EMPLOYMENT AND WORKERS' COMPENSATION IN KENTUCKY: A GUIDE FOR EMPLOYERS

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Stuart E. Alexander

Attorney, SPHR

Stuart Alexander, PLLC

LouisvilleEmploymentAttorney.com

This is an advertisement.

INTRODUCTION

Stuart Alexander III has decades of experience in employment litigation and workers' compensation defense representing employers of all sizes in Kentucky in the areas of Employment Law, Commercial Litigation and Workers' Compensation issues.

Mr. Alexander is also certified by the Society for Human Resource Management as Senior Professional Human Resources Professional (SPHR), the highest level of certification available to the Human Resource professional.

Martindale Hubbell Legal Directory and his peers have awarded Stuart an "AV" rating, the highest possible rating conferred by the Martindale Hubbell Legal Directory and he has been named by Louisville Magazine as a "Top Lawyer" by his peers. Mr. Alexander operates the boutique firm, Stuart Alexander, PLLC. Please visit his website http://www.louisvilleemploymentattorney.com.

This book is intended to serve as a general reference for managing Human Resource issues particularly , workers' compensation and employment matters in Kentucky. This book is not intended to provide specific legal advice or to provide legal services. The reader is advised to consult competent legal counsel and other HR professionals for advice regarding specific cases and issues. The reader should also be aware that while every effort has been made to be accurate and comprehensive, employment and workers' compensation laws evolve through judicial decisions and legislative enactments therefore changes in the law are frequent.

Kentucky and Federal law governing public employees is beyond the scope of this book as are Employment benefits and ERISA issues. The requirements of the Affordable Care Act are also beyond the scope of this discussion.

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CHAPTER 1

1.1 CREATING THE EMPLOYMENT RELATIONSHIP

In Kentucky an employment relationship is created when the employer and the prospective employee agree to terms and conditions under which the employee is to be employed. This employment relationship different from a contractual or "independent contractor" relationship. Under workers' compensation law in Kentucky, a "contract for hire" is not an employment contract.

Generally, in order for there to be a "contract for hire," the employee and the employer must reach an agreement on the terms and conditions of employment, an offer must be extended to the employee and the employee must accept the offer of employment. An Employment relationship generally cannot be created without the employee's consent. An independent contractor may actually be an "employee" regardless of the designation given to the relationship by the employer if the issue is raised in administrative or judicial proceedings.

1.2 EMPLOYMENT AT WILL

Most employees in Kentucky are employees "at will." Employment at will means that an employee cannot be compelled to work for the employer and by the same token, the employer cannot be compelled to retain the employee. This means that an employer may hire and fire "at will" for any reason, or for no reason at all, so long as the motivation for hiring and firing is not based upon an illegal motivation, i.e. discrimination, retaliation, or some other of the many exceptions to the "at will" employment doctrine.

Examples of exceptions to the "at will" employment doctrine include the prohibition that employers may not discriminate on the basis of race, sex, age, handicap, religion, natural origin, the pursuit of a workers' compensation claim, or other administrative or statutory rights.

Other exceptions include the prohibition that employers refrain from discrimination and retaliation in hiring and firing based upon Jury Service, National Guard affiliation, union organization, family medical leave and pregnancy, and as issues relating to wage and hour claims and safety related claims made by employees.

Employers should state clearly at each stage of the hiring process (job application, offer letter, employee handbook) that the employment of a specific employee is an employment "at will." Many employers to have new employees execute an acknowledgment of their "at will" employment status, usually in the form of an Empoloyment Handbook. This acknowledgment may also cover other areas such as obligations to report injuries on a timely basis as specified by the employer and the employee's willingness to abide by the terms and conditions of the employment handbook.

1.3 EMPLOYMENT CONTRACTS

In some circumstances, employers may choose to extend employment contracts to employees, generally to professional or crucial employees whom the employer wishes to retain contractually. An employment contract will provide (or imply) that an employee may not be terminated unless for "just cause" and that an employee may not voluntarily terminate or separate from employment unless he/she has "just cause." The employment contract generally states a specific term of employment, i.e. six (6) months, twelve (12) months, five (5) years, etc. and may contain non-compete, non-solicitation clauses as well as provisions protecting trade secrets, customer lists, and other intellectual property.

An employment contract is typically a contract in writing but under Kentucky law, employment contracts may be "implied" and may be oral if the factual circumstances permit.

1.4 COLLECTIVE BARGAINING AGREEMENTS

A form of employment contract is a Union's collective bargaining agreement by which individual employees elect to permit a labor union to be their exclusive representative. The labor union then negotiates an employment contract (or collective bargaining agreement) with the

employer. Terms and conditions of employment for all employees covered by the collective bargaining agreement are then managed and determined by the terms of the contract. Collective bargaining agreements are outside the scope of this website.

1.5 EMPLOYMENT HANDBOOK

An employment handbook may be considered an employment contract unless the "at will" nature of the employment is clearly and conspicuously set forth in the handbook and in other documents. Generally, employers rely on handbooks to provide employment information to employees and to provide a basic set of operating rules. Typically, handbooks contain some type of discipline section. Many large employers maintain a "step" or progressive discipline process where discipline increases with the severity of the offense. All handbooks should contain general provisions regarding the employer's prerogative to terminate and to vary the work rules (without regard to the "step" discipline process) if in the employer's sole discretion, the employment offense justifies dismissal.

The handbook should also contain a provision that the employer reserves the right to deviate from the rules and procedures and to modify them as it sees fit. The employment handbook and among the topics covered, should cover at least the sexual harassment and discrimination policy of the employer and provide a process for reporting and investigating such complaints. Anti retaliation provisions are also common.

Many employers require employees to acknowledge other issues of interest to the employer, including timely reporting of work related injuries, confidential and proprietary information, and policies relating to electronic communications.

Handbooks can also provide for arbitration or other dispute resolution mechanims and participate in alternative dispute resolution agreements and may also shorten statute of limitations and agreements to waive trial by jury.

1.6 PUBLIC POLICY AND "AT WILL" EMPLOYMENT

Kentucky courts have recognized that an employee may not be terminated or otherwise discriminated against in terms and conditions of employment by virtue of the employee's exercise of legal rights under Federal or State law in certain limited circumstances. This "public policy" to the "at will" employment doctrine may provide some basis for an employee to contest termination if that employee is terminated because of the exercise of a legally protected right or by virtue of the employee's refusal to permit a specific illegal act that is required by the employer.

Public employees are protected by the so-called "whistle-blower" statute, which prohibits the termination of public employees for their reporting to the appropriate regulatory entity the allegedly wrongful acts of superiors. The is no statutory whistle blower protection for non-governmental employees.

1.7 INDEPENDENT CONTRACTORS

Many employers use independent contractors. Regulatory agencies have been aggressive in citing employers for alleged misclassification alleging that misclassification creates competitive disadvantages employers and potential employees. True independent contractors are also exempt from the provisions of the Workers' Compensation Act, Unemployment to "employment."

Regardless of how the employer chooses to classify a worker (i.e. independent contractor or employee), the law will impose the status of employee if the employer controls the work provides the tools and materials, especially when the "contractor" is economically dependent.. Different tests are used by different legal entities, the IRS has a rather detailed test assessing twenty (20) separate factors; the Unemployment Insurance Commission and Workers' Compensation law generally focus on the degree of control by the punitive employer and the understanding of the parties as to what the relationship is and there are other variations of the test imposed by the National Labor Relations Board ("NLRB") and the Department of Labor.

The courts also give weight the understanding of the parties as to their relationship, and a properly drafted independent contractor agreement is essential in demonstrating the intent of the parties. Ideally, the contractor is independently incorporated and insured and does work for multiple companies and is not economically dependent on one company

1.8 RESTRICTIVE COVENANTS

Covenants "not to compete" are agreements executed by the employee which prohibit employees from competing either indirectly or as an employee of a new employer with the employer within certain enforceable parameters.

Kentucky courts have upheld these covenants as long as they are no more restrictive than necessary to protect the employer's legitimate business interests. Generally, restrictive covenants which are limited in time (no more than 3-5 years after separation of employment) and which are limited in geographical scope (within 100 miles of the employer's place of business or active markets) are enforceable.

These restrictive covenants may be supported by consideration such as continued employment. This means that an employee may be required to sign the covenant upon starting employment as long as the employer is permitted to work for some significant additional period of time after signing. Employment should be conditioned upon signing the restrictive covenants.

Restrictive covenants imposed after the employment begins must also be supported by consideration. Employers should offer something new if possible ,as consideration such as a bonus, raise or other promotion. If new consideration is not possible, it should be made clear in writing the unless the employee signs the covenant, employment will be terminated.

An employer enforcing such a valid covenant may obtain injunctive relief such as an order requiring the former employee from continuing in the competing employment as well as monetary and even liquidated damages.

Other restrictive covenants include provisions protecting proprietary and confidential information, covenants prohibiting solicitation of customers, potential customers and fellow employees.

Trade secrets, while to some extent defined and protected by Kentucky statute, are also additionally protectable by contract and permit the employer considerable latitude in defining "trade secrets."

CHAPTER 2

WORKERS' COMPENSATION

2.1 HISTORICAL DEVELOPMENT OF WORKERS' COMPENSATION

Workers' Compensation, like other social legislation affecting the employment relationship, is a relatively modern phenomenon with roots in 19th Century social legislation as well as in British common law and Roman law.

By the mid-19th century, the industrial revolution modified and complicated the relationship between master and servant and social legislation began to develop, first in Germany and later in Britain, which created some rights for the injured worker. Partially in response to the rise of socialism, the first workers' compensation laws in Europe called for a system by which the employers and the employees would contribute to a fund which was then used to pay some benefits for injured workers. The first British Compensation Act was enacted in 1897 and it became the model for many states in this country. The first American Workers' Compensation Act was passed in Massachusetts in 1904; Illinois followed in 1907. The first Workers' Compensation Act in Kentucky was enacted in 1916. By 1920, all but eight states had already developed workers compensation acts and in 1963, Hawaii finally created a workers' compensation system becoming the last state to do so.

2.2 WORKERS' COMPENSATION AS EXCLUSIVE REMEDY

The rapid rise of workers' compensation legislative schemes in the United States was not simply a matter of aggressive social legislation. Without a workers' compensation legislative provision, employers were subject to being sued by their employees if the employer was negligent. The damages recoverable by the employee could include non-economic damages such as pain and suffering, loss of consortium, and loss of the ability to labor and earn money. By accepting workers' compensation coverage, a worker gives up the right to sue the employer but gains the ability to recover workers' compensation benefits even if the employer is not negligent.

Most workers' compensation legislative enactments still contain a variety of defenses that eliminate or limit the employer's exposure for injuries caused by the intentional fault of the employee. Workers' compensation legislative enactments have been held to be constitutional exercises of a state's power particularly since the worker can "opt out" of the workers' compensation system by filing the appropriate forms with the Department of Workers' Claims, "Form 4." Form 4 is not available online, but can be obtained by contacting the Kentucky Department of Worker's Claims.

http://www.labor.ky.gov/workersclaims/Pages/Forms.aspx

2.3 REGULATION

Unlike other forms of insurance, Kentucky workers' compensation is regulated by the Department of Workers' Claims ("DWC") as a department of the Labor Cabinet. The Kentucky Department of Insurance regulates insurance carriers and now self-insured employers. The Department of Insurance provides some regulation for policy provisions and rates.

http://www.labor.ky.gov/workersclaims/Pages/Department-of-Workers-Claims.aspx

The DWC is an administrative agency and is, like the Department of Insurance, a part of the Executive Branch of government.

The DWC administers the Kentucky Workers' Compensation Act and provides for adjudication of all work-related claims. The Department of Workers' Claims also regulates self-insurance as well as for group self-insurers.

The DWC is managed by a Commissioner who is appointed by the Governor of Kentucky and approved by the Kentucky Senate. The Commissioner has statutory administrative and regulatory authority.

All Administrative Law Judges as well as the Commissioner are appointed by the Governor from a list of names provided by the Workers' Compensation Nominating Commission, a body consisting of seven members. These Administrative Law Judges are the primary finders of fact for Kentucky Workers' Compensation claims.

2.4 THE KENTUCKY WORKERS' COMPENSATION BOARD

The Kentucky Workers' Compensation Board is essentially an appellate body made up of three members appointed by the Governor with staggered terms. The Kentucky Workers' Compensation Board decides appeals from decisions of the Administrative Law Judges. The 1996 changes to the Workers' Compensation Act purported to eliminate the Kentucky Workers' Compensation Board. The legislative enactments of 2000 preserved the Kentucky Workers' Compensation Board as an intermediate appellate body.

http://www.labor.ky.gov/workersclaims/WCB/Pages/Workers'-Compensation-Board.aspx

2.5 ADMINISTRATIVE LAW JUDGES

All claims are first adjudicated by Administrative Law Judges in Kentucky. These Administrative Law Judges have been appointed by the Governor with the consent of the Kentucky State Senate and each serve a four (4) year term. The Workers Compensation Board reviews the decisions of he ALJs as the first level of appeal.

