HOT TOPICS IN LABOR AND EMPLOYMENT LAW IN 2013

2013 MIDWINTER MEETING
Employment Rights & Responsibilities Committee

Loews Miami Beach Hotel
Miami Beach, Florida

March 19 – 23, 2013

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HOT TOPICS IN LABOR AND EMPLOYMENT LAW

2013 promises to be a challenging year for labor and employment lawyers. There are more questions than answers as we speculate as to what authority the NLRB currently has and the impact of the D.C. Circuit Court’s decision in Noel Canning v. NLRB. We look to the Department of Labor, the Internal Revenue Service, the Department of Health and Human Services and the Equal Employment Opportunity Commission as we decipher the Patient Protection and Affordable Care Act. We are beginning to see the impact of the Americans with Disabilities Act Amendments and how its expansion affects the Family and Medical Leave Act. And this is just the tip of the iceberg.

Your materials include papers submitted by John Hendrickson, Regional Attorney, EEOC Chicago District, and Maureen Binetti of Wilentz, Goldman & Spitzer in New Jersey. Although there may be some overlap in the topics addressed, we have tried to highlight different issues, with the expectation that you will review the papers collectively as you consider which issues will be “hot” in your practice in 2013.

I. The Affordable Care Act

It seems the Patient Protection and Affordable Care Act (“ACA”) is here to stay – at least for now. Although many of us will defer to the employee benefit lawyers and others regarding the implementation of the Act’s provisions, there are some areas in which labor and employment lawyers will likely be of service to our clients.

For example, the ACA provides for incentives associated with “Wellness Programs” for employees. The Department of the Treasury, 26 CFR Part 54; Department of Labor, Employee Benefits Security Administration, 29 CFR Part 2590; and Department of Health and Human Services, 45 CFR Parts 146 and 157, have issued a notice of proposed amendments to regulations regarding nondiscriminatory wellness programs in group health coverage. The amendments would increase the maximum permissible reward under a health-contingent wellness program offered in conjunction with a group health plan from 20 percent to 30 percent of the cost of the coverage, and would increase the maximum reward to 50 percent for wellness programs designed to prevent or reduce tobacco use. Proposed clarifications regarding the design of health-contingent wellness programs and reasonable alternatives that must be offered to avoid discrimination are also addressed. The proposed rule can be found at 77 Fed. Reg. 70620 and at the following link: http://webapps.dol.gov/federalregister/PdfDisplay.aspx?DocId=26492.

Balancing employers’ obligations under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) with the ACA wellness program provisions will be challenging. At this time, the EEOC has no clear answers for
employers who wish to provide incentives related to wellness programs as outlined by the ACA. The Commission’s past guidance may be instructive, however.

In 2000, the EEOC issued Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) and briefly addressed wellness programs:

22. May an employer make disability-related inquiries or conduct medical examinations that are part of its voluntary wellness program?

Yes. The ADA allows employers to conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program without having to show that they are job-related and consistent with business necessity, as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records. These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. Employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs.

A wellness program is "voluntary" as long as an employer neither requires participation nor penalizes employees who do not participate.

More recently, in 2011, the EEOC publicized an informal discussion letter addressing incentives for wellness programs.

The U.S. Equal Employment Opportunity Commission

EEOC Office of Legal Counsel staff members wrote the following informal discussion letter in response to an inquiry from a member of the public. This letter is intended to provide an informal discussion of the noted issue and does not constitute an official opinion of the Commission.

ADA & GINA: INCENTIVES FOR WORKPLACE WELLNESS PROGRAMS

June 24, 2011

[ADDRESS]

Dear ____:

This is in response to your March 8, 2011, letter to Chair Jacqueline A. Berrien (which you also sent to the Departments of Labor, Treasury and Health and Human Services) asking for guidance on certain issues affecting workplace wellness programs. In particular, you seek further guidance on: the incentives that employers can offer employees to participate in wellness programs, rules explaining how the Americans with Disabilities Act (ADA) applies to workplace wellness programs, and clarification of what you believe may be conflicting regulations interpreting Title I and Title II of the Genetic Information Nondiscrimination Act (GINA) about the use of family medical history to identify employees who would benefit from wellness programs. You state that EEOC
should make clear that: 1) offering incentives for participation in wellness programs does not violate the ADA or GINA; and 2) family medical history provided voluntarily may be used to guide employees into disease management programs.

**ADA**

Title I of the ADA allows employers to conduct voluntary medical examinations and activities, including obtaining information from voluntary medical histories, as part of an employee wellness program as long as any medical information acquired as part of the program is kept confidential and separate from personnel records. EEOC guidance states that a wellness program is “voluntary” as long as the employer neither requires participation nor penalizes employees who do not participate. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act (ADA) at Q&A 22 (July 27, 2000), [http://www.eeoc.gov/policy/docs/guidance-inquiries.html](http://www.eeoc.gov/policy/docs/guidance-inquiries.html).

As you know, the Commission has not taken a position on whether, and to what extent, Title I of the ADA permits an employer to offer financial incentives for employees to participate in wellness programs that include disability-related inquiries (such as questions about current health status asked as part of a health risk assessment) or medical examinations (such as blood pressure and cholesterol screening to determine whether an employee has achieved certain health outcomes). However, we will carefully consider your comments and the comments of other stakeholders that we have received on this important issue.

**GINA**

Title II of GINA prohibits employers and other covered entities from requesting, requiring, or purchasing genetic information, subject to six limited exceptions. See 29 C.F.R. §1635.8. One exception allows a covered entity to acquire genetic information about an employee or his or her family members when it offers health or genetic services, including wellness programs, on a voluntary basis. The individual receiving the services must give prior voluntary, knowing, and written authorization. While individualized genetic information may be provided to the individual receiving the services and to his or her health or genetic service providers, genetic information may only be provided to the employer or other covered entity in aggregate form. Id. at §1635.8(b)(2)(i)(D). Finally, as you noted, the final rule makes clear that covered entities may not offer financial inducements for individuals to provide genetic information as part of a wellness program. Id. at §1635.8(b)(2)(ii).

Covered entities may use the genetic information voluntarily provided by an individual to guide that individual into an appropriate disease management program. However, if that program offers financial incentives for participation and/or for achieving certain health outcomes, the program must also be open to employees with current health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing a condition. Id. at §1635.8(b)(2)(iii). Our GINA regulations offer an example to illustrate this point that you believe is inconsistent with a similar example in the regulations of the Departments of Labor, Treasury, and Health and Human Services interpreting Title I of GINA. Id. 4
We are not in a position to offer an interpretation of the example in the GINA Title I regulations, since EEOC does not have responsibility for enforcing Title I. However, our goal in formulating the position on wellness program incentives and the examples in our Title II regulations was to be consistent with the positions taken by the Title I agencies (with which we coordinated extensively while developing our final GINA regulations).

