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Entering Employment Law thru the Back Door

35th Annual Educational Conference on Workers' Compensation

Monday, October 17, 2011

Presented by:

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Workers' Compensation Retaliation

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Workers' Compensation Retaliation

Workers' Compensation Retaliation Statute - S.C. Code Ann. §41-1-80

- Prohibits retaliation by an Employer against an employee for filing a workers' compensation claim.

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Workers' Compensation Retaliation

In 1986, the South Carolina Workers' Compensation Anti Retaliation Statute was passed into law.

This statute provides "no employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the South Carolina Workers' Compensation Law, or as testified or is about to testify in any such proceeding."

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Workers' Compensation Retaliation

The burden of proof is upon the employee.

- This is a civil action to be filed in the Circuit Court and not a workers' compensation action decided by the Workers' Compensation Commission
- It has a one year statute of limitation
- Tried in a court of equity by a Judge – not Jury.

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Workers' Compensation Retaliation

Damages

- The Plaintiff is entitled to loss wages,
- Entitled to reinstatement of former position; and,
- Entitled to reinstatement of employment.

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Workers' Compensation Retaliation

The employer has affirmative defenses that must be assertive or waived.

- Willful or habitual tardiness or absence from work
- Disorderly conduct at work
- Intoxication at work
- Destruction of the employer's property

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Workers' Compensation Retaliation

- Failure to meet established employer work standards
- Malingering
- Embezzlement or larceny of the employee's property
- Violating specific written company policy for which the action is a stated remedy of the violation

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Workers' Compensation Retaliation

Claimant's workers' compensation claim award can be a defense.

- The failure of an employer to continue to employ, either in employment or at the employee's previous level of employment, an employee who receives compensation for total permanent disability, is in no manner to be considered in violation of this section.

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Elements to prove cause of action

1. Claimant must prove or establish the institution of a workers' compensation proceeding
2. The discharge or demotion of the Claimant; and
3. A causal connection between the first two elements

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Workers' Compensation Retaliation

Causation

The appropriate test of causation under workers' compensation retaliatory discharge statute is the "determinative factor" test. This test requires the employee establish he would not have been discharged "but for" the filing of the workers' compensation claim.

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Workers' Compensation Retaliation

Cases

Courts pay particular attention to the time of the termination in connection to the time of the filing of the claim.

The shorter the distance between the termination and the filing of the claim the greater likelihood the Claimant can prove he was terminated for the filing of a workers' compensation claim.

In contrast, the longer time between the Claimant's termination and the filing of the workers' compensation claim can work as a hindrance in the Claimant proving his claim.

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Workers' Compensation Retaliation

EXAMPLES

- Claimant fired 10 days after his reported injury.
- Found liability under the statute where employer's notice of lay off in the personnel file stated "workers' compensation lay off." Horn v. Davis Electric Constructors, Inc., 307 S.C. 559 (1992).

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The Basics: OSHA / FLSA

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The Basics: OSHA

KYSS

KEEP
YOUR
STUFF
SEPARATE

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KYSS

1. Resist using your personnel file as a “Catch All”;
2. Keep OSHA Reports in a separate folder;
3. Keep Workers’ Comp Records in a separate folder;
4. Keep Medical Records – FMLA, ADA in a separate folder;
5. You can store your information electronically, but be careful when you do.

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OSHA

- The Occupational Safety and Health Act (OSHA) of 1970 was signed into law December 29, 1970 by President Nixon ("Effective Date April 28, 1971")
- Its purpose is "To assure safe and healthful working conditions."
- States may take over its enforcement under the U.S. Department of Labor (USDOL). South Carolina was the first state to reserve such approval.

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OSHA

- OSHA is designed to develop mandatory job safety and health standards and enforce them effectively.
- OSHA requires most but not all employers to maintain a reporting and record keeping system and maintain OSHA Logs.

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OSHA

- Logs generally must be kept of all occupational sicknesses regardless of severity (except first aid), and if a death occurs, OSHA must be notified within at least 8 hours.
- These summaries of the OSHA Logs must be posted on February 1st for 3 calendar months.

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OSHA

- In general, OSHA applies to employers and employees in all 50 states, D.C., Puerto Rico and all U.S. Territories.
- It is a violation of OSHA standards to punish or discriminate against an employee for complaining about or reporting an alleged OSHA violation.

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OSHA's Form 301
Injury and Illness Incident Report

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.

U.S. Department of Labor
Occupational Safety and Health Administration

Form approved OMB no. 1218-0176

The *Injury and Illness Incident Report* is one of the forms you must fill out when a recordable work-related injury or illness has occurred. Together with the *Log of Work-Related Injuries and Illnesses* and the accompanying *Summary*, these forms help you and your employer and OSHA develop a picture of the extent and severity of work-related incidents.

Within 7 calendar days after you receive information that a recordable work-related injury or illness has occurred, you must fill out this form or an equivalent. Some state workers' compensation, insurance, and other reports may be acceptable substitutes. To be considered an equivalent form, any substitute must contain all the information asked for on this form.

According to Public Law 91-596 and 29 CFR 1904, OSHA's recordkeeping rule, you must keep this form on file for 5 years following the year to which it pertains.

If you need help while completing this form, you may obtain copies and instructions as you need.

Completed by _____

Title _____

Phone ____/____/____ Date ____/____/____

Information about the employee

1) Full name _____

2) Street _____

City _____ State _____ ZIP _____

3) Date of birth ____/____/____

4) Date hired ____/____/____

5) ☐ Male
☐ Female

Information about the physician or other health care professional

6) Name of physician or other health care professional _____

_____

7) If treatment was given away from the worksite, where was it given?

Facility _____

Street _____

City _____ State _____ ZIP _____

8) Was employee treated in an emergency room?
☐ Yes
☐ No

9) Was employee hospitalized overnight as an in-patient?
☐ Yes
☐ No

Information about the case

10) Case number from the Log _____ (Enter the number from the Log after you record the case.)

11) Date of injury or illness ____/____/____

12) Time employee began work _____ AM / PM

13) Time of event _____ AM / PM ☐ Time of event cannot be determined

14) What was the employee doing just before the incident occurred? Describe the activity, as well as the tools, equipment, or material the employee was using. Be specific. Examples: "climbing a ladder while carrying roofing materials"; "spraying chlorine from hand sprayer"; "daily computer data entry."

15) What happened? Tell us how the injury occurred. Examples: "fell from ladder when it slipped on wet floor; worker fractured right leg"; "worker was sprayed with chlorine when gasket blew during replacement"; "worker developed soreness in wrist over time."

16) What was the injury or illness? Tell us the part of the body that was affected and how it was affected; be more specific than "hurt," "pain," or "sore." Examples: "strained back"; "chemical burn, hand"; "carpal tunnel syndrome."

17) What object or substance directly harmed the employee? Examples: "concrete floor"; "chlorine"; "radial saw." If this question does not apply to the incident, leave it blank.

18) If the employee died, when did death occur? Date of death ____/____/____

The Basics of FLSA

The Fair Labor Standards Act of 1938 (FLSA) sets minimum wage, overtime pay, record keeping and child labor standards for covered private employers and for Federal, State and local governments.

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Employers

For practical purposes, everybody who employs anybody is an “employer.”