2.6 THE FUNCTION OF THE JUDICIAL SYSTEM

In Kentucky, the Judicial Branch also functions as an appellate body for administrative decisions of the Administrative Law Judges and Workers' Compensation Board.

The standard for appeal in workers' compensation is generally limited to the review of legal conclusions reached by administrative adjudicators. Generally, an appellant to the Court of Appeals or the Kentucky Supreme Court must demonstrate that the facts compelled a finding contrary to the finding made by the Administrative Law Judge. The administrative decision-maker has wide latitude in picking and choosing between conflicting facts in any given case.

2.7 DEPARTMENT OF WORKERS' CLAIMS SPECIAL SERVICES

The Department of Workers' Claims has established a division of Ombudsmen and Workers' Compensation Specialist Services. These specialists are intended to assist claimants process their claims without the help of attorneys and to serve as an information source for

employers, medical providers, vocational and rehabilitation providers, insurance carriers and self-insured groups and individuals. Included among the Office of Workers' Compensation Specialists are staff attorneys, some of whom investigate fraud and allegations of unfair settlement claims practices and other violations of the Workers' Compensation law.

The Department of Workers Claims also investigates and issues citations for failure to maintain workers compensation coverage and ALJs also decide these citations when contested.

2.8 BASIC LAW

The Kentucky Workers' Compensation Act is found at Kentucky Revised Statute 342 et seq. and the administrative regulations which accompany the Act. The administrative regulations are found at 803 KAR 25:010 et seq.

http://www.lrc.ky.gov/kar/803/025/010.htm

http://www.lrc.ky.gov/statutes/chapter.aspx?id=38914

The Department of Workers' Claims produces various publications which are useful to the employer or the insurer and maintains a website containing a wealth of useful information. The most current regulations and other helpful information can be found on the Department of Workers' Claims' web site: www.state.ky.us/agency/labor/guide/htm

2.9 INSURANCE COVERAGE

With some exceptions, all employers must provide workers' compensation coverage for employees in Kentucky. Coverage may be maintained by the purchase of a commercial insurance policy from an insurance company authorized to do business in Kentucky and registered with the Kentucky Department of Insurance. Some Kentucky employers are individually self-insured, while other employers are members of a self-insured group of other employers. These self-insured groups in Kentucky include groups of employers engaged in the same type of business as well as groups which contain a diverse employer mix. All self-insured employers and self-insured groups must be approved and/or regulated by the Department of Workers' Claims.

Every employer in Kentucky providing workers' compensation coverage must show proof of "security" for claims by workers by filing the appropriate form with the Department of Workers' Claims. Typically, commercial insurance carriers and insurance agents will provide Certificates of Coverage on behalf of the employer. This coverage is now filed with the Department of Workers' Claims by electronic submission.

2.10 INCLUSION IN COVERAGE

The employer is required to cover the "whole risk" of all employees. Insurance policies must generally pay for all benefits due for work related injuries, including enhanced benefits for employer violations of safety rules and regulations that cause or contribute to the worker's injuries.

The Kentucky Workers' Compensation Act, and case law interpreting the Act, requires that every person employed under a "contract for hire" or apprenticeship and all helpers or assistants to the employer or employees, whether paid by the employer or not, are covered. Every executive officer of a corporation, every person in the service of the state or its political subdivision, volunteer, ambulance, fire or police department personnel must be covered under any insurance maintained by the employer.

2.11 EXEMPT EMPLOYEES

The Workers' Compensation Act exempts certain types of employees such as the following employees: (http://www.lrc.ky.gov/statutes/statute.aspx?id=32535)

1. Domestic servants in homes having less than two employees who work 40 or more hours per week.

2. Persons employed in agriculture. (NOTE: This exemption may not apply to workers in Kentucky's thoroughbred industry).

3. Participants in a voluntary van or carpool injured while going to or coming from the employers premises.

4. Members of religious sects or divisions who refuse to accept benefits from public or private insurance.

5. Persons employed for less than twenty (20) workdays to do maintenance, repair, remodeling or other similar work at a private home.

6. Persons who perform work in exchange for aid from a religious or charitable organization.

7. Persons for whom federal workers' compensation acts provide coverage (except federal black lung claimants).

Other exceptions include employees who elect not to be covered by the Workers' Compensation Act of Kentucky.

Rejection of coverage (opting out) is accomplished by the execution by the employee of a notarized document which is effective only upon receipt in Frankfort. The form utilized for opting out is the "Form 4." An employee opting out of the system may sue the employer for injuries received because of the employer's negligence.

The employer may not require the employee to pay the premiums for the employee's workers' compensation coverage and may not deduct the cost of such premiums from the employee's compensation. No employer can require an employee to reject coverage for work-related injuries, nor can an employee be denied employment or be terminated for refusing to reject coverage.

2.12 INDEPENDENT CONTRACTORS, CONTRACTS FOR HIRE, EMPLOYMENT

True independent contractors are not employees and may not be covered by the Workers' Compensation policy of the company contracting with such an independent contractor. Generally, Kentucky law provides that an independent contractor relationship is a relationship by which the principal merely controls the outcome of the work and controls neither the means of production nor the details of how the work is accomplished. Court decisions have relied on some or all of the following factors in making this difficult factual determination:

1. The extent of control exercised by the putative employer.

2. Whether the person employed is engaged in a distinct occupation or business.

3. Whether the occupation engaged in is typically done under the direction of a supervisor or done by a person with special skills working unsupervised.

4. Whether the employer supplies the instrumentalities of the job (i.e. tools, materials, transportation) and whether the work site is controlled by the alleged employer.

5. The length of time for which a person is employed, the method of payment (i.e. by the job, by the hour or by the piece).

6. Whether or not the work is the regular and recurrent work of the owner of the business.

7. The intention of the parties regarding the creation of an employment relationship between themselves. This concept is sometimes expressed as whether there is a "contract for hire," which is distinguished from an "employment contract."

The issue of whether a worker is an employer or an independent contractor is not an issue limited to a workers' compensation analysis. The Internal Revenue Service and the Kentucky Revenue Cabinet have similar tests for determining the true nature of the relationship. Whether the relationship is committed to writing is a persuasive but not controlling factor.

2.13 "UP THE LADDER" LIABILITY

Any general contractor who sub-contracts work may ultimately be responsible for coverage of any employees of such sub-contractors injured on the job unless the sub-contractor is maintaining insurance coverage for these employees. The "up-the-ladder" doctrine provides that an employer is liable for the employees of a sub-contractor who does not have insurance. Accordingly, any employer sub-contracting work is responsible for determining whether the sub-contractor is insured and has a valid Certificate of Coverage.

This "up-the-ladder" doctrine may also serve as a shield for the employer from lawsuits filed by employees of an uninsured sub-contractor for whom compensation would be payable by the employer.

2.14 LOANED SERVANT DOCTRINE

The loaned servant doctrine is a concept that is similar to the "up-the-ladder" doctrine. If a worker is working under an express or implied contract for hire with a special employer, the work being done is essential to that of the special employer and the special employer has a right to control the details of the work; the servant who is "loaned" by another employer may be entitled to maintain a workers' compensation claim against the special employer, but may not maintain a legal claim against the special employer.

2.15 LEASED EMPLOYEES (TEMPORARY EMPLOYMENT AGENCIES)

All businesses serving as employee leasing companies must register with the Department of Workers' Claims. An employer obtaining any part of its work force from another entity must maintain workers' compensation insurance for such leased employees. The employee leasing company typically provides this required coverage and employers generally require such an arrangement with the leasing company. Ultimately the employer is responsible for maintaining coverage for leased employees, even though the leasing companies are required to maintain coverage by contract.

http://www.lrc.ky.gov/statutes/statute.aspx?id=32531

2.16 EXTRATERRITORIAL COVERAGE

Any employee injured in Kentucky may file a claim in Kentucky.

The Kentucky Workers' Compensation Act provides that an employee who may be injured working outside of Kentucky may maintain a Kentucky claim if the worker's employment is principally localized in Kentucky, if the contract for hire was made in Kentucky and the employment is not principally localized in any state or if the contract for hire was made in

Kentucky, and the employment was principally localized in another state whose workers' compensation law is not applicable to the employer.

Employment is localized in Kentucky (or in some other state) if an employer has a place of business in the state and the employee regularly works at or from such place of business or if the employee is domiciled and spends a substantial part of his working time in the state in question.

Historically, Kentucky has provided higher benefits than most surrounding states. Employees with the option of filing in Kentucky and in other states (particularly Indiana) generally choose to file Kentucky claims because the benefits are higher. Employers operating in states other than Kentucky are well advised to analyze the risk and insurance coverages.

2.17 NOTICES REGARDING WORKERS' COMPENSATION COVERAGE

Kentucky law provides that every employer must post a notice giving the name of the workers' compensation insurance carrier, information regarding medical care for injuries, and the employees obligation to give notice of claimed injuries. This notice must be posted at the employer's principle place of business and any other locations where the employees regularly report for payroll and personnel matters. The Department of Workers' Claims has an employer information/insurance form that meets this legal requirement.

http://www.labor.ky.gov/workersclaims/Forms/Workers%20Comp%20Posting%20Notice.pdf

2.18 RECORDS/REPORTS

Generally, the records of the Department of Workers' Claims, although not public records subject to the Open Records Act, can be obtained by any interested party. Employers are required to keep a variety of records including records of injuries which require the workers' absence from work for more than one day. This form may be filed electronically with the Department of Workers' Claims using claim "Form IA-1" and it must be filed within one week of

the occurrence of such an injury. Ultimately, the insurance carrier or self-insured administrator is responsible for filing this notice of injury form with the Department of Workers' Claims.

http://www.iaiabc.org/files/public/First_EDI_Report_Form_IA-1.pdf

"Form IA-1" is signed by the employer and provides a variety of data including the time and date of the injury, the cause of the injury, and the date of notice to the employer.

When the employer pays voluntary benefits and subsequently terminates these benefits, the employer is required to file a "Form 1A-Z" which documents the benefits paid and provides basic information about the claims administrator.

2.19 SELF-INSURANCE

Any employer may apply to qualify to self-insure or to become a member of a self-insured group.

Individual self-insured employers must certify that they have assets in excess of all liabilities and of at least three million dollars ($3,000,000) and that they are financially stable, competent and experienced in the administration of workers' compensation self-insurance. The individual self-insured must purchase "specific excess insurance" with a coverage limit of at least ten million dollars ($10,000,000) per occurrence.

Self insurance is now regulated by the Kentucky Department of Insurance. Self-insured groups are groups of employers who are technically jointly and severally liable for injuries to any employee of a group member. Generally self-insured groups are administered by trustees with the help of third-party administrators providing managed care, underwriting, safety and other claims management services.

http://insurance.ky.gov/

2.20 EMPLOYERS LIABILITY COVERAGE

Most commercial insurance policies and many self-insured groups also provide "employers liability coverage." This coverage is very different from employment practice liability coverage which covers some type of employment claims. The intent of this coverage is

to provide coverage for an injured worker not subject to the Act which may include those rejecting coverage. This coverage is rarely invoked and is intended as coverage for bodily injury which may include damages which are not payable under Kentucky workers' compensation legislation. This type of policy provision generally contains a variety of exclusions for punitive damages, intentional injuries, employment-related actions, and for fines and penalties imposed for violations of Federal and State law.

2.21 CANCELLATION AND TERMINATION OF COVERAGE

An insured may terminate coverage at any time by giving a notice to the insurance carrier in the form prescribed by the insurance contract. An insurance carrier may only cancel by issuing a cancellation and non-renewal notice. Self-insured employers or members of self-insured groups may terminate coverage by giving notice that may be required by the self-insurance agreement. A self-insured group may terminate a member by issuing a cancellation and non-renewal provision.

2.22 PREMIUMS, RATES, AND EXPERIENCE MODIFIERS

Most Kentucky employers and members of self-insured groups are assigned a experienced modifier annually which measures the claims experience of an employer and compares this cost to the average claims cost for similar employers as measured by National Council on Compensation Insurance ("NCCI").

https://www.ncci.com/nccimain/pages/default.aspx

This experience modifier is used to set premium rates for employers and this premium is multiplied times the annual payroll of the employer within identified work classifications.

An employer is frequently subjected to a final audit when it cancels coverage, or has coverage canceled, or at the end of the coverage period. This audit examines the payroll of the employer during the term of coverage and may result in additional premiums to the employer. This audit may or may not correctly classify employees and therefore must be examined closely by the employer for accuracy.

2.23 RECORD KEEPING

Each company must determine its own record retention policy. This policy should be comprehensive and should focus on tax and business issues as well as personnel policy concerns. From a Workers' Compensation and Occupational Safety and Health Administration ("OSHA") standpoint, it is advisable to preserve all employee records, including work-injury records for at least five (5) years after the occurrence of the injury, and claims filed, particularly those of self-insured entities should be kept indefinitely.

The employer should immediately report all work-injuries to the insurance carrier. The employer and the insurer are also required to file forms with the Department of Workers' Claims regarding voluntary temporary total disability payments. Medical files should be kept separately from injury benefit and personnel files to comply with Federal law.