We hope this information is helpful. Please note, however, that it does not constitute an official opinion of the EEOC. If you have further questions, please contact me at 202.663.4609 or Assistant Legal Counsel Christopher Kuczynski at 202.663.4665.

Sincerely,

/s/
Peggy R. Mastroianni
Legal Counsel

Footnotes

1 This provision of the EEOC regulation cites the following example: Employees who voluntarily disclose a family medical history of diabetes, heart disease, or high blood pressure on a health risk assessment that meets the requirements of (b)(2)(ii) of this section and employees who have a current diagnosis of one or more of these conditions are offered $150 to participate in a wellness program designed to encourage weight loss and a healthy lifestyle. This does not violate Title II of GINA.

 Hopefully, the EEOC will provide more definitive guidance on wellness programs in the workplace in the near future.

The ACA prohibits employers from retaliating against employees who report alleged violations of Title I of the Act or for receiving “health insurance tax credits or cost sharing reductions as a result of participating in a Health Insurance Exchange, or Marketplace.” On February 22, 2013, the Department of Labor announced an interim final rule on the whistleblower protections for reporting violations of the ACA. The news release is set forth below and the fact sheet referenced is attached at the end of this paper. The Interim Rule can be found at www.dol.gov/find/20130222.

**US Labor Department’s OSHA announces interim final rule, invites public comment on whistleblower protections for reporting violations of Affordable Care Act’s health insurance reforms**

**WASHINGTON** — The U.S. Department of Labor's Occupational Safety and Health Administration has published an interim final rule in the Federal Register that governs
whistleblower complaints filed under Section 1558 of the Affordable Care Act. The Affordable Care Act contains various provisions to make health insurance more affordable and accountable to consumers. Among the policies to achieve its goals, the Affordable Care Act's Section 1558 provides protection to employees against retaliation by an employer for reporting alleged violations of Title I of the act or for receiving a tax credit or cost-sharing reduction as a result of participating in a Health Insurance Exchange or Marketplace.

Title I includes a range of insurance company accountability policies, such as the prohibition of lifetime limits on coverage and exclusions due to pre-existing conditions. If an employee reports a violation of one of these policies or requirements, the act's whistleblower provision prohibits employers from retaliating against the employee. If an employee is retaliated against in violation of the whistleblower provision, he or she may file a complaint with, and ultimately receive relief from, OSHA or the courts.

The Affordable Care Act authorizes the secretary of labor to conduct investigations into complaints and issue determinations, which are functions delegated to OSHA. OSHA's interim final rule establishes the procedures and time frames for the filing and handling of such complaints, including investigations by OSHA, appeals of OSHA determinations to an administrative law judge for a hearing, review of such decisions by the Administrative Review Board and judicial review of the secretary's final decision.

The interim final rule can be viewed at [www.dol.gov/find/20130222](http://www.dol.gov/find/20130222). Comments, which will be accepted for 60 days, may be submitted electronically via the federal e-rulemaking portal at [http://www.regulations.gov](http://www.regulations.gov), or by mail or fax. Faxed submissions, including attachments, must not exceed 10 pages and should be sent to the OSHA Docket Office at 202-693-1648. Comments submitted by mail should be addressed to the OSHA Docket Office, Docket No. OSHA — 2011-0193, U.S. Department of Labor, Room N-2625, 200 Constitution Ave. NW, Washington, DC 20210.


OSHA enforces the whistleblower provisions of the Occupational Safety and Health Act of 1970 and 21 other statutes protecting employees who report reasonably perceived violations of various workplace, commercial motor vehicle, airline, nuclear, pipeline, environmental, railroad, public transportation, maritime, consumer product, motor vehicle safety, health care reform, corporate securities, food safety, and consumer financial reform laws and regulations. Additional information is available at [http://www.whistleblowers.gov](http://www.whistleblowers.gov)

The U.S. Department of Health and Human Services today also issued a final rule that implements five key consumer protections from the Affordable Care Act and makes the health insurance market work better for individuals, families and small businesses. For more information, visit [http://www.hhs.gov/news/press/2013pres/20130222a.html](http://www.hhs.gov/news/press/2013pres/20130222a.html).

Under the OSH Act, employers are responsible for providing safe and healthful workplaces for their employees. OSHA's role is to ensure these conditions for America's working men and women by setting and enforcing standards, and providing training, education and assistance. For more information, visit [http://www.osha.gov](http://www.osha.gov).

Employment lawyers may also be called upon to address the potential need to reduce the workforce to avoid costs associated with healthcare. Some speculate that employers will outsource work, or use employee leasing or temporary staffing agencies to avoid burdens imposed by the ACA. Whether these strategies will be implemented
and whether they are permissible remain to be seen. Numerous agencies have authority over various aspects of the ACA and there are many moving targets, with the rules changing frequently. Because there are so many questions, and so few answers, the ACA will be a hot topic for employers in 2013.

II. Criminal Background Checks

Both the EEOC and the OFCCP recently issued guidance on the use of criminal background checks. See http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm and http://www.dol.gov/ofccp/regs/compliance/directives/dir306.htm The EEOC guidance provides that a felony conviction cannot be an automatic bar to employment, and discourages employers from seeking information about arrests or convictions.

The EEOC asserts that because arrest and incarceration rates are particularly high for African American and Hispanic men, an employment policy which prohibits the hiring of an applicant with a record of an arrest or conviction could have a disparate impact on the hiring of African Americans and Hispanics. Employers also face potential “disparate treatment” claims if, for example, the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record, or if criminal background checks are performed on African American applicants more often than on White applicants.

If an employer bases an employment decision on an arrest or conviction record and the decision is challenged, the burden will be on the employer to prove that the policy or practice is “job related for the position in question” and “consistent with business necessity.” According to the EEOC, if the employer overcomes this hurdle, the applicant may still prevail if he can prove that a “less discriminatory alternative employment practice” would have served the employer’s goals and the employer refused to follow it.

The EEOC and OFCCP recommend that employers considering an applicant with a criminal conviction utilize a targeted screening process in which at least 1) the nature of the crime, 2) the time elapsed, and 3) the nature of the job are considered. The EEOC further suggests that the employer then provide an opportunity for an “individualized assessment” for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity. “Individualized assessment” generally means that an employer 1) informs the applicant that he may be excluded because of past criminal conduct; 2) provides him an opportunity to demonstrate that the exclusion does not properly apply to him; and 3) considers whether the individual’s additional information shows that the policy as applied is not job related and consistent with business necessity.
Surprisingly, since the issuance of the guidance, it seems that more employers are interested in obtaining criminal background checks. As noted below, the EEOC has expressed a particular interest in investigating and pursuing claims associated with persons arrested and/or convicted or crimes, so employers should carefully consider and document employment decisions related to criminals.