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Overtime in a Work Week

- The work week is defined as 40 hours in a 7-day period.
- Any employee, who works – actually works – more than 40 hours in a 7-day period, is entitled to overtime.
- Overtime is 1 ½ times the employees regular pay for all hours over 40 in a 7-day period.
- The 7-day period may be set by the employer (i.e. Monday – Sunday, Sunday – Saturday, Wednesday – Tuesday, etc.)

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Compensatory Time

Contrary to popular belief, private employers are not permitted to give non-exempt employees the choice of overtime pay or compensatory time off.

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Exempt v. Non-Exempt

- Forget about "hourly v. salary." Non-exempt employees are entitled to overtime.
- Exemptions apply only for "executive employee," "administrative employees," "professional employees," and "outside sales employees."

See websites

- www.dol.gov/whd/regs/compliance/fairpay/side-by-side_PF.htm
- www.dol.gov/whd/reg/compliance/fairpay/fsl17a_overview.pdf

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Other Exemptions

There are other exemptions for outside sales person, seasonal industries, agriculture, certain computer employees.

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Questions

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Alphabet Soup:
FMLA, ADA, ADAAA

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FMLA

There are 6 categories of serious health conditions

1. In-patient care in a hospital, hospice or residential medical care facility
2. Incapacity and treatment (more than 3 consecutive full days + subsequent treatment)
3. Pregnancy or prenatal care
4. “Chronic” serious health condition
5. Permanent or long-term conditions
6. Conditions requiring multiple treatments

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FMLA

FMLA Requires Employers Provide Employees…

- Notices of Employee Rights and Responsibilities under FMLA as well as other notices
- Up to 12 weeks of unpaid leave in a 12-month period for FMLA Reasons #1 – 5
- Up to 26 weeks in a single 12-month period for FMLA Reason #6.
- Same health insurance benefits and terms during FMLA leave as when employee was working
- Same or equivalent position upon return from FMLA leave

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FMLA

What the Employer has to do:

- Post a notice explaining the FMLA's provisions and how employees may file complaints of violations.
- Post the notice prominently where employees and job applicants can see it, and it must be easy to read.
- If a significant number of employees are not literate in English, the employer must provide a general notice in the language in which they are literate.

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FMLA

What the Employer has to do:

- If an employer has one, then an a general notice on the FMLA must be included in the handbook or written materials.

- If an employer doesn't have one, the employer must give each new employee a copy of the general notice when he/she is hired.

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FMLA

What type of notice must the employee give?

- No magic are words required.
- Don't even have to mention FMLA.
- Only required to make the employer aware they need FMLA leave, along with the anticipated timing and length of the leave.
  - Examples – "I'm going to have a baby in June," or "My father had a heart attack, and I'll need to help take care of him for about a week after he's out of the hospital."

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FMLA

What type of notice must the employee give?

- Calling in “sick” without providing more information will not be considered sufficient notice under FMLA.
- Employer is expected to ask additional questions to determine if FMLA applies.

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DOL Forms

The Department of Labor forms are pretty good.

Department of Labor Website: www.dol.gov

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FMLA

Employees Without Job Restoration Rights

Employees who cannot perform an essential function of their job are not entitled to restoration, BUT may be entitled to protection under the **ADA…**

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New Amendments and Regulations under the ADA

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The Pendelum Swings

- Since early 2009, agencies led mostly by strong pro-labor advocates with no or little private sector experience
- Emphasis shift from helping employers understand and comply with law to punitive enforcement
- More investigations, audits, and charges
- After 2010 election, less focus on Congress and more on agency actions to expand employee and labor rights

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THE NEW SHERIFF

"As I have said since my first day on the job — make no mistake, the Department of Labor is back in the enforcement business. You can see this commitment echoed in my Fiscal Year 2010 Budget request. This budget will return our worker protection efforts to a level not seen since 2001."

Secretary of Labor Hilda Solis
Speech to American Society of
Safety Engineers, June 29, 2009

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EEOC Final ADAAA Regulations

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ADAAA Timeline

- ADAAA
  - Signed into law Sept. 25, 2008
  - Went into effect Jan. 1, 2009
- ADAAA Regulations
  - Final rules published March 25, 2011
    - Following review of over 600 public comments on proposed regulations issued in Sept. 2009
    - Accompanied by appendix with interpretive guidance as well as Fact Sheet and Q&A
  - Went into effect May 24, 2011

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ADA as Amended by ADAAA

- Prohibits discrimination against a "qualified individual on the basis of disability"
- That is, an individual who:
  - Has a physical or mental impairment that substantially limits a major life activity, or
  - Has a record of such an impairment, or
  - Is regarded as having such impairment, and
  - Is qualified for a job and can perform its essential functions with or without reasonable accommodation

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Main ADAAA Changes

- “Disability” “shall be construed in favor of broad coverage”
- “Substantially limits” does not mean “severely” or “significantly” restricted
- “[W]hether an individual’s impairment is a disability under the ADA should not demand extensive analysis”—focus should instead be on issues of discriminatory conduct and reasonable accommodation
- “Major life activities” includes “major bodily functions”

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Main ADAAA Changes

- Positive effects of mitigating measures other than ordinary eyeglasses or contact lenses are not considered in deciding if impairment SL a MLA
- Impairment that is episodic or in remission is disability if it would SL a MLA when active
- Applicant or employee can be "regarded as" disabled
  - Even if employer did not perceive him/her as SL in a MLA
  - If subjected to discrimination because of perceived impairment that is not "transitory and minor"
- Individual who is "regarded as" disabled is not entitled to RA

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ADAAA Did Not Change…

- Definitions of/burdens of proof relating to:
  - "Qualified"
  - "Reasonable accommodation"
  - "Undue hardship"
  - "Direct threat"

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Final Regulations

- "Regarded as" claimants don't have to show impairment that SL a MLA—only "actual disability" and "record of" claimants seeking RA have to show such an impairment.

- Even if individual is "regarded as" having impairment, liability is established only when he/she proves discriminated against on basis of disability.

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Final Regulations

- "Major" is not supposed to impose a "demanding standard"
- Non-exhaustive list of what constitutes a MLA (in addition to those listed in ADAAA):
  - Sitting
  - Reaching
  - Interacting with others

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Final Regulations

- "The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, …."
- "Substantially limits" is not meant to be a "demanding standard"

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Final Regulations

- **Impairments that "it should easily be concluded" will SL on a MLA:**
  - **Deafness**
  - **Blindness**
  - **Intellectual disability**
  - **Partially or completely missing limbs**
  - **Mobility impairments requiring use of a wheelchair**

•Autism
•Cancer
•Cerebral palsy
•Diabetes
•Epilepsy
•HIV infection
•Multiple sclerosis
•Muscular dystrophy
•Mental disabilities (major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, schizophrenia)

Final Regulations: "[T]he number of individuals [in the U.S.] with the[se] impairments … could be at least 60 million"

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Final Regulations

Non-exhaustive list of mitigating measures that must be disregarded:

- Medication
- Medical supplies, equipment, or appliances
- Low-vision devices (devices that magnify, enhance, or otherwise augment a visual image, not including ordinary eyeglasses or contacts)
- Prosthetics including limbs and devices
- Hearing aids and cochlear implants or other implantable hearing devices
- Mobility devices
- Oxygen therapy equipment and supplies
- Reasonable accommodations
- Assistive technologies
- Learned behavioral or adaptive neurological modifications
- Psychotherapy, behavioral therapy, or physical therapy

