



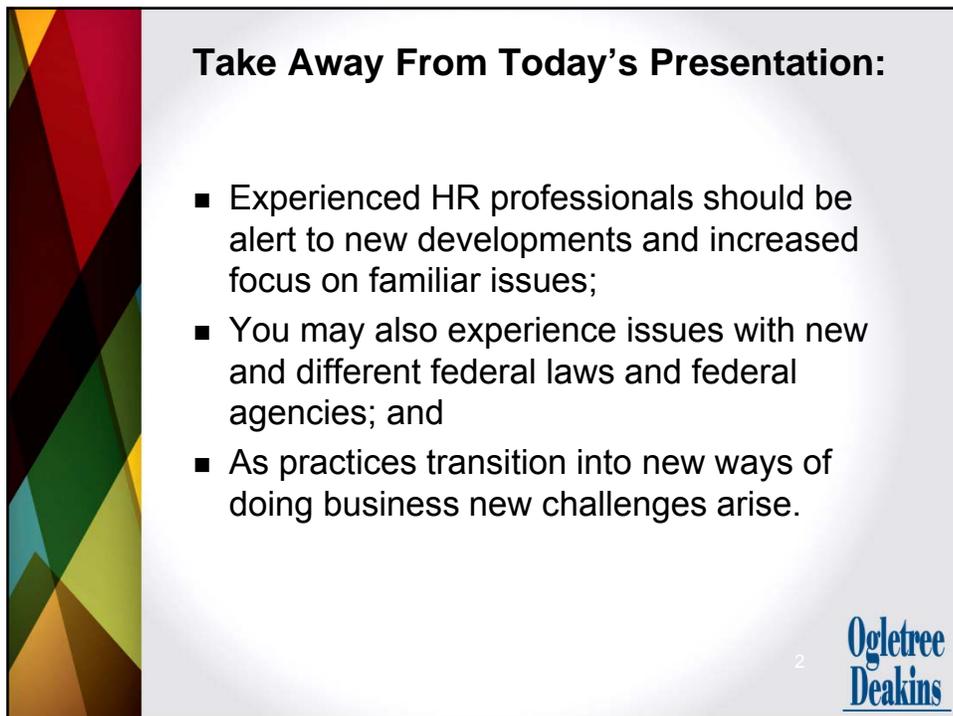
GASCO
GEORGIA SOCIETY OF CLINICAL ONCOLOGY

**Administrator Meeting
April 27 & 28, 2012**

Presented By:
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**LABOR & EMPLOYMENT
LAW
FROM A DIFFERENT
ANGLE**

**Ogletree
Deakins**



Take Away From Today's Presentation:

- Experienced HR professionals should be alert to new developments and increased focus on familiar issues;
- You may also experience issues with new and different federal laws and federal agencies; and
- As practices transition into new ways of doing business new challenges arise.

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2



Overview:

- 9:15 to 10:15
 - New Developments in Employment Discrimination
 - Hiring
 - ADEA
 - ADA
 - GINA
- 10:45 to 11:45
 - Wage & Hour Developments
 - Social Media
 - Practice in Transition

3



Now Hiring: Update on the Latest Legal Challenges to Your Hiring Process

4





EEOC Hot Topics:

- Background Checking
 - Credit
 - Criminal History

5



EEOC

6





EEOC:

Record Number of Charges filed in FY 2011

- FY 2011 99,947 private sector charges
- FY 2010 99,922 private sector charges
- FY 2009 93,277 private sector charges
- FY 2008 95,402 private sector charges

7 



Fiscal Year 2011 Charges:

■ Race	■ 35,395 ↓
■ Sex	■ 28,534 ↓
■ National Origin	■ 11,833 ↑
■ Religion	■ 4,151 ↑
■ Retaliation	■ 37,334 ↑ (37.4%)
■ Age	■ 23,465 ↑
■ Disability	■ 25,742 ↑
■ Equal Pay Act	■ 919 ↓
■ GINA	■ 245 ↑

8 



Renewed Focus:

- Age Discrimination
- Disability Discrimination

9



Age Discrimination In Employment Act (ADEA):

- New Regulations Effective April 30, 2012
- “RFOA” – Reasonable Factors Other Than Age

10





RFOA:

- Disparate Impact
 - Policies or practices that are neutral on their face but might affect older workers more than younger workers
 - Seniority
 - Compensation
- Practices must be reasonably designed and reasonably administered

11



RFOA (cont.):

- “Reasonableness” Factors
 - Related to employer’s business purpose?
 - Has employer defined the factor accurately and fairly?
 - Were managers and supervisors given guidance/training?
 - Are discretion and subjectivity limited?
 - Did employer assess adverse impact?
 - Did employer seek to take steps to reduce degree of harm?