It is worth noting that there are new Fair Credit Reporting Act forms to be used by employers obtaining background checks on applicants and employees. The new forms are attached and can be found at http://www.gpo.gov/fdsys/pkg/FR-2012-11-14/pdf/2012-27581.pdf.

III. The EEOC Strategic Enforcement Plan

The EEOC’s Strategic Enforcement Plan (SEP) and Strategic Plan can be found at http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm and http://www.eeoc.gov/eeoc/plan/sep.cfm. The nutshell version for management lawyers is that you should make sure that employers are aware that the Commission will be particularly interested in investigating and pursuing claims related to the following:

- Class/collective action waivers, such as those in arbitration agreements;
- Use of arrest/conviction records and tests and other selection devices that can operate as discriminatory barriers in hiring and recruitment;
- Fixed-leave policies and reasonable accommodation questions post-ADAAA;
- ADAAA issues generally (especially when/whether workers with disabilities are qualified);
- Pregnancy-discrimination related issues; and
- Other “emerging” issues, such as coverage of LGBT individuals under Title VII.

John Hendrickson’s paper fully addresses the Commission’s Strategic Enforcement Plan.

IV. The NLRB

On January 25, 2013, the D.C. Circuit Court ruled in Noel Canning v. NLRB that President Obama’s January 4, 2012, recess appointments to the NLRB were unconstitutional, finding that Congress was not “in recess” as intended by the Constitution at the time the appointments were made. As a result, the D.C. Circuit found that the decisions made by the NLRB subsequent to the January 4, 2012 appointments to the Board were unconstitutional and invalid.

The NLRB has issued a statement asserting that the decision will be overturned and was limited to the facts of the Noel Canning case. There are no clear answers as
to how employers, employees and unions should proceed at this point, but this issue is
certainly one of the hot issues for 2013.

V. United States Supreme Court Decisions to Watch in 2013

Sandifer v. U.S. Steel Corp.

The U.S. Supreme Court is expected to address what constitutes “changing clothes”
under the Fair Labor Standards Act. In this case, the current and former employees
are/were members of a union and the collective bargaining agreement does not require
compensation for the time spent changing clothes. Some speculate that the Court will
also use this opportunity to determine how much deference should be given to the
Department Of Labor, since its position on this issue seems to have changed through
the years.

Vance v. Ball State University

In the Vance case, the Supreme Court will consider whether the “supervisor” liability
rule established by Faragher v. City of Boca Raton and Burlington Industries, Inc. v.
Ellerth (i) applies to harassment by those whom the employer vests with authority to
direct and oversee their victim’s daily work, or (ii) is limited to those harassers who have
the power to “hire, fire, demote, promote, transfer, or discipline” their victim.

Fisher v. University of Texas

In Fisher, the Supreme Court is expected to address “race” as a factor considered in the
admissions process at a university. The case could ultimately impact affirmative action
in the workplace as well.

Oxford Health Plans v. Sutter

This case involves physicians banding together to challenge Oxford Health Plan’s
reimbursement practices. Oxford argues that the physicians’ arbitration agreements did
not allow for class arbitrations since the agreements were silent on the issue. A ruling
against the physicians could make it more difficult for individual employees to bring
class actions against employers.

VI. FMLA – Definition of a Child

On January 14, 2013, the Wage and Hour Division issued Administrator’s
Interpretation No. 2013-1 clarifying the definition of “son or daughter” under the Family
and Medical Leave Act as it applies to an individual 18 years of age or older and
incapable of self-care because of a mental or physical disability.
The FMLA grants an eligible employee up to 12 weeks of unpaid, job-protected leave to care for a son or daughter with a serious health condition. See 29 U.S.C. § 2612(a)(1)(C). The FMLA defines a son or daughter as a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is – (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability.” 29 U.S.C. § 2611(12); See 29 C.F.R. § 825.122(c). The Administrator’s Interpretation focuses on subparagraph (B) regarding the son or daughter who is 18 or older and incapable of self-care because of a mental or physical disability.

A. Impact of the ADAAA on the FMLA Definition of Son or Daughter

An employee qualifies for FMLA leave to care for a son or daughter who is 18 or older and is incapable of self-care due to a disability when the son or daughter has a serious health condition. Since the Americans with Disabilities Act Amendments Act expanded the coverage of the ADA, coverage under the FMLA has been expanded as well.

i. Incapable of Self-Care

The FMLA regulations define “incapable of self-care” as when an adult son or daughter “requires active assistance or supervision to provide daily self-care in three or more of the ‘activities of daily living (ADLs)’ or ‘instrumental activities of daily living’ (IADLs).” 29 C.F.R. § 825.122(1).

The test requires assessing whether the individual needs active assistance or supervision in performing three or more ADLs or IADLs.

Examples of activities of daily living include:

- Grooming and hygiene
- Bathing
- Dressing
- Eating

Examples of instrumental activities of daily living include:

- Cooking
- Cleaning
- Shopping
- Taking public transportation
- Paying bills
- Maintaining a residence
Not only must the adult son or daughter need supervision or assistance in performing three or more ADLs or IADLs, but he or she must be incapable of self-care due to a disability. The determination of whether one is incapable of self-care due to a disability is fact specific and is assessed at the time of the request for leave. If an adult son or daughter has a disability that is episodic, such as cancer that is in remission, and the son or daughter is incapable of self-care, but not due to a disability, the criteria for FMLA leave would not be met.

ii. Definition of Disability

The Administrator’s Interpretation notes that the Department of Labor has adopted the ADA’s definition of disability and follows the EEOC’s interpretation of the definition of disability. Thus, the issue of disability “should not demand extensive analysis.” 29 C.F.R. § 1630.1(4). Nonetheless, some analysis is appropriate.

The ADA defines a disability as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. 42 U.S.C. § 12102(1). The Americans with Disabilities Act Amendments Act broadened the definition of “major life activities.” Examples provided include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working,” as well as operation of major bodily functions such as functions of “the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. § 12102(2)(A-B).

The ADAAA provides that “substantially limits” does not mean “severely or significantly restricts,” which leaves one to question what it does mean. The Administrator’s Interpretation seems to agree, stating that this “reflects Congress' clear intent that the definition of disability is to be construed in favor of broad coverage to the maximum extent permitted by the ADA. 42 U.S.C. § 12102(4). When assessing whether one is substantially limited in a major life activity, mitigating measures should not be considered, with the exception of ordinary eyeglasses or contact lenses. 42 U.S.C. § 12102(4).€

The Administrator’s Interpretation notes that an impairment that is “episodic or in remission” is a disability if it would substantially limit a major life activity when active, and that there is no minimum duration required for the impairment to be classified as a disability. 42 U.S.C. § 12102(1)(A) and (4)(D).
VII. EEOC’s Final Rule on “Disparate Impact and Reasonable Factors other than Age Under the Age Discrimination in Employment Act”


In sum, the regulations state that:

- The reasonable factor other than age ("RFOA") defense is not available when an employment practice uses age as a limiting criterion.