2.24 WORKERS' COMPENSATION AND THE EMPLOYMENT APPLICATION PROCESS

In order for there to be an employment relationship, there must be a "contract of hire" between the employer and the employee. This "contract" is not a formal legal contract, but is rather a mutual agreement that the employee will be employed by the employer under certain employment conditions, i.e. a fixed wage and duties as specified by the employer.

In Kentucky, employees are required to be truthful at least as to medical issues in the application process. The employer may present a defense to any subsequent workers' compensation claim if the employee falsifies the employment application regarding a physical condition when a later workers' compensation claim involves the same or similar condition. Care must be taken in the pre-employment process regarding medical inquiries because of the provisions of the Americans with Disabilities Act ("ADA") which will be discussed in Chapter 9.

2.25 THE EMPLOYEE IS REQUIRED TO GIVE NOTICE OF AN INJURY

All Kentucky employees are required to give notice "as soon as practicable" after an injury occurs. While there is no formal requirement for written notice, the employer may develop

employment policies which require that accident reports be filled out and that certain designated supervisory personnel be notified.

Many employers require specific types of notification in their employee handbooks and require employees to affirmatively acknowledge their obligation to report injuries as soon as possible.

While immediate notice is required, Kentucky courts and Administrative Law Judges have been liberal in their interpretation of delayed notices.

2.26 STATUTE OF LIMITATIONS

An employee who is injured in Kentucky must file a claim within two (2) years of the injury. This limitations period is extended by any payment of temporary total disability benefits (income benefits) pursuant to the Workers' Compensation Act. When such temporary total disability benefits are paid, an employee must file a claim within two (2) years of the last payment of those benefits.

This statute of limitations period is not extended by salary continuation or short/long-term disability benefits but only by the payment of workers' compensation temporary total disability benefits.

If an employee claims an occupational disease or illness, a claim must be filed within three (3) years after the last exposure to the hazard causing the injury or after the employee experiences a manifestation of the illness sufficient to put the employee on notice that the condition is possible. Typically, this will involve a first visit to the doctor or the first experience of symptoms, either as related to the physician in the patient's history or through some other.

2.27 EMPLOYEE RIGHT TO CHOOSE MEDICAL TREATMENT

In Kentucky, an employee still maintains the right to choose his/her own medical treatment with significant exceptions.

Any physician treating an injured worker must be a physician designated by the employee using a "Form 113." An employee may change physicians and with each time a change is made, a new "Form 113" must be executed.

http://www.labor.ky.gov/workersclaims/Forms/Form%20113.pdf

Typically, the employee has the right to change the "Form 113 physician" at least one time. Thereafter, the employer must approve all changes. The employer is required to provide a "Form 113" to the injured employee. The employer may also require that the injured employee attend independent medical examinations at a reasonable time and place. The employer retains the obligation to pay for mileage and other expenses involved in the treatment and independent examination process.

2.28 WORK RELATION

In order for an injury to be compensable in Kentucky, an employee must have sustained an injury as defined by the Workers' Compensation Act which arises out of and occurs within the scope and course of his/her employment.

An injury may be a distinct traumatic event or it may be a series of "mini traumas" and that produces an injury. Carpal Tunnel Syndrome injuries are typically repetitive stress injuries. While Carpal Tunnel injuries may be compensable, the statute of limitations for such injuries begins to run when there is a distinct manifestation of the condition and there is medical confirmation that the condition is work related. Employees are generally not required to "self diagnosis" regarding causation.

2.29 PSYCHIATRIC/EMOTIONAL INJURIES

Emotional and psychiatric injuries are only compensable to the extent that they are a "direct result of a physical injury." Psychological impairment and psychological conditions may be compensable even though they arise because of the treatment and recovery process itself.

2.30 PRE-EXISTING ACTIVE CONDITIONS

Conditions which pre-exist the claimed injury and which were actively disabling prior to the claim injuries are not compensable. Typically, the determination of whether a condition is a pre-existing active condition requires medical opinion suggested by adequate diagnosis and patient history.

2.31 INJURIES OFF THE EMPLOYER'S PREMISES

Generally, an injury that occurs on the employer's premises will be compensable, subject to other defenses that the employer may have. Injuries that occur while the employee is going to or coming from work are generally not compensable, unless the trip to the operating premises or away from the operating premises is paid for by the employer or is of some specific benefit to the employer (other than having the employee show up for work).

Injuries occurring in the employer's parking lot are compensable—even if that parking lot is shared with other businesses—so long as parking areas are designated for the employees of the company employing the injured worker.

Injuries that occur as a result of an assault on the premises of the workplace are compensable only if they are connected with the employment. Injuries resulting from assaults on the employer's premises which are connected with disputes outside the work place may not be compensable. To the extent that an injured worker's employment makes him/her more likely to have sustained the injury, the Positional Risk Doctrine may require that such injuries are compensable by virtue of the fact that the employee was required to be on the job at the time such injuries or assaults occurred.

These employers' defensives are heavily fact dependent and the case law is not always clear and consistent regarding compensability and the availability of these defenses.

2.32 INTOXICATION

If an employee's injury is caused directly by his/her intoxication (drugs or alcohol), his/her condition is not compensable. The employer must be able to prove that the injury

happened as a direct result of the intoxication in order to prevail in using this defense. While the employer may require drug testing, pre-employment and post-injury, a positive post-injury drug test does not relieve an employer from liability for workers' compensation unless he/she can prove that the worker was "intoxicated" and that the injury was caused by the intoxication.

2.33 WILLFUL INJURY/HORSEPLAY

If an employee intends to be injured or is injured while attempting to injure someone else, the injury is not compensable.

An injury caused when the injured worker is engaged in horseplay is also not compensable, unless the employer has a pattern of condoning or ignoring such horseplay or unless the injured worker himself/herself is not participating in the horseplay at the time of the alleged injury.

2.34 AVERAGE WEEKLY WAGE/CALCULATIONS

Workers' compensation income benefits are calculated by first arriving at the average weekly wage of the employer on the date of the injury in question. An employee is entitled to an average weekly wage representing the highest 13-week period within the 52 weeks of employment prior to the injury. If an employee has not been employed for a full 52 weeks prior to the injury, the employee is entitled to the average wage from the highest quarter (13 weeks) prior to his/her injury.

http://www.labor.ky.gov/workersclaims/Pages/Publications.aspx

If an employee has worked less than 13 weeks prior to the injury, the employee is entitled to an average weekly wage based upon the wages of employees doing like or similar jobs for the 13-week period.

If an employer is aware that the employee is working a second job concurrently with the job at which the employee is injured, the wages from the additional jobs are counted towards the average weekly wage of the employer. The existence of concurrent employment may also affect

whether the worker is capable of returning to the type of job he/she performed at the time of injury—an issue involving multipliers of permanent benefits.

In certain circumstances, the value of other types of "wages," such as room and board and other monetary payments from the employer, may be included towards the injured worker's average weekly wage.

2.35 MEDICAL BENEFITS

The employer is required to pay all reasonable and necessary medical expenses that are the result of a work-related injury. The employer's obligation continues for life so long as the injured worker perfects a valid claim within the statute of limitations period.

While the employee may choose his/her treating physician, the physician's bills must be reasonable and necessary. The Workers' Compensation Board has promulgated a medical fee schedule for most medical procedures commonly found in workers' compensation cases.

The medical provider treating the injured worker must submit detailed medical bills on the proper OWCP-1500 Health Insurance Claim Form (formerly HCFA-1500 Form). The bills must be properly coded and the medical provider must provide enough information to demonstrate that on its face, the bill is for a work-related condition.

http://www.dol.gov/owcp/dfec/regs/compliance/OWCP-1500.pdf

The employer is then required to pay the medical bills, pursuant to the fee schedule, within thirty (30) days of receipt of such bills.

2.36 MANAGED CARE

Kentucky employers may enroll in or develop managed care networks. The Department of Workers' Claims must review and approve such managed care networks and if the Board approves such a network, an employee must treat within the network. Any "out of network" medical bills are not compensable unless special circumstances require and special regulations govern the payment of bills within the managed care network.

http://www.labor.ky.gov/workersclaims/mscc/Pages/Managed-Care.aspx

2.37 UTILIZATION REVIEW

Employers and insurance carriers must perform utilization review and medical audit on bills submitted for payment in Kentucky when a medical provider requires pre-authorization, when the medical bill exceeds $3,000.00, when a surgical procedure is proposed, and when the total loss of work days exceed 30 days. This is particularly true where the bill indicates it is work related treatment.

If the employer asserts that a bill is non-compensable because of non-work-relatedness or some other threshold defense, utilization review is not necessary. The payment of medical bills must be done in good faith and the utilization review process must provide a process for review and "appeal" of adverse findings.

2.38 MEDICAL FEE DISPUTE

When a medical fee dispute arises, any party may request a medical fee dispute resolution using the Workers' Compensation Board "Form 112." The "Form 112" must be accompanied by supporting documentation and a decision is made by an Administrative Law Judge without a hearing. The medical provider is made a party to such and may respond and submit documents.

http://www.labor.ky.gov/workersclaims/Forms/112.pdf

If the medical fee dispute arises from within the context of a litigated claim, the employee has the burden of bringing the medical fee disputes to the attention of the Administrative Law Judge and the Administrative Law Judge, after appropriate time for a response from the opposing party, will decide the despite.

If the dispute arises after the case has been decided, the employer has the burden of moving to reopen the case to request a resolution of the dispute by the Administrative Law Judge.

2.39 VOCATIONAL REHABILITATION

The Workers' Compensation Act in Kentucky provides that an injured worker may be entitled to vocational rehabilitation if an Administrative Law Judge finds that vocational rehabilitation is necessary to restore the individual to employability.

Typically, vocational rehabilitation is ordered after a comprehensive evaluation of vocational abilities be performed, usually at the request of the Department of Workers' Claims, and a recommendation is made for specific retraining.

The statute provides that an employer must pay for vocational rehabilitation for 52 weeks unless special circumstances require a longer period of vocational rehabilitation. If the vocational rehabilitation requires travel, lodging, or books, these items may be compensable if ordered by the Administrative Law Judge.

In the event that an injured worker refuses to participate in ordered vocational rehabilitation, an injured worker's benefits may be reduced by one-half (1/2) during the period of such refusal.

2.40 WORKERS' COMPENSATION BENEFITS

An employer in Kentucky may be responsible for paying reasonable and necessary medical expenses, temporary total disability benefits (while an employee is unable to return to suitable employment), permanent partial or permanent total disability benefits, and vocational rehabilitation.

Currently, an employer is required to pay medical benefits on a compensable claim for the life of the employee to the extent that medical services are necessary for the cure and relief of a work-related condition.

Medical benefits are to be paid within 30 days of the receipt of same by the employer of a properly executed medical statement. Medical expenses which are compensable must be paid but only pursuant to the Kentucky Workers' Compensation Medical Fee Schedule promulgated by the Department of Workers' Claims which insures that all fees, charges and reimbursements for medical services are limited to charges which are fair, current and reasonable for similar treatment of injured persons in the same community for like serves where the treatment is paid for by the general health insurers.

This fee schedule applies to all healthcare providers and is organized around CPT Codes.

All employers are required to perform utilization review and medical bill audit plans. If an employer seeks to challenge a medical bill, the employer initiates the utilization review. The medical provider should join as a party to the utilization review procedure. This Fee Schedule can be ordered by accessing the following site:

http://www.labor.ky.gov/workersclaims/mscc/Pages/Physicians-Fee-Schedule.aspx

2.41 TEMPORARY TOTAL DISABILITY

Temporary total disability is payable on compensable claims until a worker has reached maximum medical improvement and has reached the point of which he or she can return to suitable employment. Maximum medical improvement ("MMI") occurs when an employee returns to work, is released from medical care with permanent restrictions, or is declared MMI by a competent physician.

Generally, it is a medical issue whether the injured worker has reached MMI. Unless ordered by an Administrative Law Judge, temporary total disability benefits are voluntarily paid by the employer and the employer may terminate these benefits when the injured worker reaches MMI or returns to work.

These benefits are payable at rates that are adjusted from time to time by the Department of Workers' Claims. The current benefit schedules can be found at:

http://www.labor.ky.gov/workersclaims/Pages/Department-of-Workers%27-Claims.aspx

2.42 PERMANENT TOTAL DISABILITY

Permanent total disability ("PTD") requires a finding by the Administrative Law Judge that an injured worker is unable to complete and perform a type of work that by age, training and experience, the worker has the pre-injury capacity to do. The Workers' Compensation Act contains presumptions regarding certain types of injuries including total blindness, a loss of both feet above the ankles or the loss of both hands, the loss of one foot above the ankle and the loss of one hand at or above the wrist, permanent and complete paralysis of both legs or both arms, a complete and permanent paralysis of either both legs, both arms, or one leg and one arm,

incurable insanity, or a total loss of hearing. Otherwise, PTD is determined by the Administrative Law Judge using the American Medical Association ("AMA") Guides as a point of departure, but ultimately determining whether the worker is likely to be able to return to the type of gainful employment he/she is capable of doing by virtue of age, education, and work experience.