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Not Impairments

From Appendix—"Interpretive Guidance:"

- Physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within ''normal'' range and are not the result of a disorder
- Predisposition to illness or disease
- Pregnancy
  - But certain resulting impairments (*e.g.*, gestational diabetes) may be considered a disability if they SL a MLA
  - Also a pregnancy-related impairment may constitute a ''record of'' such an impairment or may be covered under the ''regarded as'' prong if the basis for a prohibited employment action and not ''transitory and minor''

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Not Impairments

- Common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder
- Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments
- Advanced age is not an impairment
  - But various medical conditions commonly associated with age, such as hearing loss, osteoporosis or arthritis, would constitute impairments

Tips for Employers

- Most individuals requesting RA likely disabled
- Focus more on functional job limitations and whether RA would work
- Train supervisors/managers who are likely to receive/evaluate RA requests
- Update job descriptions, policies, and forms
- Reconsider inflexible no-fault/fixed leave attendance policies
- More ADA lawsuits will survive summary judgment

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Questions

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Title VII: Discrimination

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Title VII Discrimination

- Title VII of the 1964 Civil Rights Act: bans discrimination in employment because of race, color, religion, sex, or national origin. It covers all terms and conditions of employment and it holds employers responsible for any discrimination that goes on within the employer's organization. Title VII is administered by the EEOC and covers employers with 15 or more employees.

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U.S. Equal Employment Opportunity Commission (EEOC)

- Title VII discrimination claims are enforced by the EEOC.
- Employee must first file a Charge of Discrimination with the EEOC.
- In SC, Claimant has 300 days after alleged discriminatory event to file claim.

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U.S. Equal Employment Opportunity Commission (EEOC)

After receiving Charge of Discrimination,

EEOC will either:

- Ask the parties to mediate;
- Issue a Notice of Right to Sue (if no violation found);
- Attempt voluntary settlement with employer (if violation found); or
- File lawsuit (If violation found)

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Title VII Discrimination

Plaintiff can establish violation of Title VII by showing:

- he/she suffered **adverse employment action**
- **disparate treatment** by the employer; or
- **disparate impact** of the employer's policies or practices

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Adverse Employment Action

- "An adverse employment action is a discriminatory act which adversely affect[s] the terms, conditions, or benefits of the plaintiff's employment. Conduct short of ultimate employment decisions can constitute adverse employment action." James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 375-76 (4th Cir. 2004).

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Adverse Employment Action

ADVERSE Examples:

- Reassignment that causes significant detrimental effect. Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999)

NON-ADVERSE Examples:

- Employee's exclusion from certain meetings and emails, which "could not have had a negative effect on terms, conditions, or benefits of] employment," does not "constitute adverse employment actions." Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 189 (4th Cir. 2004)
- "[A]besent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position." Boone v. Goldin, 178 F.3d 253, 256-57 (4th Cir. 1999);

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Disparate Treatment

Defined:

- "'Disparate treatment' is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." International Bhd. Of Teamsters v. United States, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977).

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Disparate Treatment

Three theories under which the plaintiff can succeed on a claim of disparate treatment:

- Single-Motive Theory (direct evidence)
- Mixed-Motive Theory (direct evidence)
- Pretext (McDonnell Douglas Framework) (indirect evidence)

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Disparate Treatment

- "Regardless of the type of evidence offered by a plaintiff as support for her discrimination claim (direct, circumstantial, or evidence of pretext), or whether she proceeds under a mixed-motive or single-motive theory, '[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.'" Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284 (4th Cir. 2004).

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Disparate Treatment

Defenses

- BFOQ:
  - In addition to the legitimate, non-discriminatory reason "defense," Title VII sets forth a statutory **bona fide occupational qualification** defense.
  - It shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of (their) religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. §2000e-2(e) (2000).

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Disparate Treatment

Defenses

- After-Acquired Evidence
  - Evidence of employee wrongdoing acquired after the employee was discharged for unlawful reasons (i.e. discriminatory reasons) may limit recovery of damages where the employer establishes "that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 362-63, 115 S.Ct. 879, 886-87, 130 L.Ed.2d 852 (1995).
  - This defense can potentially limit the plaintiff's ability to obtain reinstatement and full backpay, but it does not shield the employer from liability or from all damages.

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Disparate Impact

Defined:

- “Plaintiff must demonstrate that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin." 42 U.S.C. §2000e-2(k)(1)(A)(i) (2000).
- "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measure job capability." Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).
- Under Griggs, although an employer may not have intentionally discriminated, it may still be held liable for a Title VII violation if its procedures, policies, or testing measures had a discriminatory impact upon a class of persons protected by Title VII.

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Title VII Discrimination

- Tips for Employers

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Emerging Employment Issues: Immigration

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SC Illegal Immigration Reform Act with June 2011 Amendments

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SC Illegal Immigration Reform Act

STATUTE PROHIBITS

(§ 41-8-30)

"A private employer who knowingly or intentionally employs an unauthorized alien violates the private employer's license."

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Private Employers

Employers must…

Participate in E-Verify and check all new employees within 3 business days of "employing a new employee."

Note: Under the previous language of the Act, you had a choice of participating in E-Verify or checking if a new employee possessed or was eligible for a S.C. drivers license/ID or the equivalent.

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Scenarios

- I've got a quick project and only need workers for a few days. I know the rule gives me three days to check the employee through e-verify but I *don't think* they are illegal so…
- Can I hire them for two days and then fire them to avoid having to use e-verify?
- If I need them on another project two weeks from now, can I re-hire them for two days and then fire them to avoid having to use e-verify?

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Scenarios

No, you can't hire someone for 1-2 days and avoid E-Verify?

- "A private employer shall submit a new employee's name and information for verification even if the new employee's employment is terminated less than three business days after becoming employed." 41-8-20(D)

No, you can't re-hire someone for 1-2 days and avoid E-Verify?

- If a new employee's work authorization is not verified, you can not employ, continue to employ, or re-employ the new employee.

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What is E-Verify?

- Internet-based system
- Operated by the Department of Homeland Security in partnership with the Social Security Administration
- Electronically verifies employment eligibility of newly hired employees.

E-Verify: How to Register

- Participation is currently free to employers
- Internet Explorer 5.5 or Netscape 4.7 or higher (except Netscape 7.0)
  - www.dhs.gov/E-Verify
  - E-Verify Information

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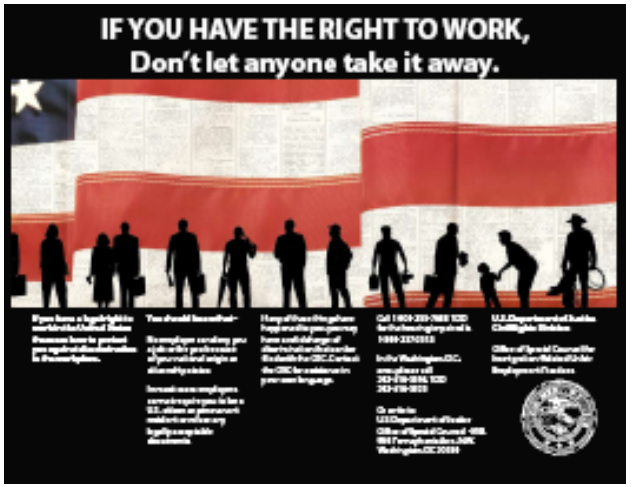
E-Verify: Notice

Employers must post at hiring sites

- The English and Spanish notice provided by the DHS indicating their participation in the program
- The Right to Work Poster



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E-Verify: Notice

- If posting notices is difficult due to the setup of your business, ensure that all prospective employees receive them with their application materials.

