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THE COMPLETE GUIDE TO HUMAN RESOURCES AND THE LAW

2013 Edition

Dana Shilling



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The Complete Guide to Human Resources and the Law

2013 Edition

by Dana Shilling

The Complete Guide to Human Resources and the Law is an invaluable tool for the HR professional who needs to place legal principles and developments in the context of the practical problems he or she faces every day. The law as it relates to human resources issues is an ever-growing, ever-changing body of information that involves not just court cases but also statutes and the regulations of administrative agencies. *The Complete Guide to Human Resources and the Law* brings you the most up-to-date information as well as practical tips and checklists in a well-organized, easy-to-use resource.

Highlights of the 2013 Edition

The 2013 Edition provides new and expanded coverage of issues such as:

- At the very end of the term, a divided Supreme Court did not find the health care reform law unconstitutional and permitted it to go into effect: *National Federation of Independent Bus. v. Sebelius*, No. 11-393 (June 28, 2012) [§ 18.19[N]]
- Agencies continued issuing guidance on the ACA, and businesses continued to prepare, as various provisions come on line. See § 18.19[B][2] for discussion of the package of essential benefits § 18.19[K] for the requirements for distributing a Summary of Benefits and Coverage, and § 18.19[L] for proposed regulations on insurance Exchanges (where individuals and small businesses can purchase policies) and Qualified Health Plans that offer the essential benefits.
- A 5-4 Supreme Court decision held that the states cannot be sued for money damages under the FMLA's "self-care" provision (leave taken for the employee's own illness rather than to care for a family member). The majority found that sovereign immunity was not clearly waived because Congress had no history of discrimination to combat. The dissenting Justices found that the intent of the FMLA as a whole was to fight against sex discrimination: *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012) [§ 38.01]



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- The EEOC published a final rule on recordkeeping requirements under the Genetic Information Nondiscrimination Act (GINA), requiring retention of relevant personnel and employment records for at least one year, or until final disposition of any GINA charges filed: 77 Fed. Reg. 5396 (Feb. 3, 2012) [§§ 26.05, 34.01[B]]
- Washington state and Maryland passed same-sex marriage statutes; a similar statute was passed in New Jersey but vetoed by the governor. [§ 18.06[A]]
- The Treasury proposed a rule under which Qualified Longevity Annuity Contracts (QLACs) would be a permissible planning measure. Under the proposal, a person could elect to have part of a 401(k) lump-sum distribution used to purchase an annuity, such as a deferred life annuity that does not begin payments until late in the annuitant's life. The purpose of the proposal is to prevent retirees from outliving their sources of income. [§§ 4.06[I], 5.03, 6.06[A], 12.05[B]]
- The employee (but not the employer) share of FICA tax was reduced to 4.2% (thus making the rate for self-employed persons 10.4%) by the Temporary Payroll Tax Cut Continuation Act, Pub. L. No. 112-78 (December 2011), and this was extended to the end of 2012 by the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96. [§§ 1.01, 2.01[A], 4.05, 23.01]
- Late 2011's Veterans Opportunity to Work (VOW) to Hire Heroes Act, Pub. L. No. 112-56 provides a new tax credit for hiring veterans; the credit can be as high as \$9,600, for a veteran with service-related disabilities. [§§ 1.18[A], 2.01[A]]
- The Department of Labor published a final rule on the "408(b)(2) notice"—the disclosures that a plan's service providers must give to the plan's fiduciary, to demonstrate the reasonableness of the compensation paid from plan assets to the service providers: 77 Fed. Reg. 5632 (Feb. 3, 2012) [§§ 6.07[B][2], 10.04[B], 11.04, 15.17]
- A unanimous Supreme Court endorsed the "ministerial exception" in early 2012, holding that the First Amendment prevents courts from intervening when a minister is fired. (The plaintiff was a teacher in a religious school who alleged that she was fired because of her medical condition.) All 12 of the circuits have recognized this exception, although this was the first time the Supreme Court dealt with the issue. The Supreme Court characterized the ministerial exception as an affirmative defense, not a bar to jurisdiction. Ministers can still sue for tortious conduct or breach of contract: *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012). [§§ 34.07, 36.06[A], 42.10[B]]
- The EEOC issued a Q&A document explaining how employers can assert the RFOA (reasonable factors other than age) defense when facially neutral practices that might have disparate impact on older workers are challenged.