- An employment practice that adversely affects individuals 40 or older on the basis of age is discriminatory unless the practice is justified by a reasonable factor other than age.

- An employee challenging an employment practice under the disparate impact theory must isolate and identify a specific employment practice that allegedly causes an observed statistical disparity.

- The employer bears the burden of production and persuasion when asserting an RFOA defense.

- The employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and that it was administered in a way that reasonably achieved that purpose in light of the facts known, or that should have been known, to the employer.

- Considerations that may be relevant in determining whether a practice is reasonable include the following. There are not requirements, but rather guidance regarding factors to be considered.
  
  - The extent to which the challenged employment practice is related to the employer’s business purpose.
  
  - Whether the employer defined the factor accurately and applied it fairly and accurately, and the extent to which management was provided guidance or training about how to apply the factor and avoid discrimination.
  
  - Whether management’s discretion in assessing employees subjectively was limited, particularly where the criteria used for evaluative purposes are subject to negative age-based stereotypes.
  
  - The extent to which the employer assessed the adverse impact of its employment practices on older workers.
  
  - The degree of harm to persons 40 and older, with regard to the extent of injury and the number of persons affected, and the extent to which the
employer took steps to reduce the harm in light of the burden of undertaking such steps.

- RFOA is not a defense to a disparate treatment claim.

The Supreme Court’s decisions have clarified many issues, but the evidence needed to prove “reasonableness” remains unanswered, and likely cannot be answered in a way to provide employers with any certainty when assessing certain employment practices. The EEOC’s amendments to 29 C.F.R. §1625.7 do, however, provide some guidance by setting forth five considerations used to make a determination of reasonableness.

The “Supplementary Information,” referred to hereafter as Commentary, provided by the EEOC with the Final Rule in the Federal Register is instructive and provides helpful background information and insight into the Commission’s analysis of the RFOA defense. For example, the Commission clarifies that the RFOA standard is less stringent than Title VII’s “business necessity” standard, but more stringent than the Equal Pay Act’s “any other factor” defense. The EEOC also reiterates that the changes are “considerations” and “not required elements of the RFOA defense.” The EEOC in no way means to limit an employer’s ability “to make reasonable business decisions that do not arbitrarily limit the employment opportunities of older workers.” The EEOC confirms that the Final Rule is intended to help employers determine whether or not their practices are reasonable, and requires no action by employers, nor does it expand coverage or require “reporting, recordkeeping, or other requirements for compliance.”

The following sections address the amended provisions and the EEOC commentary accompanying each change.

a. Section 29 C.F.R. §1625.7(c)

Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a “reasonable factor other than age.” An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that allegedly causes any observed statistical disparities.

This section was amended to conform the language to the Supreme Court’s decision in Smith, noting that the RFOA defense applies in disparate impact cases and that the employee must identify a specific facially neutral practice that allegedly causes an “observed statistical disparity” on older workers.
b. Section 29 C.F.R. § 1625.7(d)

Whenever the “reasonable factors other than age” defense is raised, the employer bears the burdens of production and persuasion to demonstrate the defense. The “reasonable factors other than age” provision is not available as a defense to a claim of disparate treatment.”

This section restates that the employer bears the burden of proof and persuasion when asserting the RFOA defense, and clarifies that the defense is only available in the disparate impact context.

An employer is required to prove the defense only after an employee has identified a specific employment policy or practice that is neutral on its face, and has established that the specific practice harmed older workers substantially more than younger workers. Examples of policies or practices that may be challenged include physical strength or agility tests, and criteria used during a reduction in force.

Once the employee identifies the practice or policy in issue and proves that that there is a statistically significant greater adverse impact on older workers, the employer bears the burden of production and persuasion in establishing that the practice was based on a reasonable factor other than age. The employer is not required to find or adopt a less discriminatory alternative.

A reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances. It must be reasonable in both design and implementation. The amended regulation provides a non-exhaustive list of considerations, discussed below, that may be relevant to deciding whether a practice is based on an RFOA. The considerations are not “requirements.”

c. Section 1625.7(e)(2)(i)

The extent to which the factor is related to the employer’s stated business purpose

This consideration looks at the “stated business purpose” at the time of the challenged employment practice, and whether the factor furthers or achieves that purpose. As an example, the EEOC stated that ensuring that qualified candidates were hired (a legitimate business purpose) could be reasonably achieved by ensuring that the criteria used for hiring decisions are related to the actual job requirements for the position sought. The consideration focuses more on the method used by the employer to achieve a purpose rather than the purpose itself. The “stated business purpose” does not have to be written.
d. Section 1625.7(e)(2)(ii)

The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination

The Commentary emphasizes the importance of defining, designing, and implementing employment criteria carefully, and then instructing management on how to “apply it fairly.” To “help overcome age-based stereotypes,” the EEOC “urges” employers to use appropriate measures to educate their employees of their anti-discrimination rights and responsibilities. However, the EEOC repeatedly states that “the rule does not require employers to train their managers.” The Rule allows for a wide range of available measures for employers to “convey their expectations to managers,” but what might be reasonable for a small employer may not be reasonable for a large employer, and vice versa. The EEOC said that contrary to the business necessity defense under Title VII, the RFQA defense “does not require employers to formally validate tests or other selection criteria.”

e. Section 1625.7(e)(2)(iii)

The extent to which the employer limited supervisors’ discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes.

Leaning on the Supreme Court’s holding in *Watson v. Fort Work Bank and Trust*, the EEOC says that “disparate-impact analysis may be the only way to combat ‘the problem of subconscious stereotypes and prejudices’ that may affect subjective decision making.” Recognizing that subjective criteria are often necessary to assess employees, the Commentary notes that “it is not reasonable to leave the supervisors’ discretion unconstrained.” As an example, the EEOC comments that a supervisor hiring people for a technology position should only look at “objective measures of the specific skills that are actually used in the job.”

According to the EEOC, an employee may not be able to pick out a facially neutral criterion that has an adverse affect if that criterion is a supervisor’s subjective discretion. Citing Ninth Circuit authority, the EEOC Commentary suggests that an employee can challenge the decision making process in its entirety “if the employer utilizes an ‘undisciplined system of subjective decision making.’”

f. Section 1625.7(e)(2)(iv)

The extent to which the employer assessed the adverse impact of its employment practice on older workers
The Commentary repeatedly states that the RFOA defense is a less stringent standard than the business necessity defense, and that just because an employer must consider less discriminatory alternatives does not mean that the existence of one will defeat the defense. In an effort not to give the impression that an employer need take action, the Commentary states that the “consideration focuses on the extent to which the employer actually assessed the impact rather than on the steps the employer took to do so.” As an example, the EEOC says that if an employer assessed the impact that a practice would have on race or sex, but did not for age, then the employer has not acted reasonably.