- Note: The Notice and Right to Work poster are available on the E-Verify website.

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E-Verify

Employers *must*:

- Only use E-Verify with newly hired employees who have completed Form I-9.

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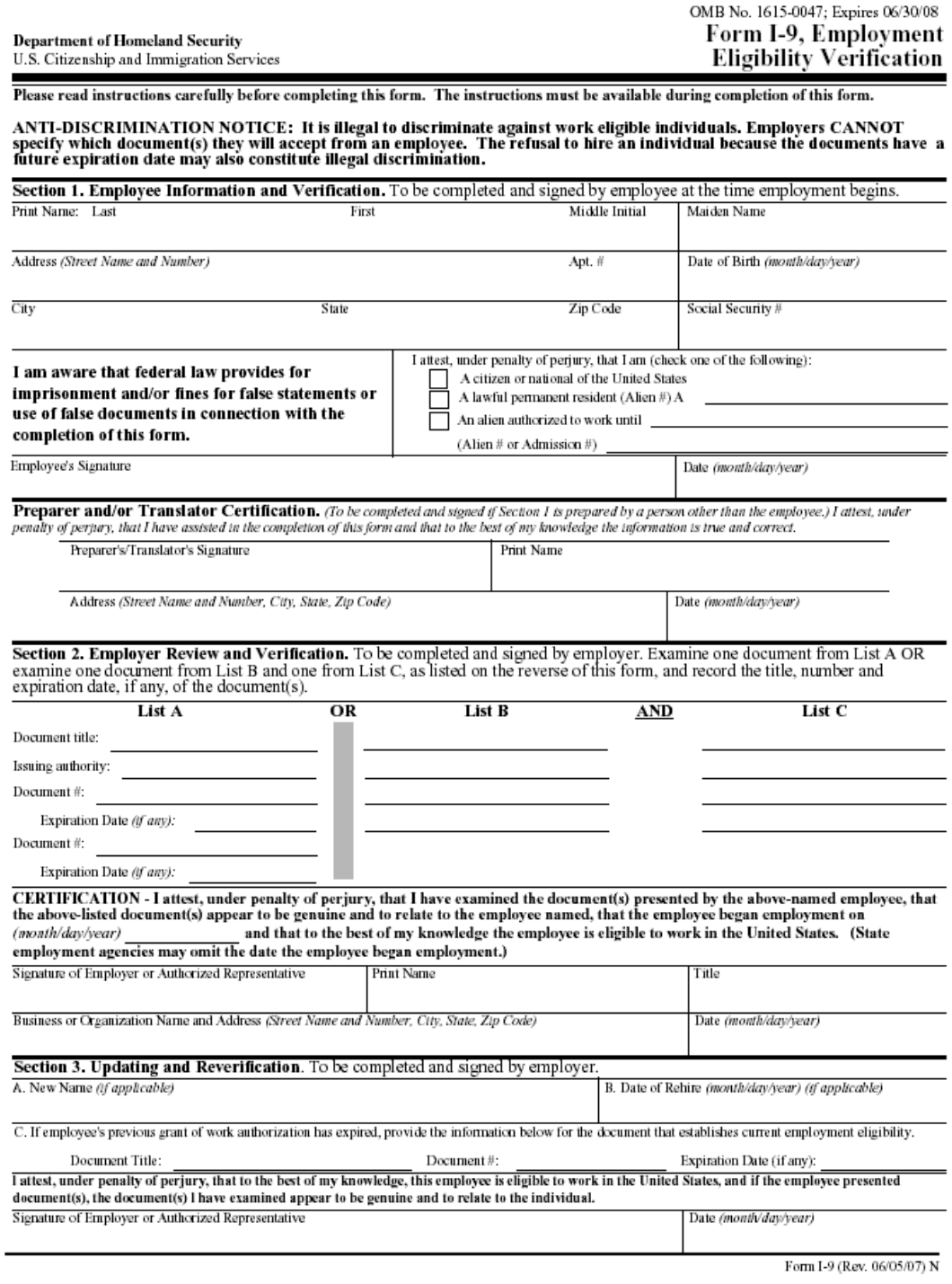
Employers *must*:

- Request employee's Social Security No. in Section 1 of the Form I-9.



OMB No. 1615-0047; Expires 06/30/08

Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-9, Employment Eligibility Verification

Please read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification. To be completed and signed by employee at the time employment begins.

Print Name: Last | First | Middle Initial | Maiden Name

Address *(Street Name and Number)* | Apt. # | Date of Birth *(month/day/year)*

City | State | Zip Code | Social Security #

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):
- ☐ A citizen or national of the United States
- ☐ A lawful permanent resident (Alien #) A _____
- ☐ An alien authorized to work until _____ (Alien # or Admission #) _____

Employee's Signature | Date *(month/day/year)*

Preparer and/or Translator Certification. *(To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.*

Preparer's/Translator's Signature | Print Name

Address *(Street Name and Number, City, State, Zip Code)* | Date *(month/day/year)*

Section 2. Employer Review and Verification. To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number and expiration date, if any, of the document(s).

	List A	OR	List B	AND	List C
Document title:					
Issuing authority:					
Document #:					
Expiration Date *(if any)*:					
Document #:					
Expiration Date *(if any)*:					

CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on *(month/day/year)* _____ **and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment.)**

Signature of Employer or Authorized Representative | Print Name | Title

Business or Organization Name and Address *(Street Name and Number, City, State, Zip Code)* | Date *(month/day/year)*

Section 3. Updating and Reverification. To be completed and signed by employer.

A. New Name *(if applicable)* | B. Date of Rehire *(month/day/year) (if applicable)*

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility.

Document Title: _____ Document #: _____ Expiration Date (if any): _____

I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative | Date *(month/day/year)*

Form I-9 (Rev. 06/05/07) N

Employers *must*:

- Any List B documents on Form I-9 provided by the employee must contain photographs.

LISTS OF ACCEPTABLE DOCUMENTS

LIST A Documents that Establish Both Identity and Employment Eligibility	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Eligibility
1. U.S. Passport (unexpired or expired)		1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		1. U.S. Social Security card issued by the Social Security Administration *(other than a card stating it is not valid for employment)*
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		2. Certification of Birth Abroad issued by the Department of State *(Form FS-545 or Form DS-1350)*
3. An unexpired foreign passport with a temporary I-551 stamp		3. School ID card with a photograph		3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. An unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, I-688B)		4. Voter's registration card		4. Native American tribal document
		5. U.S. Military card or draft record		5. U.S. Citizen ID Card *(Form I-197)*
5. An unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer		6. Military dependent's ID card		6. ID Card for use of Resident Citizen in the United States *(Form I-179)*
		7. U.S. Coast Guard Merchant Mariner Card		
		8. Native American tribal document		7. Unexpired employment authorization document issued by DHS *(other than those listed under List A)*
		9. Driver's license issued by a Canadian government authority		
		For persons under age 18 who are unable to present a document listed above:		
		10. School record or report card		
		11. Clinic, doctor or hospital record		
		12. Day-care or nursery school record		

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)

E-Verify

Employers *must:*

- initiate initial verification query on E-Verify website no later than the 3rd business day after the employee starts work
- provide their employees with an opportunity to contest a Tentative Nonconfirmation (TNC)
- allow employee to continue working while verification pending.

