

# Labor & Employment Seminar

May 19, 2011

[huschblackwell.com](http://huschblackwell.com)

# Personnel Records and Document Retention

Kimberly A. Sarff

[Kim.sarff@huschblackwell.com](mailto:Kim.sarff@huschblackwell.com)

# Personnel Records

- What documents should be included?
- What documents should be excluded?
- What documents should be produced?
- How long should documents be kept?

# Illinois Personnel Record Review Act

- 5 or more employees
- Grants rights to current and former employees
- Employee may inspect 2 times per year
- Employer has 7 days to comply
- If employee disputes material in file, employee has certain rights
- Act does not require employers to keep records

# What are “Personnel Records” under the Act?

Documents that are, have been, or are intended to be used in determining an employee's qualifications for employment, promotion, transfer, additional compensation, or discharge or other disciplinary action.

# Documents specifically excluded from production under the Act

1. Test documents, except for the test scores themselves

# Documents specifically excluded from production under the Act

2. Personal information about another employee that would invade the other employee's privacy



# Documents specifically excluded from production under the Act

## 3. Letters of reference

# Documents specifically excluded from production under the Act

4. External peer review documents for academic employees of higher education institutions

## Documents specifically excluded from production under the Act

5. Materials relating to the operation of the employer's business and planning except to the extent that such materials are, have been, or will be used by the employer to determine matters of employment, promotion, transfer, compensation, discharge, or discipline

## Documents specifically excluded from production under the Act

6. Records alleging criminal activity on the part of the employee or other conduct on the part of the employee that could reasonably be expected to harm the employer's property, operations, or business or cause the employer financial liability unless and until the employer takes adverse action against the employee based on such records

# Documents specifically excluded from production under the Act

7. Records involving a pending claim between the employee and employer that may be discovered in a judicial proceeding

From a legal standpoint,  
there are other documents  
that should NOT be included in  
an employee's personnel file

# Other documents that should not be included in the file

1. Medical records or records containing medical information

Other documents that should not  
be included in the file

2. DCFS Investigation Records



# Other documents that should not be included in the file

3. Information that may subject the employer to a possible charge or claim of unlawful discrimination which may include:
  - Grievances/complaints;
  - Documents concerning employment-related lawsuits or charges;
  - Sexual harassment investigation notes for victims; and
  - Records concerning an employee's associations, political activities, publications, communications, or non-employment activities.

# Tips for Compliance with the Act and Other Laws

# Tips for compliance with the Act and other laws

1. Formulate policies and procedures

# Tips for compliance with the Act and other laws

2. Keep a log of those employees requesting their file

# Tips for compliance with the Act and other laws

3. Keep files in one central, private location under lock and key

# Tips for compliance with the Act and other laws

4. Keep all documents on current employees for the duration of employment

# Tips for compliance with the Act and other laws

5. Separate certain documents of former employees who have been gone for 1 year by kind of document

Computerized versions of documents are acceptable



# How Long Should Employers Keep Personnel Records?

As a general rule of thumb,  
employers should keep  
most records for four years  
after an employee's  
separation unless the law  
requires more.

# Unemployment Insurance: Everything You Always Wanted to Know but Were Afraid to Ask

Sonja Whitehurst  
Don Ryan

The Illinois Department of  
Employment Security

**HUSCH BLACKWELL**

# Fiduciary Duties & Liability Regarding Employee Benefits Plans

Brian Ruddell

[brian.ruddell@huschblackwell.com](mailto:brian.ruddell@huschblackwell.com)

(See Handout in Booklet)

**HUSCH BLACKWELL**

**BREAK**

**HUSCH BLACKWELL**

# NFL Football, Wisconsin, and the Obama NLRB and DOL

Terry Potter

[terry.potter@huschblackwell.com](mailto:terry.potter@huschblackwell.com)

# TOPICS

- DOL
- NLRB
- Public Sector
- NFL

# DOL

- Hilda Solis – Secretary of Labor
- Bio
- Slower Process
- Focus – Unemployment and Training
- Misclassification of Workers
- OSHA Enforcement
- Investigations – Wage and Hour



# NLRB

- The Players

- Wilma Liebman – Chair
- Craig Becker
- Mark Pearce
- Brian Hayes
- Terence Flynn
- Lafe Solomon – Acting General Counsel

- Who needs the EFCA?
- Social Media
- Deferral
- Boeing Case
- State Right-to-Work Litigation
- Weingarten

# Public Sector

- Wisconsin
- Illinois

# NFL

- Cricket Anyone?

