employee's group health insurance coverage just as though the employee was still in a working status. It is important to note that if the group health insurance is a contributory plan (the employee shares the benefit cost with the employer), the employee is still responsible for paying his or her share of the benefit costs during the leave period.

Upon returning from FMLA leave, the employer is obligated to ensure that the employee is returned to the same or an equivalent job (29 U.S.C. § 2614(a)(1)). Furthermore, the FMLA provides the employee with a complaint process (through the DOL Wage and Hour Division) in the event that the employer fails to do so.

There are two additional FMLA-related concerns with which small employers should be acquainted. First, DOL regulations governing FMLA leave require employers to provide individual written notices to individual employees (29 C.F.R. § 825.301). Second, should the employer fail to provide such individual notices, that employer may not count any leave the employee has taken as FMLA leave (29 C.F.R. § 825.700). In other words, if an employer failed to notify an employee that the amount of leave that he or she was granted was being counted as FMLA leave, the employee could then turn around and request up to his or her full 12 week entitlement under the Act.

On March 19, 2002, the Supreme Court of the United States ruled in *Ragsdale v. Wolverine Worldwide, Inc.* that the DOL's penalties for failing to notify the employee that sick leave will be designated as part of the FMLA entitlement were disproportionate and inconsistent with Congress' intent. Unfortunately, the *Ragsdale* decision only limits the penalty imposed by the DOL to not exceed a total of 12 weeks leave combined with previously granted leaves such as sick leave or personal time. To illustrate this distinction, assume that an employee had previously exhausted 6 weeks of his or her company sick leave, because the employer failed to notify her that the previous 6 weeks of leave was to be used against her 12-week entitlement. As a result, the employer could only be required to provide up to a maximum of an additional 6 weeks of unpaid FMLA leave. The *Ragsdale* decision only limits the DOL from imposing a leave penalty that would exceed the 12 weeks mandated by law.

Consequently, small employers who are covered under the FMLA should develop policies for notification of individual employees when leave is taken. It is important that such notification be made even when the medical leave is part of a preexisting benefit program (i.e., sick leave, maternity leave, vacation, personal leave, etc.). There should be no doubt in the employee's mind that the leave will be considered part of the employee's FMLA entitlement.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

The Worker Adjustment and Retraining Notification Act (WARN) of 1988 applies to any business that employs 100 or more employees, excluding part-time employees, or 100 or more

employees who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime (29 U.S.C. § 2101(a)(1)). Covered employers are required to provide a 60-day written notice to employees in the event of a plant closing or mass layoff. No employees may be laid off until the end of this 60-day period following the written notice. In addition to this employee notification requirement, the employer must notify the state dislocated worker unit (designated under Title III of the Job Training Partnership Act) (29 U.S.C. § 1651 *et seq.*). Additionally, a written 60-day notice must be given to the chief elected official of the unit of local government to which the employer pays the highest taxes (29 U.S.C. § 2102(a)).

For the purpose of WARN, the term *plant closing* means the permanent or temporary shutdown of a single site of employment or one or more facilities or operating units within a single site of employment, provided that the shutdown results in an employment loss of 50 or more employees (excluding part-time employees) at the single site during any 30-day period (29 U.S.C. § 2101(a)(2)).

Assume that a company employs 200 workers at two plants. Due to financial demands, one plant employing 70 workers will be closed permanently. Since the closing involved 50 or more full-time employees, the written 60-day notification would have to be given. If, on the other hand, the plant designated for closing only employed 35 employees, WARN's notification provisions would not apply. Be cautious, as there may be state laws that would impose a state requirement to provide notification. Employers are responsible for knowing state laws that relate to plant closings as well.

A *mass layoff* occurs when a reduction in force is not the result of a plant closing but involves at least one-third (33 percent) of the employees (excluding part-time employees), and at least 50 employees are laid off for at least a 30-day period. Under this provision, an employer with 120 full-time employees who had to lay off one-third of its employees would not be required to provide the 60-day notification. Yes, the employer would be covered under WARN (more than 100 workers were employed). Yes, at least one-third of the workforce was laid off. However, this would require 40 employees being laid off which is 10 short of the 50 established in the Act to meet the definition of *mass layoff*.

There is one more circumstance under which a *mass layoff* would be established. In any instance in which at least 500 employees (excluding any part-time employees) are laid off, regardless of the percentage of the workforce, a mass layoff is considered to have occurred, and the employer is required to provide a 60-day notice. Therefore, a plant employing 2,000 workers would be required to provide notice if it laid off 500 employees within a 30-day period, even though this would result in a 25 percent reduction in force (a proportion less than the 33 percent specified for smaller employers).

An exception to the 60-day notification is permitted when the closing or layoff is the result of the relocation or consolidation of part or all of the business. However, prior to the closing or layoff, the employer must offer to transfer the affected employees to a different site of employment within a reasonable commuting distance. Furthermore, such transfers cannot result in more than a 6-month break in employment (29 U.S.C. § 2101(b)(2)). Additionally, the employer is not required to give notice when it offers to transfer employees to any other site of employment regardless of distance provided that there is no more than a 6-month break in employment and the employee accepts within 30 days of the offer or by the date of the closing or layoff, whichever is later (29 U.S.C. § 2101(b)(2)).

To illustrate this point, assume that a plant was to be closed on April 1, 2003, and an employee was given the option to transfer to another plant on March 15, 2003. That employee would have until April 14, 2003, to accept or reject the transfer offer. Regardless of the

employee's decision, the employer would not have to give a 60-day notice of the plant closure.

The 60-day notification period may also be reduced under circumstances that necessitate a plant closing or mass layoff resulting from business circumstances that were not reasonably foreseeable to afford the 60-day notification. For example, no notice would be required if the plant closing or mass layoff resulted from a natural disaster such as a flood, earthquake, or drought.

CONCLUDING REMARKS

Small business is the backbone of the American economy. Most businesses begin with only a few employees and either expand to meet consumer demand for their goods and/or services or fail as a result of poor management or poor planning. Successful small businesses are confronted with additional external legal and regulatory factors as revenues, capital investment, and business operations expand and increase. Not surprising, federal and state taxation and capital formation issues generally are the primary focus of owners and managers. However, employment, safety, and environmental issues often are as important in the successful transition from a small, closely held enterprise to a larger organization with more duties and responsibilities to its employees, the public, and the government. Proper planning in these three areas allows a small business to grow without incurring burdensome remedial expenses to bring itself into compliance with statutes and regulations.

Although most federal employment laws apply only to small employers when they meet a minimum threshold of employees, some apply regardless of size while the minimum threshold varies from law to law. Therefore, it is imperative that small employers are aware of the provisions and requirements of key federal legislation. Specifically, this paper suggests that small employers should have general knowledge of the Fair Labor Standards Act, the Immigration Reform and Control Act, the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Worker Adjustment and Retraining Notification Act. By understanding their compliance obligations, small employers will be able to make employment decisions that will allow their businesses to prosper and grow and avoid costly and time consuming remedial efforts to bring their businesses into compliance with applicable laws and regulations.

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