2.43 PERMANENT PARTIAL DISABILITY

Permanent partial disability ("PPD") is currently based upon the impairment rating assigned by the physician and upon the multipliers listed in KRS 342.730, which account for age, education, actual return to work and the likelihood of the worker's ability to return (and stay employed) at the type of work performed at the time of injury.

http://www.lrc.ky.gov/Statutes/statute.aspx?id=32544

2.44 AMERICAN MEDICAL ASSOCIATION IMPAIRMENTS AND PPD

The starting point for determining permanent partial disability is the amount of impairment assigned by the physician pursuant to the most recent AMA Guides for the evaluation of permanent impairment.

Currently, the AMA Guide is currently in its Sixth Edition. The AMA seeks to classify injuries which occur to various parts of the body in an objective fashion and to arrive at an impairment figure for each type of injury, which is calculated to get the "body as a whole."

Once the physician assigns an AMA impairment rating, PPD is calculated based upon factors set forth in KRS 342.730. Generally, impairment percentages are multiplied times a factor (.65–1.70) depending on the rating. This factor may be increased if the injured worker has less than twelve (12) years of formal education and if the employee is aged 60 or over. If an employee does not retain the physical capacity to return to the type of work he/she has performed, the permanent partial disability shall be multiplied by three (3) times.

Fifty percent (50%) or less permanent partial impairment shall be paid for 425 weeks. If the permanent partial impairment is greater than 50%, the benefits shall be paid for 520 weeks (unless the injured worker is totally disabled in which these benefits are payable until the injured

worker reaches the age of 65). PPD benefits are paid until the worker is eligible for social security retirement benefits.

The calculations of these benefits have changed dramatically from 1996 to 2001. Any specific calculation for an injury occurring during these years will be based upon the law in effect at that time. The reader is advised to review the applicable law in existence at the time of the injury and when in doubt, to consult the Department of Workers' Claims' web site which contains a very helpful benefits calculation feature.

2.45 DEATH BENEFITS

If an injury causes death, the Workers' Compensation Act provides for payment to the surviving widow/widower and if there are minor children, the death benefit is increased. In addition to the benefits provided to the survivors, the estate will receive a lump sum of $50,000 from which the cost of burial and the cost of the transportation of the body to the employee's place of residence shall be paid. In no event will the maximum weekly income benefits to survivors shall exceed 75% of the average weekly wage of the deceased.

Upon the remarriage of the widow/widower, the weekly payments to the widow/widower shall cease two (2) years from the remarriage.

As with income benefits, the amount of death benefits payable for a work-related injury has changed since 1996 and the law in effect at the time of the injury will control the amount of benefits paid.

2.46 OCCUPATIONAL DISEASES

An occupational disease is defined in the Workers' Compensation Act as a condition which is caused by injurious exposure to a workplace hazard or condition. Most occupational disease claims in Kentucky involve coal workers pneumoconiosis (Black Lung). As the Kentucky Legislature is in the process of revising the Occupational Disease Statute in significant ways at the time of this writing, an in-depth discussion of coal workers' pneumoconiosis claims are beyond the scope of this website.

In general, an occupational disease must be filed within three (3) years of the last date of harmful exposure to the hazardous condition or within three (3) years after the employee first sustains a distinct amount of manifestation of the condition, i.e. symptoms, medical treatment, etc.

Occupational disease claims which arise from exposure to radiation or from asbestos have a special twenty (20) year statute of limitations which runs from the last injury.

2.47 DURATION OF BENEFITS AND INTEGRATION WITH SOCIAL SECURITY/ UNEMPLOYMENT/STD AND LTD

Under current law, income benefits terminate when the injured worker "qualifies for normal old age social security retirement benefits" or two (2) years after the employee's injury or last exposure, whichever occurs last.

Income benefits for temporary total disability are offset by unemployment insurance benefits paid for unemployment during the period of temporary total or permanent total disability. It is therefore, important for the employer to provide information regarding unemployment benefits to the workers' compensation carrier or third-party administrator.

If an employer exclusively funds a long or short term disability or sickness/accident plan, the employer may be able to take credit for the amounts paid under this plan, unless the plan includes an internal offset provision.

2.48 INDEPENDENT MEDICAL EXAMINATIONS

While an employee is entitled to choose their treating physician as long as the employee complies with the requirements to designate such physician, an employer may require independent medical examinations from time to time. Employers are required to pay for the cost of the examination, including mileage and other travel costs if appropriate.

The employer may give notice to the employee of such an independent evaluation and if the employee fails to attend after reasonable notice, the employee's benefits may be suspended through the period of such an unreasonable refusal.

2.49 NOTICE OF INJURY/REPORTING REQUIREMENTS

An injured worker is required to give notice to the employer "as soon as practicable." Unfortunately, case law dilutes this requirement considerably and makes a determination of proper notice extremely subjective.

An employer should require immediate notice in written form and should require an employee to verify that such written will be given.

When an employer receives notice of an injury, the employer is required to notify the Department of Workers' Claims of such an injury by filing a "Form IA-1." This report should be filed electronically with the Department of Workers' Claims.

http://www.iaiabc.org/files/public/First_EDI_Report_Form_IA-1.pdf

After benefits are paid and eventually terminated on a voluntary basis, the employer must file a "Form IA-2" giving the dates of the temporary total disability, medicals paid, and the date of termination of such benefits. The employee's statute of limitations begins to run after the last payment of temporary total disability income benefits.

http://www.iaiabc.org/files/public/IA-2.1_Rel1_SROI_Form.pdf

2.50 SETTLEMENT

If an injured worker has reached maximum medical improvement and the impairment rating has been established, most employers at least consider the prospect of settling the claim. The Department of Workers' Claims actively encourages settlement of these claims and settlement is accomplished by filing a "Form 110-I" with the Department of Workers' Claims.

http://www.labor.ky.gov/workersclaims/Forms/110%20I%2006.pdf

All settlements must be approved by the Department of Workers' Claims and its Administrative Law Judges. Settlements generally provide for a lump-sum payment of income benefits. The Department of Workers' Claims require that the injured worker have an adequate alternative source of income if the settlement is to be made in a lump sum. Alternative sources of

income can include social security, a spouse with a job, part-time employment, and other investment income if appropriate.

Claimants who are reasonably expected to apply for or enroll in Medicare or Social Security Disability may be required to set up a Medicare Set Aside account.

The employer may take credit for amounts received by the Claimant for Unemployment and some LTD/STD plansbut may not take credit for Social Security Disability and privately funded LTD/STD plans.

2.51 LITIGATED CLAIMS

An injured worker begins the process of litigating a claim by filing a "Form 101" which describes the injury, describes the notice given, describes the parties involved, and describes the dispute that is unresolved. A "Form 101" must include a chronological medical history, a chronological work history, an up-to-date medical authorization, and some medical reports sufficient to establish causation and if possible, impairment.

http://www.labor.ky.gov/workersclaims/Forms/Form%20101.pdf

An employer is not required to file an "answer," but will be required to file a "Form 111" within 45 days after it receives notice of the filing of the "Form 101." The "Form 111" denies or accepts the claim and is intended to narrow the issues to be litigated. If an employer has a "special defense," this "special defense" must be filed within 45 days after the employer receives the notification of the claim from the Department of Workers Claim. "Special defenses" include, but are not limited to, statute of limitations, safety violations producing the injury, intoxication, failure to follow medical advice, or falsification of application resulting in the claim. It is a good idea for counsel or the employer to include as many defenses as can be reasonably stated. Failure to present these affirmative defenses may result in a waiver of these defenses.

http://www.labor.ky.gov/workersclaims/Forms/111hl.pdf

2.52 ADJUDICATION OF CLAIM

After a formal claim has been initiated with the Department of Workers' Claims, the claim is assigned to an Administrative Law Judge for decision. Administrative Law Judges permit medical proof to be taken. Medical proof can be submitted into evidence either through deposition or through written narrative reports with sufficient detail from physicians and other healthcare providers.

Employers are advised to review the employment file of the injured worker and to make this information available to defense counsel. Proof is submitted to the Administrative Law Judge in the form of depositions and medical reports. After proof is submitted to the Administrative Law Judge, the Judge sets the matter for hearing at which time the injured worker must testify. The employer's representative(s) and other witnesses may also testify.

After the hearing, the Administrative Law Judge may order that briefs be filed or may decide the case on the record. The Administrative Law Judge's decision is incorporated into an Opinion and Award. The role of the Administrative Law Judge is to decide factual issues, to pick and choose between (sometimes) conflicting medical evidence, and to apply the law to the facts.

If the Opinion and Award of the ALJ contains errors, these errors may, and in many instances must be corrected by filing a Petition for Reconsideration within 14 days of the Opinion and Award.

2.53 **APPEALS**

Opinions and Awards from the Administrative Law Judges that are final may be appealed to the Kentucky Workers' Compensation Board. The Board will review the legal rulings of the Administrative Law Judge, but will confine its review to the law unless the Administrative Law Judge commits an error in deciding the facts which compel a contrary finding. An "interlocutory" award (awarding open ended temporary total disability or medical treatment for example) is not final and not appealable.

Any party who wishes to appeal from the decision of the Workers' Compensation Board may appeal to the Kentucky Court of Appeals as a matter of right. The Court of Appeals will use

the same standard on appeal that is used by the Kentucky Workers' Compensation Board. Typically, oral arguments are not permitted – although, the Court of Appeals may permit oral arguments if appropriate.

A final appeal may be made to the Kentucky Supreme Court although the Court does not necessarily have to accept the appeal. Any party appealing to the Kentucky Supreme Court must file a motion for discretionary review. The court typically accepts less than 10% of cases offered to it and only accepts cases which present legal issues which are novel or on which various Court of Appeals panels may have disagreed.

2.54 REOPENING

Once a claim has been decided, any party may move to reopen the claim based upon fraud, newly discovered evidence, mistake, or a change in disability as shown by objective medical evidence. This change may either be a worsening of the condition or an improvement of the condition.

An injured worker may not reopen a decided claim within one year (1) of any previous motion to reopen and may not reopen a claim more than four (4) years following the date of the original award.

If an injured worker reopens a claim claiming additional disability and if the Administrative Law Judge grants additional disability, the additional disability must be paid only within the original award period, unless the reopening produces a 100% disability which, of course, is paid until a worker is eligible for social security retirement. If the increase in disability, pursuant to reopening, exceeds 50% than the original award is extended for 520 weeks (instead of the original 425 weeks).

2.55 INTERLOCUTORY RELIEF

Administrative Law Judges sometimes issue interlocutory orders. An interlocutory order is an order that is not final and which merely orders the payment of benefits pending final

decision of the case. An interlocutory order is not appealable until the entire case has been decided.

2.56 SAFETY VIOLATIONS

Kentucky workers' compensation statute, KRS 342.165(1), provide that "[i]f an accident is caused in any degree by the intentional failure" of the employer to comply with any specific safety regulation, the amount of each income payment shall be increased by 30%. If an employee intentionally fails to use safety appliances furnished or obey safety rules of the employer, income benefits shall be decreased by 15%.

http://www.lrc.ky.gov/Statutes/statute.aspx?id=32429

An employer's failure to comply with ha safety regulations can arise from its alleged violation of the general duty clause contained in OSHA statutes and does not necessarily require the violation of a specific safety provision.

2.57 FALSE REPRESENTATIONS IN EMPLOYMENT APPLICATIONS

If an employee knowingly and willfully makes a false application for employment containing a false representation as to his/her physical condition or medical history and the employer relies on the false representation, an employee's claim may be denied as long as there is a casual connection between the false representation and the injury.

Employers are naturally reluctant to inquire as to the employee's physical condition because of potential American with Disabilities Act ("ADA") compensation.

2.58 FRAUD

The Workers' Compensation Act provides that no person shall knowingly file a false claim. No injured worker may knowingly file a false or fraudulent claim and no injured worker shall use fraud, deceit, or misrepresentation to receive compensation benefits. Additionally, no employer may make false representations "including misrepresentations of hazards,

classifications, payroll, or other facts by an employer or its agents that are designed to cause a reduction in the employer's premium. . . ."

The sanction for fraudulent conduct may include the referral of the alleged fraud to the fraud unit of the Department of Workers' Claims, which investigates and may recommend penalties, including fines and referrals to other law enforcement agencies. In addition, if the fraud is committed by an insurance agent, attorney, or any person "upon whom a professional license to provide any service or benefit under this Chapter," then such person may be referred by the Commissioner to the appropriate licensing body for revocation of the license.

2.59 DISCRIMINATION AGAINST EMPLOYEES WHO HAVE FILED CLAIMS

The Workers' Compensation Act provides that no employee will be "harassed, coerced, discharged, or discriminated against" for filing or pursuing a workers' compensation claim.

http://www.lrc.ky.gov/statutes/statute.aspx?id=32437

This is true even if the injured worker has not yet perfected a claim by filing an application for claim. It is specifically illegal for an employer to refuse to hire, discharge, or retaliate against a worker because of his/her pursuit of a lawful claim. The injured has the right to sue the employer in civil court for such a violation and damages include compensatory and punitive damages as well as attorneys' fees and costs. The civil court may also issue injunctive relief requiring the reinstatement of the employee.

This does not mean that a worker who has sustained an injury may not be terminated. As long as retaliatory motivation is not a "substantial contributing factor" in the employer's decision to terminate, no violation of KRS 342.197 has occurred.