Once again, the Guidelines note that reasonableness may apply differently between a small and large employer. A formal disparate impact analysis is not mandatory; however, if the potential impact is “sufficiently large” so that the employer “was or should have been aware of it,” then the reasonableness of the employers actions will be reduced if no reasonable steps are taken to avoid or mitigate the impact on the employees. Employers will not need to do a disparate impact analysis in many cases because the practice is not a neutral practice that affects more than one person. As an example, the EEOC noted that “terminations for cause or voluntary separations” are not the typical neutral practices that have a disparate impact.

g. Section 1625.7(e)(2)(v)

The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps

This final consideration looks at the real impact that the employer’s course of action has on the employees, and also the employer’s role in reducing that impact. This section reflects a more relaxed standard than that of the proposed rules, using the word “degree” instead of “severity” and “minimize” instead of “reduce.” The degree of harm is not only the “scope of injury” but also the “scope of impact” – the number of employees affected. Using a sliding scale model, a greater degree of potential harm requires that the employer exercise a greater degree of care.

The Commentary reiterates that this section does not adopt a less discriminatory alternative requirement. The employer’s duty to investigate alternatives begins at knowledge of a significant degree of harm. The steps which are then taken by the employer to mitigate harm are relevant to an assessment of “reasonableness.” The chosen options to mitigate harm are weighed against “cost and efficiencies of using other measures” to achieve the same “stated business purpose.” As noted by the Commentary, what may be reasonable to an employer who could not have known of measures to reduce the harm may not be reasonable to an employer who knew or should have known of such measures.

Although the amended regulation provides helpful guidance to employers, there is no bright line test upon which employers can rely. Courts will assess each case
individually based on the facts and circumstances. Employers interested in engaging in “preventative maintenance” should consider the following.

1. What is the business purpose to be achieved?
2. Do the selection criteria utilized achieve or further that purpose?
3. To what extent can the criteria be assessed “objectively,” as opposed to “subjectively?”
4. Is there a means to confirm whether the criteria have been applied fairly and consistently?
5. Has training been provided to managers and supervisors to make certain that the criteria are applied objectively?
6. Have managers and supervisors been trained regarding the prohibition against age discrimination and how to avoid stereotypes about older individuals?
7. Does application of the criteria have an adverse impact on older workers?
8. How many persons are affected and how great is the injury to each individual?
9. If there is an observed statistical disparity, are there are other means of achieving the stated business purpose that would lessen the impact on older workers?
10. Is there appropriate documentation regarding the business goals to be achieved and the manner in which the goals are to be achieved?

Although the Rule espouses that “RFOA is the standard defense to ADEA impact claims,” other statutorily granted affirmative defenses remain available. For example, if an employee challenges a practice required by a seniority system, the employer may still defend the claim by relying on section 4(f)(2) of the ADEA which precludes use of the disparate impact analysis to challenge a seniority system. Additional information is available at the EEOC’s website, www.eeoc.gov, which has a helpful “Question and Answers” page.

**CONCLUSION**

The list of “Hot Topics” for 2013 is growing and changing rapidly. Novel common-law claims are being asserted successfully. Federal statutory rights are being expanded and federal agencies are drafting guidance designed to broaden those rights even further. “To infinity and beyond” comes to mind as we brace for change and challenges we will face in 2013 – and beyond.
Filing Whistleblower Complaints under the Affordable Care Act

Employees are protected from retaliation for reporting alleged violations of Title I of the Affordable Care Act. Employees are also protected from retaliation for receiving a federal health insurance income tax credit or a cost sharing reduction when enrolling in a qualified health plan.

Summary
The Affordable Care Act (ACA) contains various provisions to make health insurance more affordable and accountable to consumers. To further these goals, the Affordable Care Act's section 1558 provides protection to employees against retaliation by an employer for reporting alleged violations of Title I of the Act or for receiving a health insurance tax credit or cost sharing reductions as a result of participating in a Health Insurance Exchange, or Marketplace.

Title I includes a range of insurance company accountability requirements, such as the prohibition of lifetime limits on coverage or exclusions due to pre-existing conditions. Title I also includes requirements for certain employers. Many of the provisions in Title I are not effective until 2014.

Covered Employers and Employees
The definitions “employer” and “employee” under this whistleblower provision are found in the Fair Labor Standards Act. Therefore, this provision prohibits retaliation by private and public sector employers.

Protected Activity
An employer may not discharge or in any manner retaliate against an employee because he or she:
• provided information relating to any violation of Title I of the ACA, or any act that he or she reasonably believed to be a violation of Title I of the ACA to:
  • the employer,
  • the Federal Government, or
  • the attorney general of a state;
• testified, assisted, or participated in a proceeding concerning a violation of Title I of the ACA, or is about to do so; or
• objected to or refused to participate in any activity that he or she reasonably believed to be in violation of Title I of the ACA.

In addition, an employer may not discharge or in any manner retaliate against an employee because he or she received a credit under section 36B of the Internal Revenue Code of 1986 or a cost sharing reduction under section 1402 of the ACA.

If an employer takes retaliatory action against an employee because he or she engaged in any of these protected activities, the employee can file a complaint with OSHA.

Unfavorable Employment Actions
An employer may be found to have violated the ACA if the employee's protected activity was a contributing factor in the employer’s decision to take unfavorable employment action against the employee. Such actions may include:
• Firing or laying off
• Blacklisting
• Demoting
• Denying overtime or promotion
• Disciplining
• Denying benefits
• Failure to hire or rehire
• Intimidation
• Making threats
• Reassignment affecting prospects for promotion
• Reducing pay or hours

Deadline for Filing Complaints
Complaints must be filed within 180 days after an alleged violation of the ACA occurs. An employee, or representative of an employee, who believes that he or she has been retaliated against in violation of the ACA may file a complaint with OSHA.
How to File an ACA Complaint

An employee can file an ACA complaint with OSHA by visiting or calling the local OSHA office or sending a written complaint to the closest OSHA regional or area office. Written complaints may be filed by facsimile, electronic communication, hand delivery during business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier.

The date of the postmark, facsimile, electronic communication, telephone call, hand delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office is considered the date filed. No particular form is required and complaints may be submitted in any language.

For OSHA area office contact information, please call 1-800-321-OSHA (6742) or visit www.osha.gov/html/RAmap.html or www.whistleblowers.gov.

Upon receipt of a complaint, OSHA will first review it to determine whether there is a valid complaint allegation (e.g., timeliness or coverage). Complaints are then investigated in accord with the statutory requirements. See 29 C.F.R. 1984.104.

Results of the Investigation

If the evidence supports an employee’s claim of retaliation and a settlement cannot be reached, OSHA will issue an order requiring the employer to, as appropriate, reinstate the employee, pay back wages, restore benefits, and other possible relief to make the employee whole.