# Your Employee or a Celebrity?

YOUR EMPLOYEE!

**HUSCH BLACKWELL**

# Jeremy London



**HUSCH BLACKWELL**

YOUR EMPLOYEE!

**HUSCH BLACKWELL**

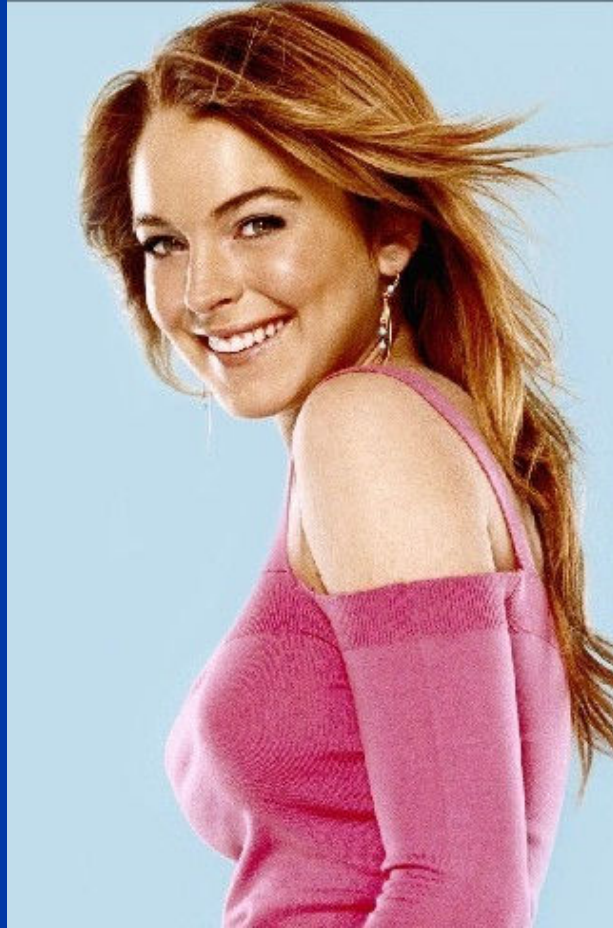


# Mischa Barton



**HUSCH BLACKWELL**

# Lindsay Lohan



**HUSCH BLACKWELL**

YOUR EMPLOYEE!

**HUSCH BLACKWELL**

# Charlie Sheen



**HUSCH BLACKWELL**

# Affirmative Action Update

FY 2011-2012  
OFCCP Enforcement Priorities

Gerard K. Rodriguez

[jerry.rodriquez@huschblackwell.com](mailto:jerry.rodriquez@huschblackwell.com)

# What is the OFCCP? What Laws Does it Enforce?

- Office of the Federal Contract Compliance Programs (OFCCP) is an executive agency of the Federal Government.
- OFCCP falls under the U.S. Department of Labor (DOL).
- OFCCP enforces 3 major laws:
  1. Executive Order 11246
  2. Section 503 of the Rehabilitation Act
  3. Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)

# Executive Order 11246

- **Threshold Requirement**

Federal contractors/subcontractors who do over \$10,000 in government business per year must take “affirmative action” to insure equal opportunity/non-discrimination (based on race, color, religion, sex, or national origin) in all aspects of employment.

- **Paperwork Requirement**

Federal contractors/subcontractors with

- 50 or more employees;
- \$50,000 or more in a single government contract/subcontract.

Must develop affirmative action programs (AAP's) for each of their establishments. AAP's must be updated annually.

# Section 503 of the Rehabilitation Act of 1973

- **Threshold Requirement**

Federal contractors/subcontractors with single contract over \$10,000 must take “affirmative action” to employ/advance “qualified individuals with disabilities.”

- **Paperwork Requirement**

Federal contractors/subcontractors with

- 50 or more employees; and single contract over
- \$50,000 or more in a single government contract/subcontract.