There may be other issues regarding termination after a worker's compensation injury notably the Family Medical Leave Act ("FMLA") and ADA as well as the Kentucky Civil Rights Act, which will be discussed later in this website.

2.60 COSTS/SANCTIONS

The Department of Workers' Claims and its Administrative Law Judges are empowered to impose costs and sanctions against a party if it finds that proceedings have been "brought, prosecuted, or defended without reasonable ground." The Administrative Law Judge or the Board may assess "the whole cost of the proceeding," including court costs, travel expenses, deposition costs, dispositions expenses, and attorneys' fees. These sanctions and costs may be imposed for filing a frivolous appeal. A frivolous appeal is an appeal that is filed even though there is clearly substantial evidence of probative value to support the finding of the Administrative Law Judge and where there are no reasonable grounds for an appeal.

2.61 REPETITIVE INJURIES

Repetitive injuries, such as carpal tunnel syndrome, have been extremely troublesome injuries in workers' compensation law.

Currently, the Workers' Compensation Act does provide that injuries that are produced by repetitive exposure to workplace conditions may be compensable. These injuries are treated as occupational diseases for purposes of statute of limitations. The statute of limitations will run on these claims if they are not filed within two (2) years of the "distinct manifestation" of the condition. Such as symptoms or a visit to the doctor, or the last payment of temporary total disability.

http://www.lrc.ky.gov/statutes/statute.aspx?id=32472

2.62 UNFAIR SETTLEMENT CLAIMS PRACTICES

Kentucky's workers' compensation law currently requires the Commissioner of the Department of Workers' Claims to fine insurance carriers for engaging in unfair settlement claims practices.

The current regulation accompanying the Kentucky Workers' Compensation Act requires that all claims files be subject to examination by the Commissioner or his agent, that the files contain documentation detailing the activities of these carriers, and the foundation for decisions.

Each document within the claims file must be noted as to the date received the date processed or the date mailed.

The regulations require that carriers diligently investigate a file upon notice of a work-related injury and that carriers advise an injured worker of acceptance or denial of a claim "as soon as practicable." The carrier must then provided the employee with the reason for denial of the claim or of additional information needed to process the claim.

Carriers are prohibited from misrepresenting pertinent facts or law regarding a claim and cannot compel an employee to institute formal proceedings for benefits when liability is clear. No carrier may offer a settlement that is "substantially less than the reasonable value of a claim." Additionally, no carrier may threaten to file on appeal for purposes of compelling a settlement nor may a carrier require an employee to obtain information that is accessible to the carrier.

The Commissioner of the Department of Workers' Claims has authority to investigate and prosecute claims of unfair settlement claims practices. The Commissioner may impose fines up to $5,000.00.

http://www.lrc.ky.gov/Statutes/statute.aspx?id=32458

Currently, Kentucky employees may be permitted to sue their employers as well as their insurance carriers in civil court for a violation of these provisions (although at the time of this writing, this issue remains unclear). Damages may include compensatory and punitive damages. If fines are imposed, they may be imposed for each violation and therefore the fines may be accumulative and potentially significant.

Bad-faith claims are governed by the provisions of Kentucky's "Unfair Claims Settlement Practices Act," a copy of which is reproduced in the Appendix. This provision is found not in KRS Chapter 342 (the Workers' Compensation Act), but in the Insurance Code at KRS 304.12-230. Very few cases have been decided which arise from alleged bad-faith in a workers' compensation context, but there is a substantial body of law concerning other types of insurance bad-faith.

http://www.lrc.ky.gov/statutes/statute.aspx?id=17037

2.63 PENALTIES, FINES, AND ENFORCEMENT

The Commissioner of the Department of Workers' Claims may recommend enforcement of civil and criminal penalties under the Workers' Compensation Act. The Commissioner initiates the enforcement of the act by issuing notice to the affective party. The affective party must then file a response within fifteen (15) days or receipt of the citation issued by the Department of Workers' Claims. If the citation is challenged, an Administrative Law Judge may be assigned to have a hearing on the alleged violation and issue an opinion. These sanctions may be issued to both employees and employers. If an injured worker fraudulently receives benefits, he/she may be fined as much as $10,000.00 or twice the amount of the gain received as the result of the fraudulent activity. The Commissioner may also initiate enforcement of criminal penalties by referring the matter to local law enforcement authorities.

2.64 ATTORNEYS' FEES

The Workers' Compensation Act provides that the attorneys' fees of the employee be paid from the benefits received by the employee. These attorneys' fees are for attorneys representing the injured worker and are capped at $12,000.00, representing 20% of the first $25,000, 10% of the next $10,000 and 5% of any additional benefits of the contested income benefits paid by the employer. Attorneys' fees for attorneys representing the employer are also capped at a maximum fee of $12,000.00.

http://www.lrc.ky.gov/Statutes/statute.aspx?id=32475

The Administrative Law Judge must approve all fees paid to attorneys and an attorneys' fees' motion must be filed within thirty (30) days following the court finality of the claim. Attorneys' fees to employee's attorneys must be paid out a pro-rata reduction of benefits for each week during the benefit period or directly from the lump-sum settlement.

2.65 SUBROGATION

The Workers' Compensation Act provides that an employer may recover from a negligent third-party amounts "paid and payable" to the injured worker.

Currently, Kentucky law provides a statutory right to recover from a negligent third-party, but provides that if the employee or employer was negligent some percentage of the overall liability may be apportioned to both. In the event that a jury finds the employee or employer negligent and apportions some percentage of fault, neither the employer nor the employee may recover this apportioned percentage (of fault) from the negligent third-party. In no event must the employer pay "new money" to the negligent third-party against whom the injured worker sues even if the third-party seeks indemnity claiming that the employer was negligent.

Recovery by the employer of subrogation, where appropriate, is extremely important for the employer's loss experience and bottom line. The employer may maintain an indemnity action against any other negligent party (except the employee) to recover amounts paid and payable if the employer's negligence is "passive" or secondary and the other at-fault party was active.

The employer should at least consider playing an active role in any action by the injured employee against a negligent third-party.

CHAPTER 3

OSHA/KOSHA AND SAFETY REGULATIONS

3.1 REGULATORY SCOPE

Kentucky employers are subject to the Occupational Safety & Health Act of 1970 ("OSHA"). OSHA requires that all employers in Kentucky meet OSHA standards regarding workplace safety. The Kentucky Department of Labor has promulgated its own occupational safety and health rules ("KOSHA"). OSHA is enforced by the Federal Department of Labor and KOSHA is enforced by the State Labor Department.

https://www.osha.gov/

http://labor.ky.gov/dows/oshp/Pages/Occupational-Safety-and-Health-Program.aspx

Kentucky's requirements are not always identical to Federal requirements imposed by OSHA. KOSHA maintains two distinct administrative agencies, one being directed towards enforcement and the second being directed towards education and training.

KOSHA's enforcement agency investigates accidents and complaints, conducts inspections, and enforces Kentucky's safety codes. The education and training division consults with and helps to educate with employers and performs site inspections.

3.2 SPECIFIC INDUSTRIAL STANDARDS

It is beyond the scope of this website to list every OSHA requirement for each industry. KOSHA's regulations provide specific standards for specific industries, including the construction industry, general manufacturing industries—including utilities, transportation and service establishments, agricultural industry, and public maritime employment.

OSHA/KOSHA standards fit into the following categories:

- Control of Hazardous Energy
- Hazard Communications
- Personal Protective Equipment
- Blood Borne Pathogens

- Specific standards relating to Forklift Operations, confine space, emergency exits, noise exposure, and machine guarding

Specific KOSHA standards require hazard communication, lockout/tag out requirements, machine guarding requirement for manufacturing industries, availability of first aid, and requirement for certain types of protective equipment.

KOSHA provides specific code requirements regarding material handling, electrical safety, and the use of compressed gases and compressed air.

3.3 GENERAL DUTY CLAUSE

Of utmost concern to Kentucky employers, particularly in the context of a work-related injury, is the general duty clause which requires that an employer provide a work place that is safe and free from recognized hazards that are causing or likely to cause death or serious physical harm.

http://labor.ky.gov/dows/Workplace%20Standards%20Library/KY%20OSH%20Poster-Secretary%20Brown.pdf

This general duty clause may be grounds for a citation by the Department of Labor and will be used by the Department of Labor even where no specific standard applies.

Kentucky law provides that no OSHA citation or determination shall be used to create an independent cause of action. While this appears to relieve employers of some legal exposure, violation of specific OSHA standards may form the foundation for the independent opinion of an expert witness regarding whether the employer breached a duty of care. Accordingly, the OSHA process should be carefully monitored by Kentucky employers for its impact on third-party and workers' compensation liability.

3.4 GENERAL DUTY CLAUSE AND WORKERS' COMPENSATION

The Workers' Compensation Act now provides for a substantially increased workers' compensation income benefit if the accident is caused by the failure of the employer to observe known safety standards. Income benefits may be increased by 30% if the accident is caused by

an employer's violation of a safety standard. An employee's income benefit may be reduced by 15% if the employee disregards a clearly expressed safety standard of the employer.

Traditionally, this enhancement provision has been used only where the employer has violated a specific safety rule. Kentucky courts have indicated that this enhanced penalty to be applied for a violation of the general duty clause contained in OSHA and KOSHA regulations. Other safety rules (including the employer's safety rules) may form the basis of this enhanced benefit provision.

3.5 RECORDKEEPING AND KOSHA

Most employers in Kentucky have the obligation to report serious work injuries and to maintain records regarding these injuries. All wellness and injury records must be preserved for five (5) years and these records must be available for inspection by the appropriate enforcement authorities. Employers must report work-related injuries to OSHA if these injuries involve fatalities or multiple hospitalizations within six (6) days of the receipt of the information. KOSHA requires that Kentucky employers maintain fire prevention plans, certain types of emergency planning, documents relating to safety training, and safety and health programs. KOSHA further requires certain employees to maintain documents relating to material safety data, emergency response, handling of hazardous materials, and other specific requirements relating to specific industries.

3.6 NOTICES AND POSTINGS

OSHA/KOSHA requires employers to post OSHA notices in conspicuous locations. Employers are required to maintain material safety data sheets and make these records available to employees who may be exposed materials described by the material safety data sheets.

Employers are required to develop safety plans and self-audits that can be developed with the assistance of the education and training branch of KOSHA and to provide medical services and first aid as well as fire protection and protective equipment for Kentucky workers.

http://labor.ky.gov/dows/Workplace%20Standards%20Library/KY%20OSH%20Poster-Secretary%20Brown.pdf

https://www.osha.gov/Publications/poster.html

3.7 KOSHA CITATIONS AND ENFORCEMENT PROCEEDINGS

When a worker is injured in Kentucky and notice is then given to KOSHA, an inspector will perform an investigation. These investigations frequently lead to citations which are provided in writing to the employer.

The highest priority inspections are for conditions which cause "eminent danger of injury or death to employees". The second highest priority is an inspection after a serious incident involving death or serious injury. The third highest priority for inspectors is a complaint that results from an employee's contact with OSHA. Other priorities include re-inspections and random inspections, particularly in high-hazard targeted industries.

Typically, a federal or state Compliance Officer shows up at the employer's place of business. The employer has a right to refuse the inspection to proceed without a federal search warrant. With or without the warrant, a conference is held. The inspector explains the purpose of the inspection, how it will proceed, and gives an overview of the standards that may apply.

The employer is permitted to have a representative to accompany the inspector and the employees are also permitted to have a representative (typically a Union Representative). The inspection may include a physical inspection, a check of required OSHA records and logs, a check that mandatory notices are properly displayed, and a review of employee safety programs.

A closing conference is held in which the employer's and employee's representatives are presented with the results of the inspection, with any proposed penalties and citations.

An employer must contest the citation within fifteen (15) days of receipt or the citation becomes final. When an employer files a contest to the issued citation, the employer may move to stay the citation until KOSHA Safety and Health Review Commission can review the matter. A contested citation may proceed to a hearing after which an opinion is rendered by KOSHA

Safety and Health Review Commission. An appeal may be made to the full Commission after such a finding.

Typically, the employer contesting a citation participates in an informal conference that may result in an agreed disposition of a citation, much like a plea bargain in a criminal case. The employee or his/her designate (typically a Labor Union) may intervene as a party to the enforcement action. If the matter is not settled, a hearing is scheduled and witnesses may be called. The hearing procedure does not permit depositions without leave of the hearing officer and most written discovery, except requests for admissions, are prohibited without leave. If the hearing officer renders an opinion, an aggrieved party may request a discretionary review with the Commission within twenty-five (25) days of the opinion. If an aggrieved party wishes to appeal from an opinion of the Commission, it may appeal to the Franklin Circuit Court. The time for an appeal to the Franklin Circuit Court is thirty (30) days from the opinion of the Commission.

Fines are proposed by the Labor Cabinet depending on 1) the size of the business, 2) the gravity of the violation, 3) the good-faith of the employer, and 4) the employer's history of previous violations. For "serious or non-serious" offenses, fines may range up to $7,000. For "willful or repeated violations," fines range up to $70,000. Failure to correct a violation within the ten (10) year period permitted may produce fines up to $7,000 per day if it remains uncorrected.