12





ADAAA:

Americans with Disabilities Amendment Act
Final Regulations

- Issued March 25, 2011
- Provide for broad coverage under the ADA
- Focus on the issue of whether discrimination occurred rather than coverage issues
- Make “reasonable accommodation” a regular part of doing business

13



The Definition Of “Disability” Has Not Changed, Just The Interpretation And Application:

- Still three prongs to the definition
 - Actual disability prong
 - Record of disability prong
 - Regarded as having a disability prong
- The interpretation and application of the definition is changing in “fundamental ways”

14





EEOC Examples Of “Disabilities:”

- Missing limbs
- Autism
- Cancer
- Cerebral Palsy
- Diabetes
- Epilepsy
- HIV or AIDS
- Multiple Sclerosis
- Deafness
- Blindness
- Intellectual Disability
- Bipolar Disability
- Post-Traumatic Stress Disorder
- Obsessive Compulsive Disorder
- Schizophrenia
- Muscular Dystrophy
- Major Depressive Disorder
- Mobility Impairments

15



Major Life Activities:

- EEOC provides “list” of major life activities
- Major Life Activities include “functions”
 - Functions of the immune system
 - Special sense organs and skin
 - Normal cell growth
 - Digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions

16





Change To “Regarded As:”

- Previous Standard: Employer must view the employee as “substantially limited” in a “major life activity”
- ADAAA: Individual is “regarded as” disabled if he/she has actual or perceived impairment
 - It does not matter whether the impairment is perceived to “substantially limit” a “major life activity” of the employee

17



New Focus:

GINA
Genetic Information
Nondiscrimination Act

18





History and Structure of GINA:

- Signed into law May 21, 2008
- Two sections:
 - Title I applies to group health plans and insurers
 - Title II applies to employment practices
- Title II: Effective Nov. 21, 2009
- Title II: Final Regulations effective 1/11/2011

19



Overview of Title II:

- Prohibits the **use** of genetic information in employment
- Prohibits employers from discriminating on the basis of genetic information. Applies to:
 - Hiring
 - Termination
 - Personnel actions
 - Compensation
- Prohibits employers from **requesting, requiring, or purchasing** genetic information, with limited exceptions
- Prohibits employers from **disclosing** genetic information, with limited exceptions

20





Applicability:

Applies to employers who employ 15 or more employees for each working day in each of the 20 or more calendar weeks in the current or preceding calendar year

21



GINA Definitions:

- Genetic information
 - Individual's genetic tests
 - Family member's genetic tests
 - Manifestation of disease or disorder of family member (family member's medical history)
 - Receipt of genetic services
- Does not include individual's health history or current diagnosis
- Does not include age or gender

22





GINA Title II – Prohibitions:

- Prohibitions:
 - Discrimination against applicant/employee based on genetic information (adverse use)
 - Collection of genetic information
 - Disclosure of genetic information
- Retaliation prohibited
- Harassment prohibited

23



Exceptions to Prohibition Against Discrimination/Use:

NONE

24





Exceptions to Prohibition Against Collection:

- Inadvertent acquisition – “Water Cooler” exception
 - Facebook under attack
 - Inquiries about family
 - Eavesdropping
 - The loaded question: “How are You?”
- Information received as part of medical certification under federal or state ADA or FMLA

25



Exceptions to Prohibition Against Collection:

- Information acquired to monitor adverse effects of hazardous/toxic workplace substances (OSHA, MSHA)
- Wellness programs
 - Must be knowing, voluntary, written authorization

26





Prohibition Against Collection:

- Final Rules:
 - Request includes:
 - Conducting internet search
 - Actively listening to third-party conversations
 - Searching an individual's personal effects
 - Making requests for information about current health status