Must develop affirmative action programs (AAP's) for each of their establishments. AAP's must be updated annually.



# Vietnam Era Veterans' Readjustment Assistance Act of 1974

- **Threshold Requirement**

Federal contractors/subcontractors with single contract over \$100,000\* must take "affirmative action" to employ/advance "qualified covered veterans."

*\*The single contract amount is \$25,000 for contracts entered into before December 1, 2003.*

- **Paperwork Requirement**

Federal contractors/subcontractors with

- 50 or more employees;
- \$100,000 or more in a single government contract/subcontract.

Must develop affirmative action programs (AAP's) for each of their establishments. AAP's must be updated annually.

# OFCCP's Premise For Affirmative Action Programs Under EO 11246

*"A central premise underlying affirmative action is that, absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial, and ethnic profile of the labor pools from which the contractor recruits and selects."*

41 C.F.R. §60-2.10

# Essential Components Of An Affirmative Action Program Under E.O. 11246

- Organizational Profile
- Job Group Analysis
- Placement of Incumbents in Job Group
- Determining Availability
- Comparing Incumbency to Availability
- Placement Goals
- Identification of Problem Areas
  - Personnel Activity
  - Compensation Systems
- Action-Oriented Programs
- Internal Audit and Reporting System

# FY 2010 OFCCP Enforcement Statistics

- **FY 2010 OFCCP Financials:**
  - OFCCP FY 2010 Budget: \$105 million
  - 4,060 OFCCP Compliance Evaluations/Audits
  - 1,071 facilities received violations
  - 919 violations resulted in conciliation agreements
  - \$9.75 million paid in “Back Pay”
  - 12,397 victims received restitution

# FY 2011 – FY 2012

## OFCCP Enforcement Emphasis

- FY 2011 OFCCP Budget: \$105 million
  - 3,500 Estimated Compliance Evaluations
  - 775 FTEs
- FY 2012 OFCCP Budget Request: \$109 million
  - 3,675 Estimated Compliance Evaluations
  - 786 FTEs
- OFCCP's New Enforcement Strategy:
  - ***Fewer, but more in-depth compliance evaluations.***

# OFCCP's Active Case Enforcement

- **Active Case Enforcement (ACE)**

- New - OFCCP Directive 295
- Effective January 1, 2011
- Replaces Active Case Management Directive (ACM)

- **ACE Highlights**

- Every Compliance Evaluation is a Full Desk Audit (Under EO 11246, Section 503, and VEVRAA)
- Every 25<sup>th</sup> Compliance Evaluation is a Full On-Site Audit

# Active Case Enforcement Procedures

- **ACE Desk Audits**

- OFCCP To Contact EEOC/Local FEP Agency
  - Confirms last 3 years' compliance history to determine patterns of discrimination
  - Review of nature, status, outcome of complaints against contractor/subcontractor
- Enhanced "Indicators of Potential Discrimination" Warranting On-Site Audit
- Excepted from additional compliance evaluation for 24 months from date of closure

# Active Case Enforcement Procedures

- **ACE “On-Site” Audit**
  - On-Site audits are not limited to the “indicator of potential discrimination” that triggered further audit.
  - OFCCP will also review compliance with other laws, e.g., E.O. 13496 (regarding notification of employee rights under National Labor Relations Act).



# Pay Equity: A Top OFCCP Priority

- **National Equal Pay Enforcement Task Force**

- Task Force Finding:

- 23% pay disparity between men and women (\$0.77/\$1.00).
    - Even greater disparity among African-American and Hispanic women.

- **OFCCP Notice of Proposed Rescission**

- To eliminate Interpretive Standards for Systemic Compensation Discrimination (“2006 Standards”).
  - To eliminate Voluntary Guidelines for Self-Evaluation of Pay Practices (“2006 Voluntary Guidelines”).

# OFCCP's Pay Equity Proposals

- OFCCP to use discretion/flexibility in investigating potential compensation discrimination.
- No more rigid rules/regression analyses for investigation/analysis of compensation.
- OFCCP to develop a web-based compensation data collection tool.
- OFCCP to update training and protocol to identify patterns of compensation discrimination.