OSHA/KOSHA requires the employer, with ten (10) or more employees, to record all occupational injuries and illnesses. Recordation is required if the injury results in lost days from work, light duty or a job transfer, or loss of consciousness or death. Even an employer with less than then (10) employees must report an injury that results in the death of an employee or hospitalization of three (3) or more employees within eight (8) hours of the occurrence.

Recordable instances are recorded on OSHA Form 301; *Injury and Illness Incident Report*. A summary of this information is filed on OSHA Form 300; *Log of Work Related*

Injuries or Illnesses. The Form 301 must be kept for five (5) years and must be available for employee review.

Once a year, an employer is required to complete and post OSHA Form 300(A); *Summary of Work Related Injuries and Illness*. The form must be signed by a company executive and must be posted between February 1st and April 30th in the year following the covered report.

CHAPTER 4

4.1 HIRING, TERMINATIONS, LAYOFFS, AND REDUCTIONS IN FORCE

The process of hiring an employee in Kentucky may present some risk for the employer. Certain inquiries are prohibited, other inquiries may (at least from the prospective of the U.S. Equal Employment Opportunity Commission ("EEOC")) present problems while other inquiries are permissible.

In general, an employer may question a prospective employee regarding areas that are reasonable and necessary in order for the employer to efficiently operate the employer's business. The employer may need to demonstrate that a particular inquiry is made based on business necessity. Clearly, an employer should not question a perspective employee regarding race, color, sex, religion, or natural origin. An employer should not question an employee about the existence or severity of a disability until after the applicant is hired subject to an Americans with Disabilities Act ("ADA") medical exam and other inquiries. The ADA does not prohibit employers from asking about an applicant's ability to perform the essential functions of the job. The EEOC looks with disfavor on certain types of pre-employment questioning if these questions have the effect of screening out members of protected classes, i.e. race, sex, age, and national origin.

http://www.eeoc.gov/

As long as certain questions do not impermissibly screen out members of protected classes, questions regarding these areas would not necessarily be prohibited in Kentucky. Examples of these types of questions include asking a potential applicant about an arrest, credit ratings and other financial issues including previous bankruptcies and past wage garnishments.

All separations from employment must be examined very carefully by the employer. Whether the termination is for cause or whether it is a layoff due to declining business, most employment lawsuits and claims arise after termination of employment.

The employer should thoroughly document the employment history of the employee and the employer must uniformly apply its discipline rules. The employer should be prepared to justify its decision and to present documentation which supports its actions.

Some employers maintain step or progressive discipline policies which provide increasingly severe discipline for enumerated workplace offensives. Typically, the step discipline procedures permit immediate termination if the action of the employee is deemed (in the employer's sole discretion) sufficiently serious. These elaborate processes severely limit employer flexibility and should be analyzed carefully.

Obviously, the discipline process is very different in a collective bargaining environment where the discipline and grievance process is governed by the collective bargaining agreement.

Every decision to terminate an employee should be examined in light of potential litigation. The employee's records should be examined carefully and documentation should be provided to the extent possible. The termination should be conducted as privately as possible but the supervisor conducting the termination should have a witness present. Typically, the employer will ask the employee to leave the premises immediately. Some employers opt for not explaining the precise reason for the termination in order not to be locked into a full explanation until all facts are known. If a specific reason was given for the termination, the reason should remain consistent throughout subsequent proceedings such as unemployment hearings and agency mediations and subsequent litigation and documentation should support the reason given. Other employers prefer to be specific and if possible, to extract an acknowledgment from the terminated employee.

4.2 LAYOFFS AND W.A.R.N.

Layoffs that involve a plant closing where the business enterprise employs more than 100 employees may be required to give a sixty (60) day warning to the employees of such a plant closing. This notice is required by the Worker Adjustment and Re-Training Notification Act of 1998 ("WARN Act") and contains significant exceptions.

http://www.dol.gov/compliance/laws/comp-warn.htm

4.3 REDUCTION IN FORCE

Reductions in force are layoffs of a number of employees and these reductions in force must be conducted very carefully in light of Federal statutes involving age, race, and sex discriminations. Many companies employ consultants to structure the reductions in force. Many companies also do a detailed analysis of the workforce with regard to determining where the impact of such a reduction in force will be felt most severely and the various age, race, and sex distributions of the employees affected, both those reduced in force and those who are not reduced in force. The purpose of this analysis is to determine the statistical impact of the reduction in force and to provide documentation that such a reduction in not being conducted to weed-out older workers. The employer should be prepared to demonstrate that the reduction is not an exercise in discrimination and must be able to articulate non-discriminatory reasons for its choice of laid-off employees. The company's employment documentation often plays a decisive role in this process.

Decisions regarding reduction in force should be made by a committee of executives from different disciplines (as well as ages, races, and sexes) within the company. The committee's decision should be well documented and should appear to be a reasonable and non-discriminatory decision. The apparent fairness of the criteria and people involved is frequently a decisive factor in subsequent discrimination claims and litigation.

4.4 PERSONNEL FILES

Kentucky law does not require an employer to produce a personnel file for the inspection of the employee. These files are the property of the employer. The employer has no absolute right to "supplement" the employment file with additional information.

4.5 PRIVACY

Employees generally retain a limited right to privacy even at the workplace. The employer is entitled to make reasonable inquiries regarding job-related issues and to control the work premises. An employer's right to inquire about medical conditions is limited to those situations that require such an inquiry and are governed by various anti-discrimination statutes, including the ADA.

http://www.ada.gov/

Private employee information, which is in the possession of the employer, should be kept private from all other employees who have no need to know such information. Employee medical files should be kept separately from employment files to the greatest extent that is possible.

The employer is entitled to conduct reasonable investigations regarding workplace issues. The investigation conducted by the employer should be tailored to the specific work-related issues and should exclude personal private issues as much as possible. Investigations are frequently conducted relating to theft and discipline issues as well as to sexual harassment allegations. Sexual harassment investigations are discussed elsewhere in this website.

The employer may monitor the workplace using reasonable means, including electronic and video surveillance. No federal or state law currently prohibits reasonable surreptitious recording by the employer. Some employers choose to employ outside investigating agencies or may contact law enforcement agencies if such investigations are needed.

While the employer has some limited legal privileges, he/she should be careful with regard to accusations against employees. Even if the employer does not have sufficient evidence

to make specific accusations against the employee, the employee may be disciplined for failing to cooperate with the investigation and the employee may be terminated without a stated reason.

Employers are not prohibited from monitoring employees' phone calls, although many employers choose to warn customers and other people doing business with the company that their calls may be monitored for "quality assurance." Employers choosing to monitor employees' phone calls should also give notice to the employees that their phone calls and email communications may be subject to monitoring. If video monitoring is used by the employer, the video should not be used in conjunction with an audio recording. A company communications policy should be instituted and signed by every employee.

Investigations of an employee's activities off the work premises must be conducted very carefully and must be tailored to the reasonable requirements of an employer for such information. Searches of any part of the workplace are not necessarily illegal, particularly if the employer has a reasonable basis to conduct a search. Many employers warn employees (typically in the company handbook) that the employer's premises may be searched and that an employee does not have a reasonable expectation of privacy for any part of the employer's premises.

Most employees now assume that the employer may monitor email and internet usage. This is particularly true where the employer has a good-faith basis for monitoring such email and Internet traffic and where the employer specifically warns an employee that such monitoring may occur. The company handbook should contain a notice to employees regarding the employer's right to monitor communications.

4.6 REFERENCES

Most employers simply provide job references with the "name, rank, and serial number." An employee may be "privileged" to accurately state facts regarding an employee in a reference referral, but an employer may not be privileged to give false information. An employer may not disclose private medical information on a reference check, particularly if that information leads to the conclusion that an employee has a "disability."

Most employers now simply state that the person was employed, the dates of employment, and the type of work done by the employee.

Kentucky law, including recent legislation, provides some protection for employers in dealing with reference issues, but caution is still recommended.

CHAPTER 5

UNEMPLOYMENT INSURANCE

5.1 UNEMPLOYMENT INSURANCE AND CLAIMS

A qualified employee in Kentucky, who is separated from employment through no fault of his/her own, may be entitled to unemployment compensation benefits. The claimant must file an administration claim against the Unemployment Commission for benefits. The employer is a witness, not a party to the claim. Non-profit corporations are exempt from participating in the unemployment system.

http://www.kewes.ky.gov/

Kentucky employers pay into "reserve account" from which unemployment benefits may be paid to a qualified employee under certain circumstances. An employee may be qualified for unemployment benefits so long as the employee is able to work, available for suitable work, makes reasonable accommodations to obtain work during the unemployment compensation period, and is not otherwise disqualified from benefits.

An employee is disqualified from obtaining benefits for falsification of the employment application, violating clear and uniformly applied company rules, absenteeism for which no good cause is shown, damage to the employer's property, refusing to obey work orders, the use of or being under the influence of drugs and/or alcohol, endangering others safety, and for being incarcerated for more than five (5) working days.

Employees are not entitled to unemployment benefits if their separation of employment was the result of misconduct or voluntary separation from employment. Not all conduct rises to the level of "misconduct" and "misconduct" cases are typically fact dependent. An employee who voluntarily separates himself/herself from employment is not entitled to employment benefits and an employee who indicates that he/she will be quitting, but does not give a precise quitting date, is not entitled to unemployment benefits.

Unemployment claims are decided initially by the unemployment office. The employer or the employee may ask for a hearing in an effort to appeal the decision, but this request must be made within fifteen (15) days of the initial determination. An unemployment compensation referee will set a hearing and will permit some testimony to be taken by the parties. This hearing may either be by phone or in person. A party may appeal the referee's decision to the Unemployment Commission and after that, to the applicable circuit court. Typically, appeals focus on the referee's application of unemployment law, not for the referee's determination of the facts.

5.2 EFFECT OF UNEMPLOYMENT DECISIONS

Although the unemployment statute states that no findings of fact in unemployment cases may be "conclusive or binding" in a subsequent action, unemployment decisions are important in the context of other employment law issues. While the unemployment decision may not be binding, it may be admissible in a subsequent proceeding.

If an unemployment referee decides that an employee was not terminated for "misconduct," this decision may be admissible in a subsequent lawsuit by the employee for wrongful termination. The party's testimony in an unemployment hearing may be used against the party in subsequent proceedings. It is therefore important that employers take these hearings extremely serious if the employer suspects that the employee may pursue additional actions against the employer after the discharge.

CHAPTER 6

SEVERANCE AGREEMENTS, ARBITRATION, AND TERMINATION ISSUES

6.1 SEVERANCE AGREEMENTS

Some employers provide terminated or laid-off employees with severance payments. Severance packages are certainly not required under Kentucky law. An employer may choose to offer a severance agreement to selected employees and may choose not to offer other employees the same terms for severance. If the employer announces a company policy regarding severance for any laid-off employee, the employer may be liable to pay severance according to the announced policy as such a severance package may be considered as "wages."

All employers paying a severance package should extract, to the extent possible, a waiver from the employee of any and all future claims. An employer may extract such a release of all claims and may also extract an agreement not to compete and not to solicit the other employees of the employer in such a severance agreement.

Generally, an employee is permitted to waive all claims against the employer by executing a proper severance agreement and waiver of all claims. If the employer also obtains a waiver for age discrimination claims, certain specific requirements apply. The Older Workers' Benefit Protection Act, Section 201, requires that the waiver must be in plain language, that it specifically waives age discrimination claims, and that the employee must be paid some additional consideration, i.e. severance benefits, in exchange for such a waiver. The employee must be advised to consult an attorney and must be given twenty-one (21) days to consider the proposed waiver of age discrimination claim.

http://www.eeoc.gov/eeoc/history/35th/thelaw/owbpa.html

After an employee signs the waiver, the employee may rescind his/her signature within seven (7) days after the signing. After the expiration of seven (7) days, the release is binding and valid.

6.2 ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

Many employers are turning to agreements which require that any claims made by employees after separation or employment must be decided by arbitration rather than through litigation. The obvious advantage of this agreement is that the employer avoids the expenses, disruptive and potentially serious threat of court proceedings and runaway juries. Typically, the employer provides the mechanism for arbitration, i.e. American Arbitration Association or some alternative dispute resolution service.

The U.S. Supreme Court has upheld binding arbitration agreements regarding employment cases, including discrimination issues. The employer should propose to pay at least 50% of the arbitration costs since the cost of arbitration may be seen to be an artificial and illegal barrier to the employee to enforce his/her legal rights.

Arbitration proceedings are less likely to become disruptive to the employer's workforce and may be more likely to be conducted with privacy and confidentiality for all concerned. Arbitration agreements are highly recommended in the employment context. Where the employee and employer have executed an agreement to arbitrate disputes, a party's failure to arbitrate may be raised as a defense to any subsequent legal action filed by the party failing to permit arbitration of a claim.