27



Prohibition Against Collection:

- Final Regulations:
 - specific intent to acquire genetic information not necessary

28





Disclosure Prohibited:

- Treat genetic information confidentially – same as all other employee medical information
- Maintain written information in separate medical file
 - Can combine with medical information maintained separately for ADA
- For pre-existing records:
 - EEOC suggests “purge”
 - At least segregate

29



Exceptions to Disclosure Prohibition:

- May disclose to employee (or family member receiving genetic services) upon written request
- Occupational health researcher
- Upon court order, with employer’s notice to employee
- Government officials investigating GINA compliance (EEOC)
- Public health agency regarding contagious disease that presents imminent hazard of death or life threatening illness

30





The Importance of Disclaimers:

“The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. ...”

31



The Importance of Disclaimers:

“...‘Genetic information’ as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

32





Disclaimer Required:

- Documentation of request for ADA reasonable accommodation
- Documentation supporting FMLA leave request or return to work certificates
- Documentation for other leaves if comply with ADA

33



Title II Remedies:

- Same as Title VII
 - Reinstatement
 - Hiring
 - Promotion
 - Back pay
 - Compensatory damages (cap applies)
 - Punitive damages (cap applies)
 - Attorneys fees
- No disparate impact claims
 - Cannot claim that genetic-neutral practices have discriminatory effect

34





Tips For Avoiding GINA Violations:

- Understand what constitutes genetic information
- Add genetic information to your non-discrimination statement
- Post most recent version of the “Equal Employment Opportunity Is The Law” poster with GINA information
- Train managers
- Beware of social media

35



Tips For Avoiding GINA Violations:

- Review current procedures with respect to obtaining medical information. Watch for:
 - Post-offer medical questionnaires—doctors’ forms
 - FMLA certification—”clarifications”
 - ADA certifications
 - Workers’ compensation records
- Include the suggested language used in the regulations (see prior slides)
- Ensure that systems are in place so that any genetic information will be kept confidential and maintained outside employee’s personnel file

36





Wage & Hour Litigation Trends:



39 

Misclassification Cases —

These are the most common type of wage-hour cases and generally involve a claim that an employee who is being treated as exempt from overtime should be receiving overtime pay:

<p>USAA — Special Investigators</p> <p>Oak Street Mortgage — Loan Officers (\$2.45 million)</p> <p>Wells Fargo — Technical Support Workers (\$6.72 million)</p> <p>Astra Zeneca — Sales Representatives</p> <p>Charles Schwab — Customer Service Specialists</p> <p>Ernst & Young — Staff Positions</p> <p>Budget Rent-A-Car — Shift Managers</p> <p>KFC — Assistant Unit Managers</p> <p>Kaiser Foundation Health Plan — Site Support Specialists (\$5.4 million)</p> <p>Lowe's — Loss Prevention Managers (\$3 million)</p>	<p>Oracle — Sales Consultants (\$9 million – <i>Rejected</i>)</p> <p>Radio Shack — Managers (\$29.9 million)</p> <p>Starbucks — (\$18 million)</p> <p>SBC Pacific Bell — Engineers (\$35 million)</p> <p>Insurance Adjusters — (\$120 million and \$35 million)</p> <p>Geico — Auto Claims Adjusters</p> <p>Wal-Mart — Pharmacists</p> <p>Apple — Network Administrators</p> <p>UBS — Technical Support Associates</p> <p>JP Morgan — Underwriters (\$42 million)</p>
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40 

Common “Hours Worked” Issues:

- Clocking in and out
- Travel time
- On-call time
- Rounding clock time
- Donning and doffing time
- Breaks and meal periods
- “Off-the-clock” work



41



What About Travel Time?

- To and from work? No, unless work during commute (or possibly before leaving home)
- Travel “all in a day’s work?” Yes
- Same day travel to and from another facility? Yes
- Overnight travel away from home? No, except for time that cuts across normal work hours

(29 C.F.R. § 785.35-785.40)



42





Examples Of Off-The-Clock Work:

- Setting up machine before clocking in
- Clocking out and continuing to work
- Taking work home
- Checking emails before clocking in
- Working during lunch, including business calls

43



Compensable Work Time?