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E-Verify

IMPORTANT:

If a verification query is not initiated by the third business day after the employee starts work for pay, the employer must note the reason for the delay and attach it to the employee's Form I-9 on file.

SOURCE: "E-Verify User Manual," U.S. Department of Homeland Security

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E-Verify

Employers *may not*:

- verify newly hired employees selectively.
- request that the employee use certain documentation for Form I-9 or E-Verify purposes.
- use E-Verify to discriminate against any job applicant or new hire on the basis of his or her national origin, citizenship, or immigration status.

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E-Verify

Employers *may not*:

- use the system to pre-screen applicants for employment.
- go back to check employment eligibility for employees hired before their company signed the Memorandum of Understanding with USCIS and SSA.
- re-verify employment authorization.
- take any adverse action against an employee based upon E-Verify unless the program issues a Final Non-confirmation.

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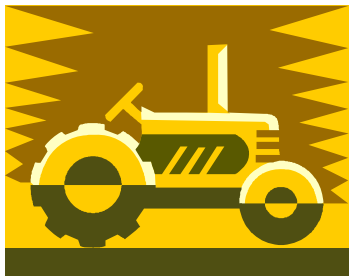
Question

I am an employer with MULTIPLE hiring sites.

Can one site verify everyone? How?



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Answer

YES.

One site may verify new hires at all sites.

At the registration page online select

"multiple site registration"

and give the number of sites

per state to verify

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E-Verify

Who's going to know if I'm following the requirements?

- LLR charged with investigations;
- LLR will have a statewide random auditing program;
- Individuals may submit written complaints;
- 24-hour toll-free phone number and website created by the state commission for minority affairs to receive, collect, and report alleged violations of federal or state immigration laws.

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What happens during an audit?

1) You will receive a letter or email from LLR

   – Informs you LLR wants to perform an audit

   – Will include an Affirmation of Legal Work Status Form
     - Contact your legal counsel before completing as some requests in the form may put you in jeopardy of violating the Memorandum of Understanding

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What happens during an audit?

2) You contact LLR to setup a time for the audit.

  – Investigator will visit your company's office or review the necessary documents at the office of your company's legal counsel

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What happens during an audit?

3) LLR investigator reviews necessary documents.

- List of all current employees
- List of current employees with a post hiring date of July 2009
- E-Verify Audit Report
- Contractors must also provide:
  - Contact phone numbers of all Subcontractors and Sub-sub contractors within 72 hours of LLR's request.

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What happens during an audit?

- Expect LLR to look for employees who are not entered into E-Verify within 3 days of hire
- Investigators may conduct interviews of employees who were entered into the system late.

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What happens during an audit?

If an investigator performs an interview…

- Normally short
- Includes questions like:
  - employees name,
  - address, and
  - whether they have any knowledge of illegal workers.

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What happens during an audit?

4) After the audit you receive a letter from LLR

- Sent 45-60 days after the audit
- Includes audit's findings and if there were any violations

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What happens during an audit?

5) If you believe you were cited falsely,

- You have 30 days to appeal the citation with LLR.

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Scenario

I need workers and hire some for a project. I go through e-verify like the rule requires, but the system sends me back a "Tentative non-confirmation."

Do I have to wait to receive a confirmation before I can put them to work?

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Scenario

No.

The Act actually requires you to “provisionally” employ a new employee until the new employee’s work authorization has been verified. 41-8-20(D)

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E-Verify

What happens if I'm caught violating the Immigration Act?

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Failure to use E-Verify

Prior to July 1, 2012

1st Offenses

- Sworn affirmation of compliance in writing within three business days

Failure to Comply

- Probation for 1 year, AND
- Submit quarterly reports to LLR demonstrating compliance with the Act

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Failure to use E-Verify

After July 1, 2012

1st Offenses

- Probation for 1 year, AND
- Submit quarterly reports to LLR demonstrating compliance with the Act

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Failure to use E-Verify

2nd and Subsequent offenses

- Suspension of license for 10-30 days

Exception

- If no violation in last 3 years, subsequent occurrence treated as first occurrence

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Failure to use E-Verify

Any violation for failure to verify after a violation for knowingly / intentionally hiring an illegal alien results in…

- Suspension of license for 10-30 days

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Suspension or Probation

Employing *anyone* during period of suspension or probation results in revocation of all business licenses for 5 years.

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Failure to use E-Verify

Remember:

It is a separate violation each time you fail to verify status of a new employee through E-Verify

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Knowingly / Intentionally Hiring an Unauthorized Alien

1st Offense:

- Suspend all business licenses INCLUDING the employer's SC employment license for 10-30 days;
- During suspension, employer may not engage in business, open to the public, or hire new employees;
- Terminate all unauthorized alien employees;
- AND pay reinstatement fees up to $1000 (covers investigation and enforcement costs).

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Knowingly / Intentionally Hiring an Unauthorized Alien

2nd Offense:

- Suspend all business licenses INCLUDING the employer's SC employment license for **30-60 days**;
- During suspension, employer may not engage in business, open to the public, or hire new employees;
- Terminate all unauthorized alien employees;
- AND Pay reinstatement fee up to $1000;

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Knowingly / Intentionally Hiring an Unauthorized Alien

3RD Offense:

- Revocation of business and employment license for 90 days;

- After 90 days, may apply for provisional license if:
  - Probation for 3 years;
  - Submits quarterly compliance reports;
  - Terminates all unauthorized alien employees; and
  - Pays reinstatement fee of up to $1000.

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Knowingly / Intentionally Hiring an Unauthorized Alien

Subsequent Offenses (after 3rd offense):

- Revocation of business and employment license (5 year minimum);
- Only be reinstated after 5 years if employer terminates all unauthorized alien employees;
- Probation for 3 years and submits quarterly compliance reports;
- AND Pays reinstatement fee of up to $1000.

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Knowingly / Intentionally Hiring an Unauthorized Alien

If private employer conducts business or employs when license is revoked, LLR must seek an injunction against the private employer from doing further business.

The violation would subject the private employer to civil or criminal contempt sanctions.

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Felony

The Act also creates a felony punishable with fines and imprisonment *of up to 5 years* for anyone who makes false, fictitious or fraudulent immigration reports.

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What does LLR consider when determining punishment?

- Number of employees you've failed to verify
- Prior violations of the Act
- Size of your workforce
- Actions you've taken to comply with federal immigration laws and with the Act

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What does LLR consider when determining punishment?

- Acts you've taken after the inspection or audit to comply with the Act
- Duration of the violation
- Degree of the violation (new); and
- Good faith you've shown (new)

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Wrongful Termination

Under the unfair trade practices act, the Act enables lawful U.S. workers to sue an employer who terminates them for the purpose of employing a worker the employer knew or should have known was not authorized to work in the U.S.

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SC Illegal Immigration Reform Act

When do I have to start following the requirements of the Act?

NOW

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Compliance Checklist

1. Complete I-9 for all employees
2. Do not knowingly/intentionally hire unauthorized aliens
3. Use E-Verify for each new employee's work authorization
4. Provide notice that you participate in E-Verify with application Materials

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Questions

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Emerging Employment Issues: Drug Testing

Collins Lacy SM
ATTORNEYS AT LAW

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Is Your “Office” Passing the Test

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What's Your Policy ?