# New OFCCP Focus in FY 2012: Misclassification of Workers

- **Government Accountability Office (GAO)**

- 2000 – 2009: Increase of independent contractors in U.S. workforce from 8 million to 10 million.
- Certain industries with increasingly high rates of misclassified workers (e.g., construction).

- **OFCCP Investigation Training Programs**

- FY 2012: OFCCP to develop investigative plan for training investigators to identify/focus on worker misclassification issues in compliance evaluations.

# FY 2011 – 2012 OFCCP Recap

- **What Federal Contractors/  
Subcontractors Should Know:**
  - OFCCP's audit focus is extending beyond E.O. 11246
  - Total number of audits will decrease in 2011-2012
  - BUT, all audits will be more extensive
  - Gender pay equity will be an audit priority
  - Worker misclassification is a new audit target

# The New Era of Health and Disability: Employee Wellness Programs

Kate Heideman

[Kate.heideman@huschblackwell.com](mailto:Kate.heideman@huschblackwell.com)

# What is a Wellness Program?

Any program designed to improve the health and well-being of an organization's employees.

# Why Have a Wellness Program?

- Many advantages (e.g., increased productivity, employee morale)
- Biggest reason (for U.S. employers): saving on healthcare costs: \$1.65 saved for every \$1 spent

# Common Wellness Programs

- Gym reimbursements
- Smoking cessation
- Premium discounts for nutrition classes



# Laws Governing Wellness Programs

- PPACA
- HIPAA
- ADEA
- Title VII
- ADA
- GINA

# PPACA: Federal Policy in Favor of Wellness Programs

- Grants for small businesses
- Technical assistance for employers
- Increased incentives
- Reporting requirements
- Ban on co-pays for preventative care

# HIPAA: Federal Policy Against Discrimination in Health Plans (Eligibility or Benefits)

Applies only to programs that are:

- Tied to health plans
- That require employee to meet a "health status" standard

# 5 HIPAA Requirements

- Limits on value of award
- Promotes health or prevents disease
- Annual qualification
- Available to all similarly situated employees
- Disclosure of reasonable alternative or waiver

# Other Forms of Discrimination Prohibited

- Beware of disparate impact claims
  - Age
  - Race
  - National Origin

# ADA

- Reasonable accommodations for disabled employees
- No adverse actions based on disability
- No mandatory disability-related inquiries or medical examinations unless job related and consistent with business necessity

# Exceptions to ADA: Health Risk Assessments

- Disability-related questions and examinations are permitted if:
  - Voluntary
  - Confidential
  - Not used to limit insurance eligibility or prevent advancement

# Disability Related Questions

- Yes
  - Are you taking prescription drugs?
  - What is your blood pressure?
  - What is your weight?
- No
  - How often do you exercise?
  - What time do you eat dinner?
  - How many hours of sleep do you get?



# “Voluntary” Under the ADA

- Regulations/EEOC offer no guidance but should be strictly construed
- No penalties
- Awards not explicitly prohibited (but risky)

# GINA

- Prohibits requesting, requiring, or purchasing genetic information from employees
- Family medical history = genetic information

# Exceptions to GINA: Health Risk Assessments

- Family medical history questions are permitted if:
  - Health or genetic services are provided (may be part of a wellness program)
  - Voluntary, knowing, and *written* authorization provided by the employee
  - Confidential

# “Voluntary” Under GINA

- Very strict
- No incentives or inducements to provide genetic information

# Other Laws to Watch Out For

- ERISA
- NLRA
- State laws, particularly “off-duty” conduct laws (like Colorado’s)