- Do you have nonexempt employees who are “connected remotely?”
- Do you provide nonexempt employees with computers, cell phones, BlackBerries, and/or other PDAs?
- Do your nonexempt employees use their personal computers or cell phones for work-related purposes?
- Are you capturing and paying for all time worked?



44





**ELECTRONIC EXPRESSION AND
SOCIAL MEDIA**

45



**Regulating Employee Speech: Social
Media Policies At Home and At Work:**



Social Media Policies:



Facebook Statistics

- More than 800 million active users
- > 50% of active users log on in any given day
- Average user has 130 friends
- > 350 million active users access Facebook via smartphone or mobile device

47



Social Media Policies:



Twitter Statistics

- More than 100 million active users
- 50% of active users tweet on a daily basis
- > 55% of active users tweet via smartphone or mobile device
- Adults are rapidly adopting Twitter

48



Computer Usage At Work and At Home:

- Use at Home:
 - Blogging
 - Message boards
 - Chat rooms
 - Twitter & Facebook
- Use at Work:
 - E-mails to and from work
 - Internet access to public sites
 - Internet access to password protected web-based e-mail accounts and internet sites (i.e., on-line banking)
 - Internet blogs
 - Social Media



49

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Five Sites to Vent Work Frustration:

The collage includes the following elements:

- WorkRant:** A site for venting workplace frustrations with a headline "Release your Job Stress - No More Job Stress".
- Blog Binding:** A site for sharing workplace stories with a headline "My never ending job".
- JobGrades:** A site for comparing salaries across companies like Google, Intel, Dell, Pfizer, and Qualcomm.
- telonU:** A site for venting about workplace issues with a headline "Have, Rent, Rate™ your Workplace, the People there and lots of other stuff... Anonymously, via a 1-800-4...".
- Glassdoor Table:** A table showing company ratings and statistics.

Company	Rating	Score	Company	Rating	Score
Microsoft	3.9	448	IBM	3.7	214
Facebook	3.8	222	Oracle	3.6	214
Amazon	3.8	302	Netflix	3.6	178
Google	3.8	305	LinkedIn	3.6	214
Walmart	3.7	349	UnitedHealthGroup	3.6	184
CVS	3.7	214	Verizon	3.6	214
Wells Fargo	3.7	214	Target	3.6	214
Bank of America	3.7	214	Home Depot	3.6	214
JP Morgan Chase	3.7	214	Wal-Mart	3.6	214
Capital One	3.7	214	Best Buy	3.6	214
Bank of America	3.7	214	Walmart	3.6	214
Bank of America	3.7	214	Walmart	3.6	214

1. **Asiatix** - Let the world know if something's not right. This site also provides details of some of the sites such as e.g. etc. based on the severity of complaint.
2. **Blazebase** - DMDB is a site that lets you vent about your boss.
3. **Blazebase** - DMDB is a site that lets you vent about your boss.
4. **Blazebase** - DMDB is a site that lets you vent about your boss.
5. **Blazebase** - DMDB is a site that lets you vent about your boss.

Limitations On Monitoring At-Work Computer Usage:

- Privacy and Unauthorized Access Claims:
 - Claims
 - Invasion of Privacy
 - Federal and State Wiretapping laws
 - Electronic Communications Privacy Act of 1986
 - Stored Electronic Communications Act

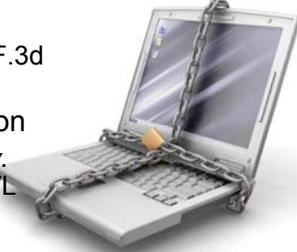
51



Obligation to Monitor At-Work Computer Usage:

- Sexual Harassment claims
 - *Knox v. Indiana*, 93 F.3d 1327 (7th Cir. 1996)
- Defamation claims
 - *Meloff v. New York Life*, 240 F.3d 138 (2nd Cir. 2001)
- Theft of Confidential Information
 - *NewSouth Communications v. Universal Telephone*, 2002 WL 31246558 (E.D. La. 2002)
- Pornography
 - *Doe v. XYZ Corp.*, 887 A.2d 1156 (N.J. Ct. App. 2005)

52



Computer Usage Policy:

- Address computer usage at-work and/or using company resources
 - Inform employees that e-mail/internet system employer's property and is intended for business purposes
 - Notifies employees they have no express or implied privacy rights in any matter created, received or sent through the company's e-mail system, or the sites that they visit on the internet, including web-based e-mail accounts



53

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Computer Usage Policy:

- Provide notice that contents of e-mails, work-related and personal, and history of internet sites visited subject to monitoring
- Warn that violations may subject them to discipline up to and including termination
- Inform employees that e-mails are property of employer
- Prohibit blogging and social media use on company computers and during working hours



54

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Computer Usage Policy:

- Instruct employees that e-mail and internet use limited to not interfere with company's computer resources, or employee's work performance, obligations or duties
- Directs that company's servers should not be used for personal monetary gain or commercial purposes outside the scope of the employee's employment



55



Computer Usage Policy:

- Inform employees that they may not:
 - use e-mail or internet to violate any law, including obscenity, copyright, and defamation laws
 - invade privacy rights of others
 - violate company policies, including harassment policy
 - disclose or use confidential information except as authorized to perform their job duties
 - FLSA issues



56



Social Media Policies:

- Prevent employee misuse of social media and protect company's reputation, confidential and proprietary information, and employee morale
- Minimize future costs by establishing guidelines for what content and behavior is acceptable in the social media realm and providing a foundation for managing future disciplinary actions
- Some rules impacted, i.e. trade secrets, confidential information and conflict of interest
- Advise employees we will be watching

57



Social Media Policies:

- Social media policies should be narrowly drafted to protect legitimate employer interests without infringing on employee rights. Overbroad social media policies could result in liability



58





Social Media Policies and the National Labor Relations Act:



Employee Rights
Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other concerted activities with or without their employer's consent. This includes the right to discuss wages, hours, and other terms and conditions of employment. The National Labor Relations Board (NLRB) is the federal agency that enforces the NLRA. Under the NLRA, employers are prohibited from interfering with, restraining, or coercing employees in the exercise of their rights under the NLRA, unless the employer can prove that such conduct is necessary to the production of goods or services for interstate commerce.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Elect a representative to bargain with your employer.
- Engage in other concerted activities with or without the aid of a union to improve your wages, hours, and other terms and conditions of employment or other workplace conditions.
- Refuse to work under an employer's unfair labor practices, such as discrimination on the basis of race, sex, religion, or national origin.
- Refuse to work under an employer's unfair labor practices, such as discrimination on the basis of race, sex, religion, or national origin.
- Refuse to work under an employer's unfair labor practices, such as discrimination on the basis of race, sex, religion, or national origin.

Under the NLRA, it is illegal for your employer to:

- Interfere with, restrain, or coerce you in the exercise of your rights under the NLRA.
- Discriminate against you because you have exercised your rights under the NLRA.
- Retaliate against you for exercising your rights under the NLRA.

Under the NLRA, it is illegal for a union or the employer to:

- Engage in unfair labor practices, such as discrimination on the basis of race, sex, religion, or national origin.
- Retaliate against you for exercising your rights under the NLRA.

Section 7 of the National Labor Relations Act (NLRA) protects the right of employees to engage in “concerted activity”—which includes the right to discuss wages, hours and other terms and conditions of employment

59 



NATIONAL LABOR RELATIONS ACT APPLIES TO YOUR PRACTICE!

60 



NLRB Scrutinizes Social Media Policies:



NLRB's Acting General Counsel has directed regional offices to refer to his office any charges filed by nonsupervisory employees who believe they have been disciplined or discharged as a result of a posting on social media in violation of their Section 7 rights.

61



NLRB Focus on Social Media:

- 129 cases including social media
- 4 complaints on ULPs with social media component
- Significant percentage from non-unionized workplaces

62





NLRB's Guidance on Social Media Policies:

- The Office of the General Counsel is reviewing social media cases and formulating and publishing guidance for employers.
- Memorandum OM 11-74 published 8/18/11
- Memorandum OM 12-31 published 1/24/12

63



NLRB's Guidance on Social Media Policies:

- **Legal Framework**
 - An employer violates Section 8(a)(1) of the NLRA through maintenance of a work rule if that rule “would reasonably tend to chill employees in the exercise of their Section 7 rights.”
 - A rule (or policy) is unlawful if it explicitly restricts Section 7 protected activities.