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History of Employer Drug Testing

- The Drug-Free Work Place Act passed in 1988.
- The Act requires federal contractors who receive contracts valued at $25,000 or more, as well as recipients of federal grants, to take actions to maintain drug-free workplaces.

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History of Employer Drug Testing

Omnibus Transportation Employee Testing Act of 1991

- Makes transportation carriers and their employees subject to pre-employment testing for illegal drug use and reasonable suspicion, random and post-accident testing for alcohol and illegal drug use.

- The Act covers air carriers, Federal Aviation Administrators, railroad carries, motor carriers and mass transportation employees.

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S.C. Drug-Free Workplace Act of 1990

Requires recipients of state grants or contracts to maintain a drug-free workplace.

- It's similar to the Federal Drug-Free Workplace Act of 1988.
- Additionally, it requires state contractors and grantees to:
  - Provide a written drug-free policy statement to employees,
  - Notify state agencies after receiving a notification of a conviction for a drug offense occurring in the workplace,
  - Establish and maintain a drug-free awareness program for all employees engaged in the performance of the contract or grant, and
  - Maintain confidential nature of the testing and test results.

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History of Employer Drug Testing

PRIVATE EMPLOYERS:

- No Federal or State law prohibits private employers from engaging in pre-employment, post-offer employment and post accident, random and post-accident drug and alcohol testing.

- Case law supports drug testing policies.

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History of Employer Drug Testing

NOTICE:

- Federal and State notifications must be posted in all commonly used meeting areas for employees, which puts them on notice of the Drug-Free Workplace Act Zone.
  - Such as break rooms, locker rooms, general meeting facilities, time check-in and check-out facilities, etc.
  - All handbooks and updated pre-employment packages must contain information designating the policies of the company and procedures for testing.
  - Employees must be given notice of any changes or updates 30 days prior to the implementation of the new policy and these changes or updates must be acknowledged by employees in writing.

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Public / Private Employers

- The Fourth Amendment's protections against unreasonable searches and seizures are not directly relevant to private-sector employees (unless their drug testing is mandated by the Federal Government).

- Fourth Amendment limits government conduct, not private conduct.

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Public Employers

Drug testing of public employees constitutes a search under the Fourth and 14th Amendments and, therefore, a *public employer* may not conduct such a test without individualized suspicion of wrongdoing.

Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

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Types of Drug Testing

- Pre-Employment Testing
- Employee Testing
  - Periodic random testing
  - Post-accident testing
  - Suspicion based testing

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Pre-Offer Testing

- Job description
- Safety Sensitive Functions
- Clearly Stated in the Application
- Signed Waiver
- A negative test result must be received before a final offer of employment is made in drug testing/ Alcohol testing requires a conditional offer prior to the testing.

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Employee Testing

Random Testing

- Selection of employees for random testing will be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with Social Security numbers, payroll identification numbers or other comparable identifying numbers.

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Employee Testing

- The number of random controlled substance tests conducted annually under a policy should equal or exceed 50 percent of the average number of people being tested for which testing is required.
- The number of random alcohol tests conducted shall equal or exceed 25 percent of such testing pool applicants.
- Each time a random selection is made, every employee from the pool will have an equal chance of being selected. Random tests will be unannounced and spread reasonably throughout the year. Employees, when notified that they have been selected for random testing, will proceed immediately to the collection site.

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Employee Testing

- **Post Accident Testing**
  - All employees, regardless of whether their performance has contributed to an accident or cannot be completely discounted as a contributing factor to the accident, who are injured or involved in accident will be tested.
  - Should apply to every accident that occurs where a citation under State or local law arises from the accident and the accident involved the loss of life; or bodily injury to any person who, as a result of the accident, receives medical treatment away from the scene of the accident.

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Employee Testing

- **Post Accident Testing**
  - One or more of the vehicles incurred disabling damages as a results of the accident, requiring the vehicle to be transported away from the scene of the accident by tow truck or other motor vehicle; or
  - Any reported accident or injury the employee suffers while working in the course and scope of his employment.
  - Testing will take place as soon as possible, but no later than 32 hours after the accident.

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Is Your “Office” Passing the Test

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Reasonable Suspicion

Courts routinely uphold the validity of Employers who engage in drug testing in which they have reasonable grounds for suspecting a particular employee is under the influence of illegal drugs.

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What is Reasonable Suspicion?

- Private Employer; not held to the Public/Government 4th and 14th Amendment standard.

Courts define suspicion with its common meaning:

  - "It must be accorded its common meaning in ordinary parlance which, according to the dictionary, includes doubt, mental uneasiness and uncertainty, or to imagine one to be culpable without proof or with a slight touch or trace of proof. "

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Reasonable Suspicion

Look to your policy:

- Does your policy require an investigation?
- How far do you have to investigate?
- What steps do you have to take with the investigation?
- Document your investigation?
- Is it okay not to require an investigation?
- FACT SPECIFIC FOR EACH OCCURENCE

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Reasonable Suspicion

Suspicion based upon personal observations:

- Classic indicators:
  - Slurred speech
  - Glazed eyes
  - Odor
  - Erratic behavior
  - On the job accident
  - Stumbling
  - Fighting with co-workers

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Reasonable Suspicion

- Excessive absenteeism or tardiness
- Significant change in personality, appearance, or repeated abusive behavior, insolence, insubordination, etc.
- Unexplained absences from normal worksites
- Unusual behavior that cannot be readily explained
- Changes in appearance or demeanor
- Excessive cravings for water or sweets
- Difficulty in motor coordination

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Reasonable Suspicion

Suspicion based upon 3rd party reports

- Reports from Supervisors
  - First-hand knowledge
  - Willing to write a statement
  - Can you trust your supervisor?
  - Detail / sufficiency of information presented

- Reports from Co-Workers
  - First-hand knowledge
  - Willing to write a statement
  - Can you trust the source?
  - Detail / sufficiency of information presented

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Reasonable Suspicion

Suspicion based upon poor performance?