OSHA’s findings and order become the final order of the Secretary of Labor, unless they are appealed within 30 days.

After OSHA issues its findings and order, either party may request a full hearing before an administrative law judge of the Department of Labor. The administrative law judge’s decision and order may be appealed to the Department’s Administrative Review Board.

If a final agency order is not issued within 210 days from the date the employee’s complaint is filed, or within 90 days after the employee receives OSHA’s findings, then the employee may file a complaint in the appropriate United States district court, with a copy provided to OSHA.

To Get Further Information

For a copy of the Affordable Care Act, the regulations (29 CFR 1984), and other information, go to www.whistleblowers.gov.

For information on the Office of Administrative Law Judges procedures and case law research materials, go to www.oalj.dol.gov and click on the link for “Whistleblower.”

For information on the Affordable Care Act, go to www.healthcare.gov.
A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under the FCRA. For more information, including information about additional rights, go to www.consumerfinance.gov/learnmore or write to: Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.

• You must be told if information in your file has been used against you. Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment — or to take another adverse action against you — must tell you, and must give you the name, address, and phone number of the agency that provided the information.

• You have the right to know what is in your file. You may request and obtain all the information about you in the files of a consumer reporting agency (your "file disclosure"). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:
  • a person has taken adverse action against you because of information in your credit report;
  • you are the victim of identity theft and place a fraud alert in your file;
  • your file contains inaccurate information as a result of fraud;
  • you are on public assistance;
  • you are unemployed but expect to apply for employment within 60 days.
In addition, all consumers are entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.consumerfinance.gov/learnmore for additional information.

• You have the right to ask for a credit score. Credit scores are numerical summaries of your credit-worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.

• You have the right to dispute incomplete or inaccurate information. If you identify information in your file that is incomplete or inaccurate, and report it to the consumer reporting agency, the agency must investigate unless your dispute is frivolous. See www.consumerfinance.gov/learnmore for an explanation of dispute procedures.
• Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information. Inaccurate, incomplete, or unverifiable information must be removed or corrected, usually within 30 days. However, a consumer reporting agency may continue to report information it has verified as accurate.

• Consumer reporting agencies may not report outdated negative information. In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.

• Access to your file is limited. A consumer reporting agency may provide information about you only to people with a valid need—usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.

• You must give your consent for reports to be provided to employers. A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.consumerfinance.gov/learnmore.

• You may limit “prescreened” offers of credit and insurance you get based on information in your credit report. Unsolicited “prescreened” offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt out with the nationwide credit bureaus at 1-800-XXX-XXXX.

• You may seek damages from violators. If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.

• Identity theft victims and active duty military personnel have additional rights. For more information, visit www.consumerfinance.gov/learnmore.

States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General. For information about your federal rights, contact:
### TYPE OF BUSINESS:

1. **A. Banks, savings associations, and credit unions with total assets of over $10 billion and their affiliates:**
   - Contact: Consumer Financial Protection Bureau
     - 1700 G Street, NW.
     - Washington, DC 20552

2. **B. Such affiliates that are not banks, savings associations, or credit unions also should list, in addition to the CFPB:**
   - Contact: Office of the Comptroller of the Currency
     - Customer Assistance Group
     - 1301 McKinney Street, Suite 3450
     - Houston, TX 77010-6050

### CONTACT:

3. **a. National banks, federal savings associations, and federal branches and federal agencies of foreign banks:**
   - Contact: Office of the Comptroller of the Currency
     - Customer Assistance Group
     - 1301 McKinney Street, Suite 3450
     - Houston, TX 77010-6050

4. **b. State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of Foreign Banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 23 or 25A of the Federal Reserve Act:**
   - Contact: Federal Reserve Consumer Help Center
     - P.O. Box 1200
     - Minneapolis, MN 55480

5. **c. Nonmember Insured Banks, insured state branches of Foreign Banks, and insured state savings associations:**
   - Contact: FDIC Consumer Response Center
     - 1100 Wymore, Room 911
     - Kansas City, MO 64106

6. **d. Federal Credit Unions:**
   - Contact: National Credit Union Administration
     - Division of Consumer Compliance and Outreach (DCCO)
     - 1775 Duke St.
     - Alexandria, VA 22314

7. **Air carriers:**
   - Contact: Office of the General Counsel for Aviation Enforcement & Proceedings
     - Department of Transportation
     - 1200 New Jersey Avenue, N.W.
     - Washington, DC 20590

### 4. Creditors Subject to the Surface Transportation Board:

8. **Office of Proceedings, Surface Transportation Board**
   - Contact: Nearest Packers and Stockyards Administration area supervisor

9. **Small Business Investment Companies:**
   - Contact: Associate Deputy Administrator for Capital Access
     - United States Small Business Administration
     - 409 Third Street, SW., 1st Floor
     - Washington, DC 20416

10. **Brokers and Dealers:**
    - Contact: Securities and Exchange Commission
      - 100 F Street, N.E.
      - Washington, DC 20549

11. **Federal Land Banks, Federal Land Bank Associations, Federal Intermediate Credit Banks, and Production Credit Associations:**
    - Contact: Farm Credit Administration
      - 1201 Farm Credit Drive
      - McLean, VA 22102-5090

12. **Retailers, Finance Companies, and All Other Creditors Not Listed Above:**
    - FTC Regional Office for regions in which the creditor operates.
    - Federal Trade Commission: Consumer Response Center - FCRA
      - Washington, DC 20580
      - (877) 382-4357

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**Appendix M to Part 1022—Notice of Furnisher Responsibilities**

The prescribed form for this disclosure is a separate document that is substantially similar to the Bureau's model notice with all information clearly and prominently displayed. Consumer reporting agencies may limit the disclosure to only those items that they know are relevant to the furnisher that will receive the notice.
NOTICE TO USERS OF CONSUMER REPORTS:
OBLIGATIONS OF USERS UNDER THE FCRA

The Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681-1681y, requires that this notice be provided to inform users of consumer reports of their legal obligations. State law may impose additional requirements. The text of the FCRA is set forth in full at the Consumer Financial Protection Bureau’s (CFPB) website at www.consumerfinance.gov/learnmore. At the end of this document is a list of United States Code citations for the FCRA. Other information about user duties is also available at the CFPB’s website. Users must consult the relevant provisions of the FCRA for details about their obligations under the FCRA.

The first section of this summary sets forth the responsibilities imposed by the FCRA on all users of consumer reports. The subsequent sections discuss the duties of users of reports that contain specific types of information, or that are used for certain purposes, and the legal consequences of violations. If you are a furnisher of information to a consumer reporting agency (CRA), you have additional obligations and will receive a separate notice from the CRA describing your duties as a furnisher.