**HIPAA: Tied to a “health plan”?**

YES

NO

**Required to meet health standard?**

YES

NO

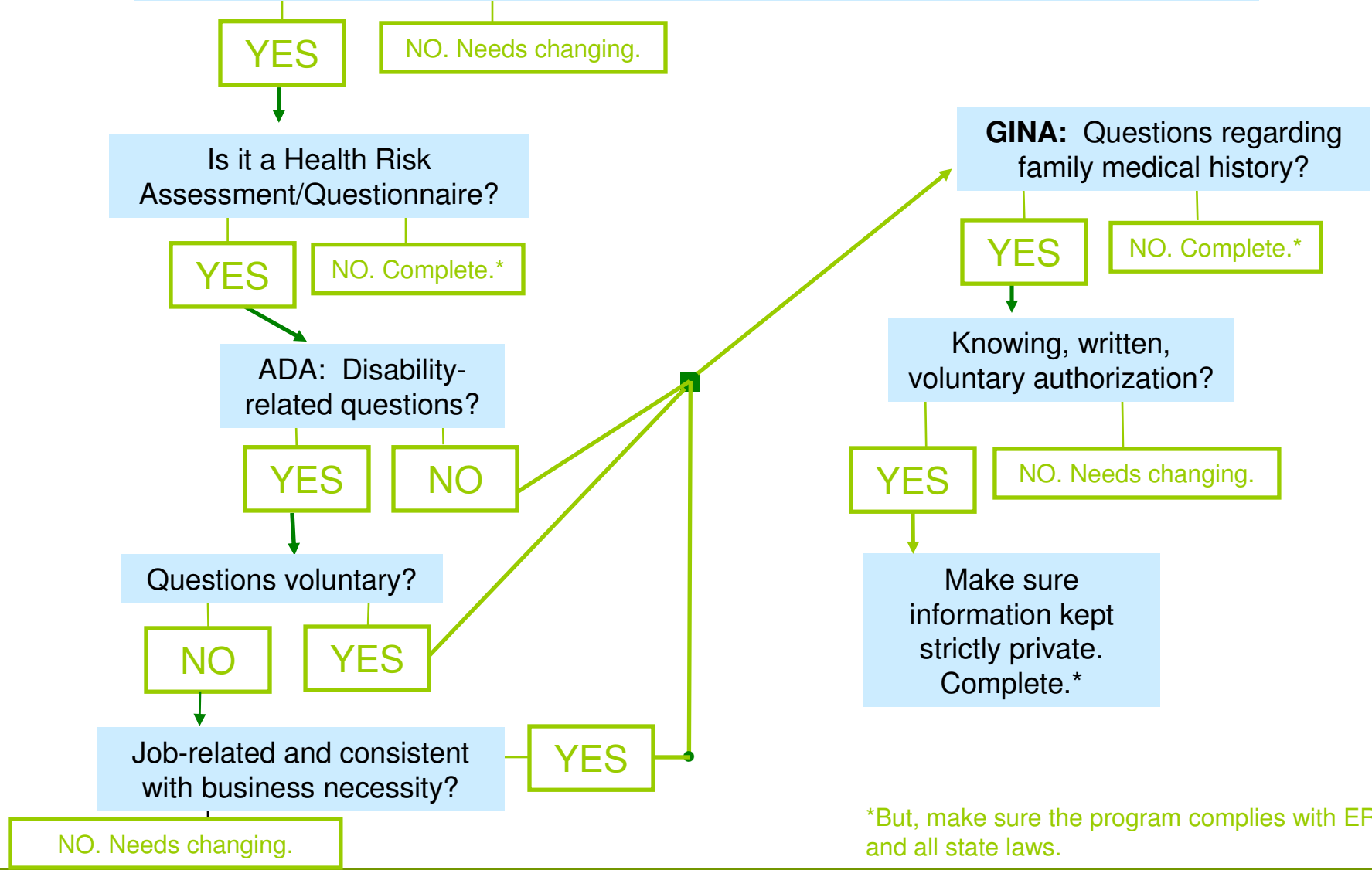
**Must meet 5 HIPAA regulations:**

1. Incentive may not exceed 20% of employee premium (or 30% for new plans)
2. Must be designed to promote health / prevent disease
3. Chance to earn reward once/year
4. Available to all
5. Alternatives for those physically unable to participate

**ADA, ADEA, Title VII: Wellness program available to all with reasonable accommodation for disabled employees?**

**Refer to next page.**

Continued from previous page ... Wellness program available to all with reasonable accommodation for disabled employees? (ADA, ADEA, Title VII)



\*But, make sure the program complies with ERISA, and all state laws.

# Thank you

## Questions & Answers

**HUSCH BLACKWELL**