64





NLRB's Guidance on Social Media Policies:

- Legal Framework (cont.)
 - Or, if a rule does not explicitly restrict Section 7 protected activities, it will violate Section 8(a)(1) upon a showing that:
 - (1) employees would reasonably construe the language to prohibit Section 7 activity;
 - (2) the rule was promulgated in response to union activity; or
 - (3) the rule has been applied to restrict the exercise of Section 7 rights.

65



NLRB's Guidance on Social Media Policies:

- What is concerted activity?
 - An activity is concerted when an employee acts “with or on the authority of other employees and not solely and on behalf of the employee himself.”
 - The definition of concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action.”

66





NLRB's Guidance on Social Media Policies:

- What is concerted activity?
 - General Counsel takes a broad view of concerted activity
 - Employees have the right to discuss wages, hours, working conditions, terms and conditions of employment

67



Case Law on Social Media Policies?

- The NLRB's General Counsel can provide guidance on what he believes the law should be, but his decisions are not binding. For decisions on social media policies that have the force of law, we have to wait for rulings from administrative law judges, the NLRB, and ultimately, federal courts of appeals.
- Supervisory employees are not "employees" under the NLRA and generally not subject to its protections—so employers can hold supervisors to a higher standard.

68





Social Media Policies: Guiding Principles

- A social media post concerning a workplace complaint that generates comments by other employees likely will be protected.
- Employee likely protected, even if no other employees respond to the post, if on a site designed to be seen by fellow employees, there is a clear intent to initiate or further group action, and/or the grievance has been presented to management or discussed with fellow employees.
- Employee likely protected even if the post disparages the employer or management, includes profanity or is rude or vulgar, unless the comments are maliciously or recklessly false or there is clear intent to harm the company.

69



Social Media Policies: Guiding Principles

Purely personal gripes or posts to nonemployee friends/relatives, even about work-related issues, may not be protected absent evidence of a clear intent to initiate or further group action among that individual's fellow employees.

70





Social Media Policies: Practical Tips

- Be specific – draft policy narrowly to protect employer interests (reputation, confidential information, etc.) without restricting employee rights
 - State in as much detail as possible what is prohibited, and why, and give examples
 - Avoid using subjective terms such as “unprofessional” or “inappropriate”
- Include a disclaimer or “savings clause” which clearly states that the policy does not restrict employees’ Section 7 rights

71



Social Media Policies: Practical Tips

- Tell employees that they are responsible for what they post on social media sites
- Tell employees that if their posts include the name of the employer, they should make it clear that their comments are their own opinion and not the opinion of the employer
- Devote adequate time and resources to training and educating employees about the policy

72





PRACTICE IN TRANSITION

73



Practice in Transition:

Larger entity → Covered by Additional Laws and Reporting

- EEO-1 Report = 100 Employees
- FMLA = 50 Employees w/in 75 Miles of Worksite
- OFCCP/Affirmative Action = 50 Employees

Seniority/Tenure = Credited?

Accrued PTO/Vacation = Credit? Buyout?

74





Practice in Transition (Cont.):

Hiring Issues

- Offers of Employment to All/Some?
- Relocation
- Background Checks
- Pre-Employment Physicals
- No-Rehire Policy
- Nepotism Policies

75



Practice in Transition (Cont.):

Entity Integration Issues

- Duplication of Services
- Additional Qualification or Certification Requirements
- Different Job Duties/Requirements
- Reduced Job Duties/Titles

76





Practice in Transition (Cont.):

Benefits

- How Do New Benefits Compare?
- Will You Lose Any Staff
- Termination of Current Benefits

Plan ahead and get advice!!!

77



Practice in Transition (Cont.):

Wage-Hour Issues

- Pay Periods May Change
- Overtime Policies/Practices
- Classifications
- Beware: 2 to 3 Year Statute Of Limitations On Claims

78





Practice in Transition (Cont.):

Meetings
Make Time For Meetings = Can Be Disruptive

Disclosure
Potential Claims?

79



Administrator Meeting
April 27 & 28, 2012

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