I. OBLIGATIONS OF ALL USERS OF CONSUMER REPORTS

A. Users Must Have a Permissible Purpose

Congress has limited the use of consumer reports to protect consumers’ privacy. All users must have a permissible purpose under the FCRA to obtain a consumer report. Section 604 contains a list of the permissible purposes under the law. These are:

- As ordered by a court or a federal grand jury subpoena. Section 604(a)(1)
- As instructed by the consumer in writing. Section 604(a)(2)
- For the extension of credit as a result of an application from a consumer, or the review or collection of a consumer’s account. Section 604(a)(3)(A)
- For employment purposes, including hiring and promotion decisions, where the consumer has given written permission. Sections 604(a)(3)(B) and 604(b)
- For the underwriting of insurance as a result of an application from a consumer. Section 604(a)(3)(C)

- When there is a legitimate business need, in connection with a business transaction that is initiated by the consumer. Section 604(a)(3)(F)(i)

- To review a consumer's account to determine whether the consumer continues to meet the terms of the account. Section 604(a)(3)(F)(ii)

- To determine a consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status. Section 604(a)(3)(F)

- For use by a potential investor or servicer, or current insurer, in a valuation or assessment of the credit or prepayment risks associated with an existing credit obligation. Section 604(a)(3)(E)

- For use by state and local officials in connection with the determination of child support payments, or modifications and enforcement thereof. Sections 604(a)(4) and 604(a)(5)

In addition, creditors and insurers may obtain certain consumer report information for the purpose of making "prescreened" unsolicited offers of credit or insurance. Section 604(c). The particular obligations of users of "prescreened" information are described in Section VII below.

B. Users Must Provide Certifications

Section 604(f) prohibits any person from obtaining a consumer report from a consumer reporting agency (CRA) unless the person has certified to the CRA the permissible purpose(s) for which the report is being obtained and certifies that the report will not be used for any other purpose.

C. Users Must Notify Consumers When Adverse Actions Are Taken

The term "adverse action" is defined very broadly by Section 603. "Adverse actions" include all business, credit, and employment actions affecting consumers that can be considered to have a negative impact as defined by Section 603(k) of the FCRA — such as denying or canceling credit or insurance, or denying employment or promotion. No adverse action occurs in a credit transaction where the creditor makes a counteroffer that is accepted by the consumer.
1. Adverse Actions Based on Information Obtained From a CRA

If a user takes any type of adverse action as defined by the FCRA that is based at least in part on information contained in a consumer report, Section 615(a) requires the user to notify the consumer. The notification may be done in writing, orally, or by electronic means. It must include the following:

- The name, address, and telephone number of the CRA (including a toll-free telephone number, if it is a nationwide CRA) that provided the report.
- A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made.
- A statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the CRA if the consumer makes a request within 60 days.
- A statement setting forth the consumer's right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.

2. Adverse Actions Based on Information Obtained From Third Parties Who Are Not Consumer Reporting Agencies

If a person denies (or increases the charge for) credit for personal, family, or household purposes based either wholly or partly upon information from a person other than a CRA, and the information is the type of consumer information covered by the FCRA, Section 615(b)(1) requires that the user clearly and accurately disclose to the consumer his or her right to be told the nature of the information that was relied upon if the consumer makes a written request within 60 days of notification. The user must provide the disclosure within a reasonable period of time following the consumer's written request.

3. Adverse Actions Based on Information Obtained From Affiliates

If a person takes an adverse action involving insurance, employment, or a credit transaction initiated by the consumer, based on information of the type covered by the FCRA, and this information was obtained from an entity affiliated with the user of the information by common ownership or control, Section 615(b)(2) requires the user to notify the consumer of the adverse action. The notice must inform the consumer that he or she may obtain a disclosure of the nature of the information relied upon by making a written request within 60 days of receiving the adverse action notice. If the consumer makes such a request, the user must disclose the nature of the information not later than 30 days after receiving the request. If consumer report information is shared among affiliates and then used for an adverse action, the user must make an adverse action disclosure as set forth in 1.C.1 above.
D. Users Have Obligations When Fraud and Active Duty Military Alerts are in Files

When a consumer has placed a fraud alert, including one relating to identity theft, or an active duty military alert with a nationwide consumer reporting agency as defined in Section 603(p) and resellers. Section 605A(h) imposes limitations on users of reports obtained from the consumer reporting agency in certain circumstances, including the establishment of a new credit plan and the issuance of additional credit cards. For initial fraud alerts and active duty alerts, the user must have reasonable policies and procedures in place to form a belief that the user knows the identity of the applicant or contact the consumer at a telephone number specified by the consumer; in the case of extended fraud alerts, the user must contact the consumer in accordance with the contact information provided in the consumer’s alert.

E. Users Have Obligations When Notified of an Address Discrepancy

Section 605(h) requires nationwide CRAs, as defined in Section 603(p), to notify users that request reports when the address for a consumer provided by the user in requesting the report is substantially different from the addresses in the consumer’s file. When this occurs, users must comply with regulations specifying the procedures to be followed. Federal regulations are available at www.consumerfinance.gov/learnmore.

F. Users Have Obligations When Disposing of Records

Section 628 requires that all users of consumer report information have in place procedures to properly dispose of records containing this information. Federal regulations have been issued that cover disposal.

H. CREDITORS MUST MAKE ADDITIONAL DISCLOSURES

If a person uses a consumer report in connection with an application for, or a grant, extension, or provision of, credit to a consumer on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person must provide a risk-based pricing notice to the consumer in accordance with regulations prescribed by the CFPB.

Section 609(g) requires a disclosure by all persons that make or arrange loans secured by residential real property (one to four units) and that use credit scores. These persons must
provide credit scores and other information about credit scores to applicants, including the disclosure set forth in Section 609(g)(1)(D) ("Notice to the Home Loan Applicant").

III. OBLIGATIONS OF USERS WHEN CONSUMER REPORTS ARE OBTAINED FOR EMPLOYMENT PURPOSES

A. Employment Other Than in the Trucking Industry

If information from a CRA is used for employment purposes, the user has specific duties, which are set forth in Section 604(b) of the FCRA. The user must:

- Make a clear and conspicuous written disclosure to the consumer before the report is obtained, in a document that consists solely of the disclosure, that a consumer report may be obtained.
- Obtain from the consumer prior written authorization. Authorization to access reports during the term of employment may be obtained at the time of employment.
- Certify to the CRA that the above steps have been followed, that the information being obtained will not be used in violation of any federal or state equal opportunity law or regulation, and that, if any adverse action is to be taken based on the consumer report, a copy of the report and a summary of the consumer's rights will be provided to the consumer.
- Before taking an adverse action, the user must provide a copy of the report to the consumer as well as the summary of consumer's rights. (The user should receive this summary from the CRA.) A Section 615(a) adverse action notice should be sent after the adverse action is taken.

An adverse action notice also is required in employment situations if credit information (other than transactions and experience data) obtained from an affiliate is used to deny employment. Section 615(b)(2)

The procedures for investigative consumer reports and employee misconduct investigations are set forth below.