- Can be a partial basis
- Too weak by itself

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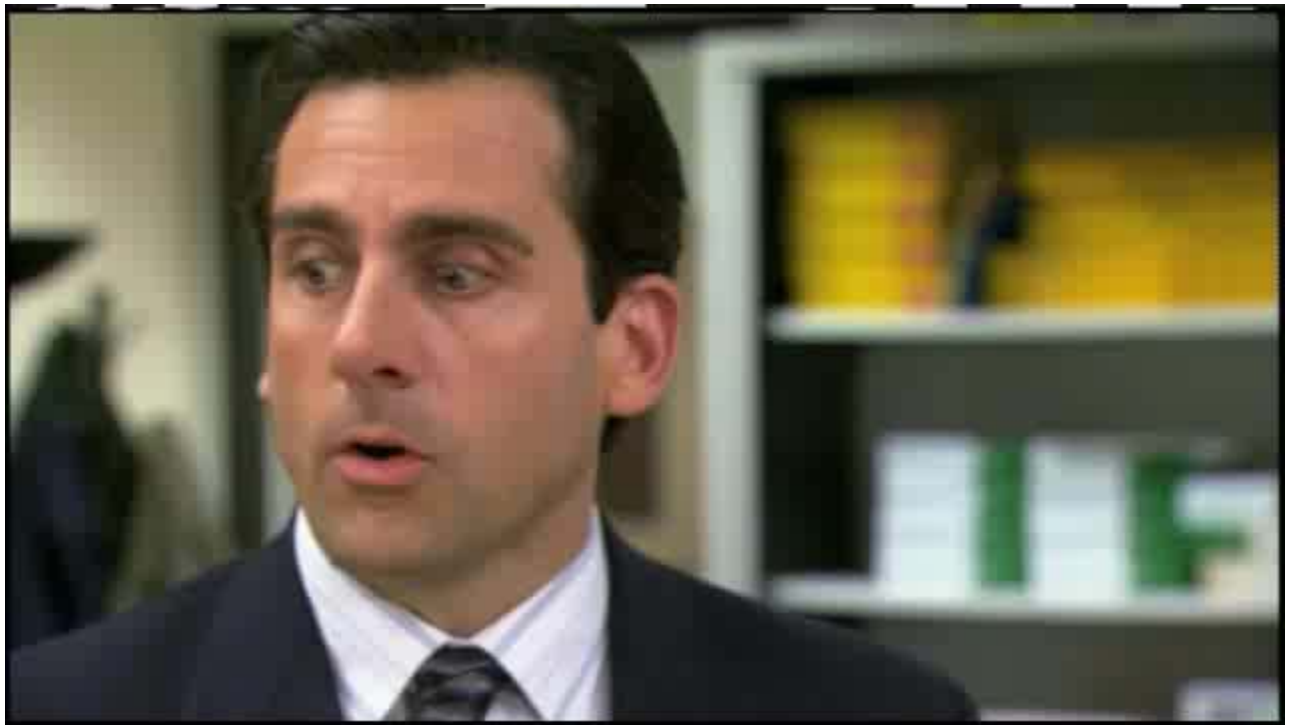
Is Your “Office” Passing the Test



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Confidential

Courts / Statute require employers to keep the results and testing confidential

- Procedures in place before testing to keep all results strictly confidential
- Will not disclose the information without the written consent of employee
- Limit the amount of people who know
  - HR Generalist
  - Supervisor
  - Safety Specialist

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Confidential

- Release only with a signed consent
- Okay to release to Court or State Administrative Office for legal matter:
  - South Carolina Employment Commission
  - DOT Reporting Requirements

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Searches

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Searching Property

Strongly discourage

- No to personal searches
- No to personal bags / purses
- No to personal vehicles

Limited circumstances / No expectation of privacy

- Facility lockers
- Desks
- Company vehicles

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What is a DER?

A <u>D</u>esignated <u>E</u>mployer <u>R</u>epresentative

is an employee authorized by the employer to take immediate action(s) to remove employees from safety-sensitive duties, cause employees to be removed from these covered duties, and to make decisions required in the testing and evaluation process. This person receives test results and other communications for the employer, consistent with the requirements of 49 CFR Part 40.

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Sample List of a DER's Role?

- ✓ Know the difference between a covered employee and a non-covered employee
- ✓ Be knowledgeable about the collection process
- ✓ Know the percentage of testing required by the regulating federal agency
- ✓ Burden of responsibility to ensure a Return to Duty or Follow-Up Test is directly observed

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Sample List of a DER's Role?

- ✓ Know what is required should your employee have a shy bladder
- ✓ Notify the collection site if a flaw in the collection process causes a test to be cancelled…if you are not working through a service agent
- ✓ Define when a covered employee can also be tested under the company policy

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Reporting Test Results

- Who gets the test results?
  - How are they received?
- What if the tests are positive?
  - What rules apply?
- How long must I maintain negative records?
  - Positive records?

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Auditing Your Collection Site

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Collection Site Checklist

Securing the Collection Site

- Blue the water
- Remove or secure any adulterants
- Ensure no foreign objects or unauthorized substances are present
- Ensure no undetected access by another individual is possible
- Secure any areas or items that may be used to conceal contaminants
- Secure all water sources

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Collection Process

- Be sure you are working with the correct Chain of Custody Form (CCF)
- Properly identify the donor
- Review collection procedures, and ask the donor not to list medications except on his/her copy upon departure
- Have donor remove excess clothing and secure all personal items, except his/her wallet.
- Have donor turn pockets inside out, remove hats, gloves and show socks to ensure nothing is concealed.

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Collection Process

- Begin Step 1 of the CCF
- Ask donor wash hands with hand sanitizer or a sanitizer towelette ***prior*** to the void
- Unseal the collection container in front of the donor
- Provide collection container to the donor with instructions to return the void to the collector within four minutes and not to flush to toilet

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Specimen Integrity

- Check the temperature, within four minutes, to ensure it is within 90-100°F
- Check the quantity of specimen to ensure the amount is adequate
- Ensure the specimen does not show any signs of adulteration

  (smell of bleach, bluing, or foreign substance, excessive foaming)

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Packaging the Shipment

- Pour specimens into the vial(s)
- Apply the tamper evident seals from the CCF to the respective specimen vials
- Collector dates the seals; donor initials
- Instruct the donor to read and sign the certification statement
- Collector completes the CCF by printing, signing & providing time/date and method of delivery of specimen

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Packaging the Shipment

- Place the laboratory copy and vials into the plastic bag, and seal it in front of the donor
- Provide donor with the donor copy where he/she should list any medications, including over–the-counter, ingested within 30 days
- Place all specimens for the day into laboratory shipping bags appropriate to the laboratory
- Distribute the remaining copies of the CCF within 24 hours or next business day

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Additional Items to Maintain

- Copy of all applicable certifications
  - Urine and Breath Alcohol
- Copy of Professional Liability/Errors and Omissions Policies

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Is It a Disability?

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Illegal Drugs and the ADA

Is addiction to illegal drugs a disability under the ADA?

- Current Illegal Drug Users
  - Not a Disability
  - See definitions on next slides
- Past Illegal Drug Users
  - Disability, if other ADA requirements for "disability" met
  - Must have been actual addict, not casual user

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Illegal Drugs and the ADA

What is "Illegal" Drug Use?

- Illegal drug use includes not only the use of unlawful drugs such as cocaine or heroin, but also the unlawful use of prescription drugs.

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Current v. Past Drug Use

When is an employee a "current" drug user?

- Employer does not need to prove that an employee used drugs on the very day that the employer took adverse employment action, or even within a specified period before.

- Case law is limited as to a specific time period in which the employee must have used drugs, but it is reasonable to speculate that a period of abstinence
    - more than nine months will not equal current use
    - 3-4 months or less will equal current use
    - 4-9 month period is a gray area and unpredictable

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Illegal Drugs and the ADA

- A positive result in a drug test will only constitute a finding of "current use" if "the test *correctly* indicates that the individual *is engaging in* … illegal use."
  - *See, EEOC Technical Assistance Manual VIII-8.3*

- An applicant / employee who tests positive for an illegal drug cannot avoid discipline or termination by immediately entering a drug rehabilitation program and claiming that he/she is no longer using drugs illegally.

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What Actions By an Employer are Generally Allowed?

- Prohibit all illegal use of drugs and alcohol at the workplace
- Require that employees not be under the influence of alcohol or engaging in the illegal use of drugs at the workplace

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What Actions By an Employer are Generally Allowed?

Hold Employees to the Same Standards

- i.e. Hold an employee who engages in the illegal use of drugs, or who is an alcoholic, to the same qualification standards for employment or job performance and behavior that the employer holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

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What Actions by an Employer are Allowed During the Application / Hiring Process?