Kentucky law initially prohibited mandatory arbitration clauses in employment disputes. The U.S. Supreme Court has now pre-empted Kentucky law, at least for employers operating in interstate commerce—the great majority of employers. Some employers regard arbitration as a friendlier forum in which to litigate employment disputes. Those employers favoring arbitration generally believe that the arbitrator is less likely to award excessive damages and that the arbitration is generally less expensive, much quicker, and more predictable than cases litigated in State or Federal courts. Statistically, employment actions by employees are increasing in frequency and in the amount of damages awarded by juries. Some employers also believe that since they may have to pay statutory attorneys' fees for many types of employment actions, a

shorter, timelier, and less expensive arbitration proceeding will be less likely to require the employer to pay the fees of the attorney representing the employee.

Some employers have developed an elaborate system of dispute resolution that requires the employee to attempt to mediate or settle the claim before proceeding to arbitration. Benefits of this type of blended dispute resolution/arbitration system include the likelihood that an aggrieved employee would be less likely to retain an attorney at the mediation stage and that the employer can control the outcome more effectively. Many employers also believe that even if the case is not mediated to a settlement, the employer can gain valuable information (free discovery) before the case is arbitrated. Most arbitrations permit far less extensive discovery than is permitted in courts of law. Less discovery, less cost.

Other employers do not favor arbitration. They argue that an arbitration procedure may not be any less expensive than a court proceeding and that arbitrators are more likely to give compromised verdicts. Unlike courts of law, arbitrators generally do not entertain motions for summary judgment, which means that an employer with a strong defense is less likely to be able to win the case entirely. Employers who do not favor arbitration also argue that initiating litigation requires substantial investment by the employee or their attorney and that this cost barrier may weed out many cases which would be arbitrated except for the cost.

In order to have a binding arbitration agreement, the employee should agree to submit any and all claims to arbitration and to do so explicitly. Kentucky law may require each employee to agree to arbitration of any and all claims individually (as opposed to a general provision in an employee handbook). Employers wishing to require arbitration of all claims should ask new employees to sign a separate *statement of agreement to arbitrate* and this specific agreement should be kept in the employee's personnel file.

The best practice is to have all new employees sign the *statement of agreement to arbitrate*.

As with covenants not to compete, it is possible for employers to require current employees to sign arbitration agreements (or be terminated) so long as the employer provides substantial continued employment to the employee. How substantial the continued employment must be depends on the circumstances. Certainly, six (6) months or more of continued employment should be adequate consideration for the agreement not to arbitrate.

The U.S. Supreme Court and the Federal courts have also wrestled with issues relating to the costs of the arbitration proceedings and relating to the amount of due process that must be provided in the arbitration proceedings. The best practice is for the employer to pay most of the cost of the arbitration. If the arbitration is conducted by an arbitrator from the American Arbitration Association ("AAA"), AAA rules provide some measure of due process, i.e. a limited amount of discovery, subpoenaed power for witnesses, etc. A private arbitrator should impose some measure of due process protection so that a party's claim can be fully heard and decided by the arbitrator.

http://www.adr.org

Many employers also provide for shortened statutes of limitations periods in their arbitration agreements and in company handbooks. A recent Federal court decision has upheld this shortening of the statutes of limitations (by Contract). Other employers who have chosen not to require arbitration for employment disputes have required workers to sign *waiver of jury trial rights* that may or may not be enforceable.

Kentucky employers may require that all claims must be mediated. Mediation is a consensual attempt to settle a claim usually with the assistance of a mediator. The U.S. Equal Employment Opportunity Commission ("EEOC") routinely conducts mediation for discrimination charges.

http://www.eeoc.gov/employees/mediation.cfm

CHAPTER 7

COBRA

The Consolidated Budget Reconciliation Act ("COBRA") was passed by the U.S. Congress. This act applies to group health plans and applies to employers with more than 20 employees.

http://www.dol.gov/ebsa/newsroom/fscobra.html

COBRA provides that in the event of a termination of employment, an employee may purchase his/her own coverage for a period of up to eighteen (18) months after the termination. COBRA does not apply to an employee that has been terminated because of gross misconduct or because of a voluntary separation of employment or voluntary reduction of the hours worked.

An affected employee may elect to purchase COBRA coverage and must do so within sixty (60) days of the notice from the employer regarding the employee's COBRA rights or within sixty (60) days of the time that coverage would end if the employee does not elect to continue COBRA coverage. COBRA coverage may not exceed a premium cost of more than 102% of the plan's costs for providing the coverage. If the employee elects to continue with COBRA coverage, the first premium payment must be provided within forty-five (45) days after the election. An employer is required to notify a covered employee of the availability of COBRA coverage by sending a written notice to the employee. This notice typically gives the employee information regarding their right to continue coverage, the time limits required for this election, the duration of any COBRA coverage, and the employee's obligation to pay for the continuing coverage.

Failure to provide the necessary notices and COBRA coverage may result in fines of $100.00–$200.00 per day. An employee may have a right to enforce COBRA rights in a legal action.

CHAPTER 8

WAGE AND HOUR LEGISLATION

8.1 SOURCES AND ENFORCEMENT

Federal and State law creates minimum standards for the payment of wages and for the hours worked by employees in Kentucky. Federal legislation is enforced by the United States Department of Labor. Kentucky wage and hour issues are investigated and enforced by the Kentucky Department of Labor.

http://www.labor.ky.gov/Pages/LaborHome.aspx

8.2 KENTUCKY WAGE AND HOUR STATUTES

The Kentucky Wage and Hour statutes include many of the provisions also included in Federal legislation, but also contain some provisions that are unique to Kentucky.

Kentucky defines wages to include commissions and various other benefits, including sick time and vacation pay. An employer may not fail to pay wages under Kentucky law and an employee who has not been paid wages may sue the employer and may recover attorneys' fees if the employee prevails. The court may also award twice the amount of wages due for a violation of Kentucky wage statutes if the court finds that the failure to pay was intentional.

http://www.lrc.ky.gov/statutes/statute.aspx?id=41856

No employer may retaliate against an employee making a wage and hour claim. Employers may deduct only those classification of deductions that are authorized by the employee and may not deduct amounts from the employee's wages which represent business losses, lost or broken employer property, and the recovery of debt, unless expressively authorized by the employee.

Kentucky employers must provide their employees with a reasonable period for lunch break and this lunch break must be as close to the middle of the employee's shift as is possible if

the employee works for more than five (5) hours. Employees are also permitted a 10-minute break for every four (4) hours worked.

There is some disagreement between Kentucky and Federal Courts as to whether an employee can go right to court or whether he/she is required to file a claim with the Kentucky Department of Labor.

8.3 FEDERAL WAGE AND HOUR STATUTES

In general, the Fair Labor Standards Act ("FLSA") governs the payment of wages, minimum wage and overtime wages. The minimum wage is currently $7.25 per hour; although tipped employees may have a lower minimum wage. An employee working more than forty (40) hours in any given week must be paid time and one-half their regular rate of pay, less the exempt employees under the FLSA.

http://www.dol.gov/compliance/laws/comp-flsa.htm

http://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf

The FLSA requires that all hours worked (as opposed to hours spent traveling to and from work) be generally covered for employees who are not exempt from the FLSA. In some circumstances, an employee must be paid for time spent "on call" if that employee is required to be available and if this required availability precludes the employee from effectively using the time for employee's own purposes. Certain types of executive, administrative, and professional employees are exempt from the overtime provisions of the FLSA. Outside sales workers are also excluded so long as their sales activities predominate over other work activities, i.e. service.

8.4 EXEMPT EMPLOYEES

Employees who perform executive or administrative functions may be exempt under the FLSA. Executive employees typically supervise and manage the work of other employees and have the authority to affect the conditions of employment, i.e. hiring, firing, promotions, etc. Administrative employees' assist in the management of the job site using independent judgment and discretion.

Professional employees may also be exempt so long as they perform work requiring advanced or specialized knowledge that is creative and original in nature or that includes teaching, or the application of highly specialized technological knowledge.

Retail and service establishments may also be exempt from paying overtime for workers who are engaged in retail and service employment. If the business in question has more than 75% of its annual revenue as retail sales or services, or if the establishment's operation is more than 50% within the state, these employees may be exempt.

Additionally, agricultural workers may be exempt from the FLSA as well as other diverse workers such as transportation workers, some hospital workers, recreational workers, and newspaper delivery workers. Exempt employees may be paid a salary rather than hourly pay.

CHAPTER 9

RACE, RELIGION, AND NATIONAL ORIGIN

Discrimination on the basis of race, religion, and national origin is illegal under Federal and State law. Economic and non-economic damages, attorneys' fees, and reinstatement are potential remedies.

As in other forms of discrimination, these cases may be referred to administrative agencies (EEOC, State, and local agencies) and an alleged motion may proceed in State and Federal courts.

http://kchr.ky.gov/about/

http://www.eeoc.gov/

CHAPTER 10

DISABILITY DISCRIMINATION

10.1 AMERICANS WITH DISABILITIES ACT ("ADA")

The employment related provisions of the Americans with Disabilities Act ("ADA") prohibit an employer from employment discrimination if an employee has a qualified disability. The employer is prohibited from discriminating on the basis of disability for a qualified employee in all aspects of the job, including hiring, termination, promotion, compensation, or other benefits and conditions of the employee's employment.

http://www.ada.gov/

http://www.ada.gov/pubs/adastatute08.pdf

The ADA applies to all employers with fifteen (15) or more employees in twenty (20) or more weeks in the preceding calendar year. The ADA does not apply to private membership clubs and does not cover the U.S. government. The employer is prohibited from discriminating against a qualified employee in the terms and conditions of his/her employment.

Discrimination on the basis of disability is also prohibited under Kentucky law.

10.2 QUALIFIED DISABILITY

A qualified disability is defined to include a physical or mental medical condition which "substantially limits one or more of the major life activities." Certain types of psychological conditions are expressively excluded from those qualified disabilities covered by the ADA, including various sexual disorders, substance abuse resulting from the use of illegal drugs, and some psychiatric conditions.

If an employee has successfully completed a drug rehabilitation program and is no longer using illegal drugs, a person arguably has a qualified disability particularly if the employer regards the person as having a disability. If a disabled employee is correcting the disability by using medication, glasses, or other types of corrective devices, the employee is not disabled.

If an employee has a qualified disability, the disability must, with or without reasonable accommodations, prevent the employee from performing the "essential functions" of the job. Typically, the employer is provided wide latitude in describing the job functions which it believes to be essential and most employers design their job descriptions with this in mind.

10.3 EMPLOYMENT APPLICATIONS AND THE ADA

The employer typically deals with the ADA concerns first in the employment application process. An employer may not require a medical examination before a qualified offer of employment is given to the applicant. An employer may not specifically question the perspective employee as to whether the employee has a particular disability. An employer may inquire as to whether the job applicant has the abilities to perform legitimate job related tasks and may also offer employment to a prospective employee conditioned upon an employee's successful completion of a medical exam that is directed towards an applicant's ability to perform the essential functions of the job.

Information gathered in the application process must be treated as confidential, except that this information may be shared with supervisors and other employees who "need to know" such information.

10.4 PERCEIVED DISABILITY

An employer may not discriminate on the basis of a perceived disability. This means that even if an employer is mistaken as to whether an he/she has a qualified disability and discrimination occurs because of a perceived disability, the ADA prohibits such discrimination.

10.5 REASONABLE ACCOMMODATIONS

An employee who has or acquires a qualified disability must be given "reasonable accommodations." Whether any particular accommodation is reasonable may depend upon whether such an accommodation would provide undue hardship to the employer. Undue hardship is judged with regard to the size of the employer, the nature of the claimed accommodation, the

costs of the claimed accommodation, and the degree of disruption caused by the claimed accommodation.

10.6 RETURN TO WORK

In general, employers are not required to create a job to provide reasonable accommodations to a disabled employee. If a job is open and the disabled employee is physically capable of performing the job, an employer may be required to extend the opportunity to the disabled employee to perform the job. The employer is not required to "bump" other employees from a job in order to provide a "reasonable accommodation," particularly where the job in question is subject to seniority bidding or is within a collective bargaining environment.

In order for the employer to have a duty to provide reasonable accommodations, a request must be made by the employer for the reasonable accommodations. Whether a person has a qualified disability typically depends on medical evidence. The employer may seek a second opinion by requiring an employee to attend an independent medical evaluation ("IME").

CHAPTER 11

FAMILY AND MEDICAL LEAVE ACT ("FMLA")

11.1 SCOPE

The Family and Medical Leave Act ("FMLA") is a Federal statute which applies to employers in Kentucky with 50 or more employees during twenty (20) calendar weeks in the current or preceding year. The covered employer must provide unpaid family and medical leave to employees. The family medical leave period extends for 12 weeks of unpaid leave. The employee must have worked for the employer for at least one (1) year, must have at least worked a total of 1250 hours during that year, and must be employed within 50–75 miles of the work site of the employer for which 50 or more employees are employed.

http://www.dol.gov/whd/fmla/

http://www.gpo.gov/fdsys/pkg/USCODE-2010-title29/html/USCODE-2010-title29-chap28.htm

An employee may be entitled to 12 weeks of unpaid leave for all serious health conditions of the employee or of an immediate family member, including a spouse. A condition is considered a "serious health condition" if it acquires in-patient care, absence of more than three (3) days, and treatment by a healthcare provider—a chronic condition which requires periodic visits to a healthcare provider over an extended period of time. Pregnancy is also considered to be "a serious health condition" for purposes of the FMLA. When a worker returns from a covered FMLA leave, the employer is required to return the worker to the same or an equivalent job. Benefits must be maintained during the leave with some exceptions and defenses.