B. Employment in the Trucking Industry

Special rules apply for truck drivers where the only interaction between the consumer and the potential employer is by mail, telephone, or computer. In this case, the consumer may provide consent orally or electronically, and an adverse action may be made orally, in writing, or electronically. The consumer may obtain a copy of any report relied upon by the trucking
company by contacting the company.

IV. OBLIGATIONS WHEN INVESTIGATIVE CONSUMER REPORTS ARE USED

Investigative consumer reports are a special type of consumer report in which information about a consumer's character, general reputation, personal characteristics, and mode of living is obtained through personal interviews by an entity or person that is a consumer reporting agency. Consumers who are the subjects of such reports are given special rights under the FCRA. If a user intends to obtain an investigative consumer report, Section 606 requires the following:

• The user must disclose to the consumer that an investigative consumer report may be obtained. This must be done in a written disclosure that is mailed, or otherwise delivered, to the consumer at some time before or not later than three days after the date on which the report was first requested. The disclosure must include a statement informing the consumer of his or her right to request additional disclosures of the nature and scope of the investigation as described below, and the summary of consumer rights required by Section 609 of the FCRA. (The summary of consumer rights will be provided by the CRA that conducts the investigation.)

• The user must certify to the CRA that the disclosures set forth above have been made and that the user will make the disclosure described below.

• Upon the written request of a consumer made within a reasonable period of time after the disclosures required above, the user must make a complete disclosure of the nature and scope of the investigation. This must be made in a written statement that is mailed, or otherwise delivered, to the consumer no later than five days after the date on which the request was received from the consumer or the report was first requested, whichever is later in time.

V. SPECIAL PROCEDURES FOR EMPLOYEE INVESTIGATIONS

Section 603(x) provides special procedures for investigations of suspected misconduct by an employee or for compliance with Federal, state or local laws and regulations or the rules of a self-regulatory organization, and compliance with written policies of the employer. These investigations are not treated as consumer reports so long as the employer or its agent complies with the procedures set forth in Section 603(x), and a summary describing the nature and scope of the inquiry is made to the employee if an adverse action is taken based on the investigation.

VI. OBLIGATIONS OF USERS OF MEDICAL INFORMATION

Section 604(g) limits the use of medical information obtained from consumer reporting agencies (other than payment information that appears in a coded form that does not identify the
If the information is to be used for an insurance transaction, the consumer must give consent to the user of the report or the information must be coded. If the report is to be used for employment purposes or in connection with a credit transaction (except as provided in federal regulations), the consumer must provide specific written consent and the medical information must be relevant. Any user who receives medical information shall not disclose the information to any other person (except where necessary to carry out the purpose for which the information was disclosed, or as permitted by statute, regulation, or order).

VII. OBLIGATIONS OF USERS OF "PRESCREENED" LISTS

The FCRA permits creditors and insurers to obtain limited consumer report information for use in connection with unsolicited offers of credit or insurance under certain circumstances. Sections 603(1), 604(c), 604(e), and 615(d). This practice is known as "prescreening" and typically involves obtaining from a CRA a list of consumers who meet certain preestablished criteria. If any person intends to use prescreened lists, that person must (1) before the offer is made, establish the criteria that will be relied upon to make the offer and to grant credit or insurance, and (2) maintain such criteria on file for a three-year period beginning on the date on which the offer is made to each consumer. In addition, any user must provide with each written solicitation a clear and conspicuous statement that:

- Information contained in a consumer's CRA file was used in connection with the transaction.
- The consumer received the offer because he or she satisfied the criteria for credit worthiness or insurability used to screen for the offer.
- Credit or insurance may not be extended if, after the consumer responds, it is determined that the consumer does not meet the criteria used for screening or any applicable criteria bearing on credit worthiness or insurability, or the consumer does not furnish required collateral.
- The consumer may prohibit the use of information in his or her file in connection with future prescreened offers of credit or insurance by contacting the notification system established by the CRA that provided the report. The statement must include the address and toll-free telephone number of the appropriate notification system.

In addition, the CFPB has established the format, type size, and manner of the disclosure required by Section 615(d), with which users must comply. The relevant regulation is 12 CFR 1022.54.
VIII. OBLIGATIONS OF RESELLERS

A. Disclosure and Certification Requirements

Section 607(e) requires any person who obtains a consumer report for resale to take the following steps:

- Disclose the identity of the end-user to the source CRA.
- Identify to the source CRA each permissible purpose for which the report will be furnished to the end-user.
- Establish and follow reasonable procedures to ensure that reports are resold only for permissible purposes, including procedures to obtain:
  1. the identity of all end-users;
  2. certifications from all users of each purpose for which reports will be used; and
  3. certifications that reports will not be used for any purpose other than the purpose(s) specified to the reseller. Resellers must make reasonable efforts to verify this information before selling the report.

B. Reinvestigations by Resellers

Under Section 611(f), if a consumer disputes the accuracy or completeness of information in a report prepared by a reseller, the reseller must determine whether this is a result of an action or omission on its part and, if so, correct or delete the information. If not, the reseller must send the dispute to the source CRA for reinvestigation. When any CRA notifies the reseller of the results of an investigation, the reseller must immediately convey the information to the consumer.

C. Fraud Alerts and Resellers

Section 605A(f) requires resellers who receive fraud alerts or active duty alerts from another consumer reporting agency to include these in their reports.

IX. LIABILITY FOR VIOLATIONS OF THE FCRA

Failure to comply with the FCRA can result in state government or federal government enforcement actions, as well as private lawsuits. Sections 616, 617, and 621. In addition, any person who knowingly and willfully obtains a consumer report under false pretenses may face criminal prosecution. Section 619.

The CFPB's website, www.consumerfinance.gov/learnmore, has more information about the FCRA, including publications for businesses and the full text of the FCRA.
This AD was prompted by 16 reports of certain part numbers (P/Ns) of 3rd stage LPT duct segments P/Ns 50N095; 50N095–001; 50N235; 50N235–001; 50N494–01; 50N495–01; and 50N495–001, at the next piece-part exposure after the effective date of the proposed AD.

**Comments**

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal and the FAA's response to each comment.

**Agreement With the Proposed AD**

One commenter, Boeing, agreed with the intent of the proposed AD.

**Request To Reference Pratt & Whitney Service Bulletin PW4ENG 72-488**

One commenter, FedEx Express, requested that we add a reference to Pratt & Whitney Service Bulletin PW4ENG 72-488 for a list of the engine serial numbers affected. We assume this request was made to add clarity.

We do not agree. The AD applicability is for PW4000 engines with certain P/N 3rd stage LPT duct segments installed. Although the Pratt & Whitney Service Bulletin does list engine serial numbers, it is not necessary to include this information in the AD. We did not change the AD.

**Conclusion**

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD as proposed.