During the Application / Hiring Process an Employer is **Permitted to**:

- Require an applicant take an illegal drug test prior to making a conditional offer of employment. This is allowed because testing for illegal drugs is not a "medical exam" under the ADA.*****
  - Must be required of all similar job applicants, not just select ones
  - Must be designed to identify accurately "illegal drugs" as defined under the Act and not prescription drugs
  - Not required that the test be job-related or consistent with business necessity

**If testing for drugs was a "medical exam" under the ADA, the employer would have to make a conditional offer of employment prior to requiring the test as well as comply with other requirements of medical exams under the ADA.*

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What Actions By an Employer are Allowed During the Application /Hiring Process?

During the Application / Hiring Process an Employer is

<u>Permitted to</u>:

- Deny employment to persons who *currently illegally use drugs.*

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What Actions by an Employer are Prohibited During the Application / Hiring Process?

During the Application / Hiring Process an Employer is **Prohibited from**:

- Asking whether an applicant was previously a drug addict or nature or severity of previous addiction (i.e. disability as long as not currently using illegal drugs)

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What Action is an Employer Allowed to Take with Current Employees?

For Current Employees, an Employer is **Permitted to**:

- Require an employee take an illegal drug test without showing that the test is job-related and consistent with business necessity. This is allowed because testing for illegal drugs is not a "medical exam" under the ADA.

- Test former substance abusers more frequently than employees without a history of substance abuse, as long as the tests used are reasonable and similar to those used on other employees. Buckley v. Consol. Edison Co. of N.Y., 155 F.3d 150 (2d Cir. 1998) (en banc).

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What Action is an Employer Allowed to Take with Current Employees?

For Current Employees, an Employer is **Permitted to**:

- Discharge employees who *currently illegally use drugs*.
  - Even if the employee has a disability independent of his current drug use, his ADA protection extends only to that disability and his employer may still discipline or discharge him because of his use of drugs. (EEOC Technical Assistance Manual VIII-8.3.)
  - Even if employee states he / she recently stopped being a current drug user

- Employers are not required to give an employee a chance to rehabilitate him / herself, although employers are encouraged to do so.

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Alcoholism and the ADA

Are alcoholics protected under the ADA?

- Current Users of Alcohol
  - Disability, if other standard ADA requirements for "disability" met
- Past Users of Alcohol
  - Disability, if other standard ADA requirements for "disability" met

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Alcoholism and the ADA

- Testing for alcohol is a medical examination under the ADA
- Employer may not discriminate against an alcoholic on account of his / her status or perceived status as a substance abuser

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Testing for Alcohol

During the Application / Hiring process an Employer is **Permitted to**:

- Ask applicant's ability to perform job-related functions and/or applicant to describe or demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions

- Require an applicant take an alcohol test *after* a conditional offer of employment is made, so long as
  - *all* conditional offerees in the same job category are required to do so

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Testing for Alcohol

During the Application / Hiring Process an Employer is **Prohibited from**:

- Requiring an applicant take an alcohol test prior to making a conditional offer of employment
- Requiring only certain applicants in the same job category to take an alcohol test
- Asking whether an applicant is an alcoholic or nature or severity of alcoholism (i.e. disability)

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Testing for Alcohol

For Current Employees, an Employer is

Permitted to:

- Require a medical examination of an employee which includes an alcohol test, as long a the test is job-related and consistent with business necessity

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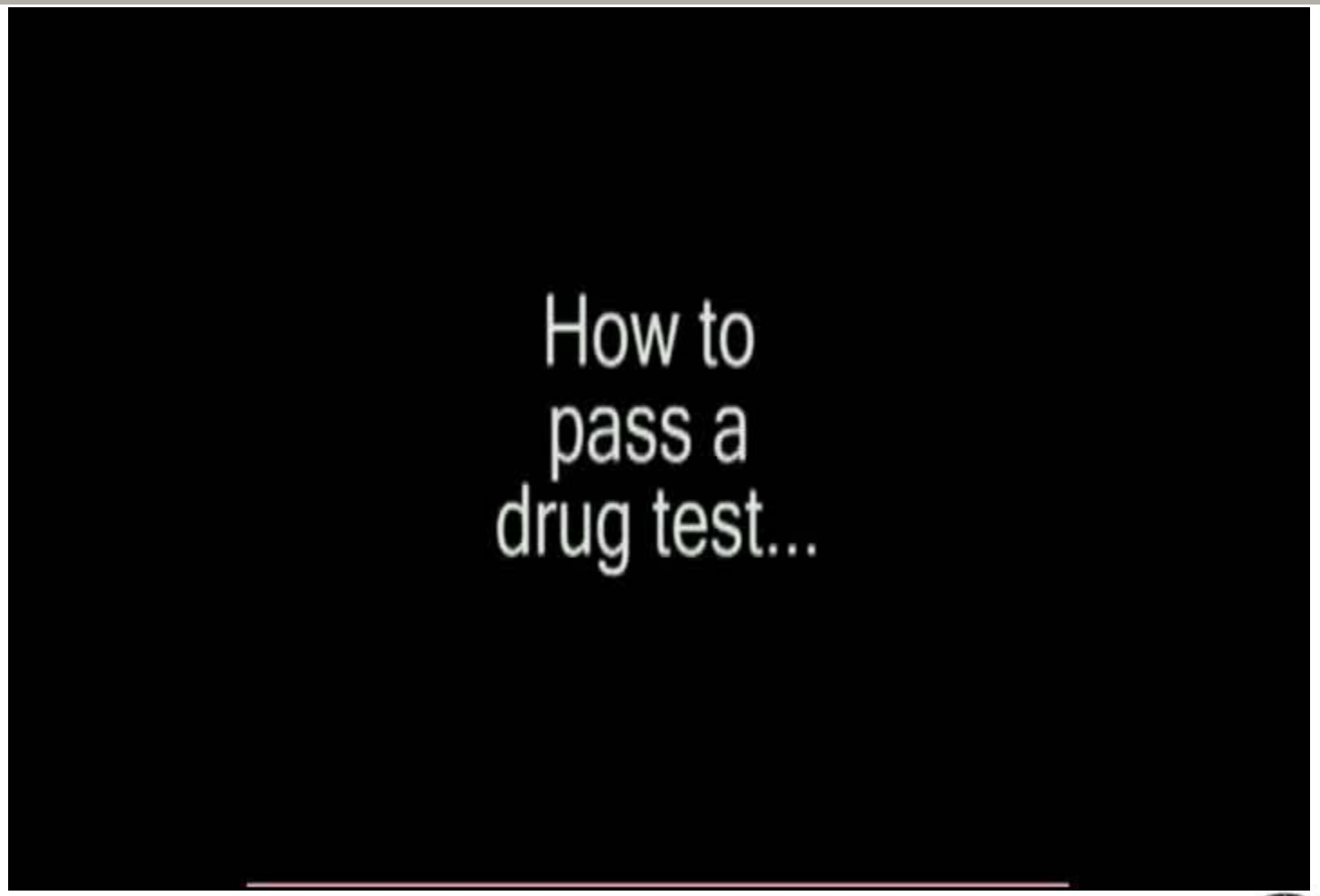
They're Trying to Beat You



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Questions

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Final Thoughts / Questions

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