11.2 DOCUMENTATION

Unlike the ADA, an employer may have an affirmative obligation to count absences as FMLA leave time. If an employee requests FMLA leave time, an employer must notify the

employee that such a leave will count towards the FMLA required 12-week leave period. This notice from the employer to the employee shall be in writing.

The employee has an obligation, when asked, to provide sufficient medical certification of eligibility.

Employers may require the employee to provide medical documentation supporting the claim and may also require the employee to provide medical proof that the employee is capable of returning to the job.

Employers' defenses center around the reason for the denial or alleged violation of the FMLA. If an employment action was inevitable or planned before the leave, the employer may not have violated the Act. As always, documentation is the key to a strong defense.

CHAPTER 12

WORKERS' COMPENSATION/FAMILY MEDICAL LEAVE ACT ("FMLA") AND AMERICANS WITH DISABILITIES ACT ("ADA")

Typically, after a work-related injury, the employer is presented with issues relating to FMLA and ADA as well. An employee who has been injured on the job and is on temporary total disability ("TTD") may also be entitled to a 12 week unpaid FMLA leave during which the employee may not terminated, demoted or otherwise discriminated against in terms and conditions of employment. If the injury or occupational condition qualifies under the FMLA, the employee may be entitled to a 12 week leave even if the employee is released to return to work by the treating medical professional.

Beyond this 12 week period, the employer may terminate an employee who is unable to return to the job. The employee who has been terminated and has not returned to work at the same or greater wage may also be entitled to additional workers' compensation benefits. Many companies require that any employee who is out of work for six (6) months must be terminated. Other companies have a similar 12 month requirement.

12.1 LIGHT DUTY/RETURN TO WORK

The ADA may require the employer to supply reasonable accommodations for someone with a work-related injury if that injury is a qualified disability under the ADA and if such reasonable accommodations are requested by the employee.

The issue of the relationship between workers' compensation, FMLA, and ADA most frequently arises in the context of whether an employer is required to provide "light duty" to injured workers. The employer is generally not required to provide "light duty." Generally, the ADA will not require an employer to provide "light duty" positions unless the "light duty" position is reasonably similar in terms of job functions to the job performed by the employee at the time of his/her injury and if the employee requests an ADA reasonable accommodation. An

employer who provides temporary "light duty" is not necessarily required to offer a permanent "light duty" job.

Employers are not required to create a job for a worker with permanent restrictions. The employer is not required to bump another employee in order to provide a job to a returning employee unless the company's seniority rules (or collective bargaining agreement) would permit the returning employee to bid for the job even without the restrictions imposed after the work injury.

CHAPTER 13

AGE DISCRIMINATION

Kentucky and Federal law prohibits discrimination on the basis of age.

The Federal statute prohibiting age discrimination is the Age Discrimination and Employment Act ("ADEA").

Any worker who is over 40 years of age shall not be discriminated against by virtue of the employee's age. This is true for hiring as well as the terms and conditions of work after the hiring process.

13.1 KENTUCKY CIVIL RIGHTS ACT ("KCRA")

The Kentucky Civil Rights Act also prohibits age discrimination for workers over 40 years of age. The Kentucky Civil Rights Act is generally interpreted by using Federal case law and these age discrimination laws may be enforced by the U.S. Equal Employment Opportunity Commission ("EEOC") or the Kentucky Commission on Human Rights. The Jefferson County version of the Kentucky Commission on Human Rights is the Louisville/Jefferson County Human Rights Commission, which also has enforcement authority.

http://kchr.ky.gov/about/kycivilrightsact.htm

13.2 ADMINISTRATIVE REMEDIES

If an employee pursues an age discrimination claim in Federal court, the aggrieved employee must first file a charge with the Federal EEOC and may not sue the employer in Federal court unless and until the employee receives a "right to sue" letter. If an employee chooses to proceed with a charge to the Kentucky Commission on Human Rights or the Jefferson and Fayette County versions of the state enforcement agency, the employee who files such a charge must complete the process and may be limited to enforcement of the award of the administrative agency (NOTE: This issue is currently pending in Kentucky Appellate Courts).

Such an employee may not be able to sue the employer in State court after pursuing a charge through the Kentucky Commission on Human Rights or its Jefferson/Fayette County equivalent.

13.3 ADEA

The Age Discrimination in Employment Act of 1967 ("ADEA") is a Federal statute prohibiting age discrimination in employment.

Generally, if an employee intends to sue under Federal civil rights statutes, the statute of limitations for such a claim requires the employee to sue within five (5) years after the alleged age discrimination. An employee suing in Federal court must sue within ninety (90) days after receiving a "right to sue" letter from the EEOC. An employee successfully pursuing a claim for age discrimination may recover back pay and also front pay—representing future damages of the employee from the discriminatory conduct.

An employee who waives his/her right to proceed against the employer for age discrimination must do so knowingly and voluntarily.

13.4 **OWBPA**

The Federal Older Workers' Benefit Protection Act ("OWBPA") requires that releases must be in plain language and must refer to claims under the ADEA. These releases must also be accompanied by "consideration"—meaning the employee must get something for giving up the right to sue. Typically, this type of consideration includes severance payments.

The employee must be given twenty-one (21) days in which to consider the release and after signing the release; the employee has a 7-day period in which to rescind the release. After such time, the release is valid and enforceable.

http://www.eeoc.gov/eeoc/history/35th/thelaw/owbpa.html

CHAPTER 14

IMMIGRATION: EMPLOYER RESPONSIBITIES

14.1. IMMIGRATION CONTROL AND REFORM ACT OF 1986

The purpose of this legislation to prevent an employer from hiring persons not permitted to work in the United States. The employer is required to comply with the Act by not knowingly hiring unauthorized aliens, verifying the employee's identity and work status, and maintaining records regarding the employee's identity. A direct requirement for employers in Kentucky is that all employees must complete a Form I-9; *Employment Eligibility Verification* (http://www.uscis.gov/sites/default/files/files/form/i-9.pdf), no later than the close of the employee's third day of employment.

The employer must retain the employee's Form I-9 for a minimum of three (3) years or for one-year after the employee separates from employment.

The Act also prohibits discrimination in hiring and the terms and conditions of employment based upon natural origin or citizenship status. Employers may not discriminate in the hiring or termination of individual based upon their natural origin or citizenship status (legal citizenship). An employer may not retaliate against an employee for exercising his/her rights as under the Act.

The Act does not prohibit the employer from giving preference in employment to an U.S. Citizen over an Alien with a legal right to work in U.S., if both have equal qualifications. If any employer does not comply with the I-9 requirements, the employer can be fined ranging from $100.00 to $1,000.00 per violation. For repeated violations, fines are much higher.

http://www.uscis.gov/tools/glossary/immigration-reform-and-control-act-1986-irca

CHAPTER 15

WARN ACT

15.1. WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN ACT) of 1988

The Worker Adjustment and Retraining Notification Act (WARN Act) of 1988 is a law which provides advance notification to employees in the event of mass layoffs and plant closings. This Act applies to employers with more than 100 or more full-time employees or 100 or more employees that in the aggregate work more than 4000 hours per week, including overtime.

Subsidiaries and independent contractors may be considered in this calculation if there is common ownership between the entities in question. Generally, the employer must provide a sixty (60) day notice to all employees affected by a mass layoff. A mass layoff is either a permanent or temporary shutdown of a plant that results in 50 or more employees losing their jobs. Exceptions exist in the Act for natural disasters and business conditions that could not have been reasonable foreseen.

Failure for the employer to provide this notice to its employees may result in significant costs, including the requirement that the employer pay lost wages up to 60-days, including the value of employment benefits, i.e. health coverage, etc.

http://www.dol.gov/compliance/laws/comp-warn.htm

CHAPTER 16

EMPLOYMENT RECORDS

Since most employment records are kept electronically, there may be no reason an employer may choose to discard employment records. There are many employment related laws requiring specific record retention periods. The foregoing is a partial list of record keeping requirements:

16.1 AGE DISCRIMINATION EMPLOYMENT ACT ("ADEA")

- Three (3) years for employment records;
- One (1) year regarding employment promotion applications, layoffs, recalls and terminations; and
- One (1) year from record creation or taking the action

http://www.eeoc.gov/laws/statutes/adea.cfm

16.2 CIVIL RIGHTS ACT OF 1964

One (1) year from record creation or taking the action

http://www.eeoc.gov/laws/statutes/titlevii.cfm

16.3 CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT (COBRA)

Six (6) years from end of contract.

http://www.dol.gov/ebsa/COBRA.html

16.4 WALSH-HEALY PUBLIC CONTRACT ACT (PCA)

Three (3) years from end of contract.

http://www.dol.gov/compliance/laws/comp-pca.htm

16.5 EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

Six (6) years as long as the records are relevant.

http://www.dol.gov/dol/topic/health-plans/erisa.htm

16.6 EQUAL PAY ACT OF 1963

Three (3) years from end of contract.

http://www.eeoc.gov/laws/statutes/epa.cfm

16.7 **FAIR LABOR STANDARDS ACT (FSLA)**

Three (3) years from end of contract.

http://www.dol.gov/compliance/laws/comp-flsa.htm

16.8 **FAMILY MEDICAL LEAVE ACT (FMLA)**

Three (3) years from end of contract.

http://www.dol.gov/whd/fmla/

16.9 **IMMIGRATION CONTROL AND REFORM ACT OF 1986/FORM I-9**

Three (3) years from date of hire or one (1) year after the employee's separation from employment.

http://www.uscis.gov/tools/glossary/immigration-reform-and-control-act-1986-irca

http://www.uscis.gov/sites/default/files/files/form/i-9.pdf)

16.10 **OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)**

Five (5) years for injury records.

Thirty (30) years for logs and reports, i.e. Medical records and records of exposure to toxic substances for each employee

https://www.osha.gov/

16.11 **INTERNAL REVENUE SERVICE/KENTUCKY REVENUE CABINET**

The Internal Revenue Service and the Kentucky Revenue Cabinet both require different record keeping periods. In general, such records should be kept for at least ten (10) years.

CHAPTER 17

FEDERAL LABOR LAW AND LABOR RELATIONS

The history of American labor relations begins with the Wagner Act of 1935 (*aka* National Labor Relations Act of 1935), continued through the Taft-Hartley Act of 1947 (*aka* Labor-Management Relations Act of 1947), and the Landrum-Griffin Act of 1959 (*aka* Labor-Management Reporting and Disclosure Act of 1959).

Taken together, these Federal laws guarantee employees the right to form and join a Union and engage in collective bargaining; but also provide the employer with some degree of free speech during certification elections and injunctive relief for violations of Federal law.

In general, collective bargaining and Union organization is regulated by the National Labor Relations Act and the National Labor Relations Board (NLRB). The NLRB administers the Act, certifies Union elections and investigates unfair labor practices.

Employees have the right to engage in "concerted activities" for their mutual aid and protection. Among most frequent employers' unfair labor practices, Federal labor law prohibits an employer from interfering with and/or constraining or coercing the employee from the exercise of their rights to collectively bargain, from dominating or interfering with the formation of a Labor Union, and from encouraging or discouraging membership or retaliating against an employee because he/she has filed unfair labor charges or given testimony.

The Union, once legally formed, is the exclusive representative of the employee with regard to the Collective Bargaining Agreement between the Union and the Employer.

Employers also have rights under the Federal Labor Law. In some circumstances, the employer can permanently replace striking workers during an economic strike, and it can present its view to workers regarding the effects of unionization on the workplace. The employer can also prohibit Union solicitation on the premises.

The unionization process begins with initial contact and interest building by the Union. If 30% of the respective bargaining unit has signed authorization cards, the Union may petition the NLRB to hold a certification election. Employers and employees also have the right to petition the NLRB to decertify unions under certain circumstances. Most employers facing a unionization drive will hire consultants to guide the organization through the process and will use its communications abilities to provide its employees with anti-union information.

In general, employers should avoid threats, interrogation of prospective union employees, promises which do not comply with the law, and surveillance of union activities.

The National Labor Relations Act requires both parties to bargain in good-faith. Failure to do so constitutes unfair labor practices.

Some workplace issues are mandatory bargaining issues, i.e. wages, work hours, overtime, discipline, paid and non-paid time off, union security, lay-offs, recalls, seniority, work rules and assignments. Other issues are permissive. Permissive issues are benefits for retired employees, totality agreements, etc. Some issues are illegal items and are not items for which good-faith bargaining is available, including closed shops and rules that would violate other Federal laws.

Collective Bargaining Agreements typically include a grievance process which results in binding arbitration. Arbitrators are chosen from a number of different sources but the American Arbitration Association ("AAA") is the most frequent source. An arbitration panel is composed of three (3) Arbitrators, although other arrangements are made including permanent arbitrators in some circumstances.

Even if employees do not express a desire for a Union, employees are legally permitted to engage in "concerted action" and the employer must be very careful to avoid unfair labor practices in this area.