The practice is analyzed with a number of factors, including the extent to which over-40 workers are harmed and whether supervisors have discretion to apply criteria that might reflect negative stereotypes of older workers. [§§ 37.03[D], 42.11[E]]

- The Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, includes many provisions dealing with unemployment insurance. For example, the EUC program is extended through the end of 2012, but the maximum number of weeks of benefits scales down from 99 to 93; benefits are available only to people who are able to work, available to work, and actively seeking work; states can pass laws imposing drug testing requirements for unemployment benefits—but only if the applicant was fired for using drugs, or the only suitable work for him or her is in an industry that has a federal drug testing requirement; recovery of state and federal overpayments is mandatory. [§ 32.02[C]]
- The Supreme Court struck down provisions of Arizona’s immigration law that would have made it a misdemeanor for illegal aliens to apply for jobs, or work, in the state of Arizona: *Arizona v. United States*, No. 11-182 (June 25, 2012) [§ 23.11[A]]
- The Supreme Court ruled that drug “detailers” (representatives who discuss drugs with doctors) are not entitled to overtime because they fit within the FMLA regulations’ definition of “outside salesperson”: *Christopher v. Smith-KlineBeecham Corp.*, 132 S. Ct. 2156 (2012) [§§ 1.06[A], 1.15[B]]
- Non-union employees in public sector agency shops can only be charged a fee for a union lobbying campaign if they opt to pay the fee; the union cannot assume that they are willing to pay unless they opt out: *Knox v. SEIU*, No. 10-1121 (June 21, 2012) [§ 30.06[A]]
- Important HR-related provisions were included in the highway funding bill, the Moving Ahead for Progress in the 21st Century Act (Pub. L. No. 112-141; MAP-21). Sponsors of defined benefit plans get rate relief: they can use higher interest rates in plan calculations, thereby reducing the amount they have to contribute. MAP-21 also extends the availability of 401(h) plans [transfers from over-funded plans to retiree health plans] and allows 401(h) funds to be used to buy group-term life insurance for retirees. However, MAP-21 also increases PBGC premiums. [§§ 4.01, 5.05[I], 5.08[B], 11.04, 21.02[D], 22.06]

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PREFACE

This book, originally published in 1998, is reissued each year, in revised form, to deal with the cases, statutes, and administrative rulings affecting HR issues. This 2013 edition went to press in April 2012, so it reflects events from mid-2011 to mid-2012.

When the first draft of this edition was prepared, it was still uncertain whether the Supreme Court would prevent the health care reform legislation from taking effect. By the time the 2013 edition went to press, the Supreme Court had ruled that the employment-related provisions of the statute were not unconstitutional, resolving one important question. But 2012 is a Presidential election year, and the results of that election (and the composition of the Congress) will affect the future direction taken in HR law.

Employers also had to deal with ongoing economic problems, wondering if they could afford to add to their payrolls by hiring new workers.

Yet another area of uncertainty was what would happen at the end of 2012, as tax cuts expired—perhaps to be renewed, perhaps to be eliminated by a Congress eager to deal with the problem of the deficit.

The 2013 Edition is divided into 43 chapters, in eight parts:

1. Part I: Pay Planning, including compensation planning, bonuses, severance pay, and tax issues.
2. Part II: Pension Law, comprising basic pension concepts, defined benefit plans, and the transition from the predominance of defined benefit plans to the rise of defined contribution and 401(k) plans; cash balance plans; nonqualified plans; and plans for early retirement and retiree health benefits.
3. Part III: Pension Plan Administration, going from the adoption of a plan to disclosures to plan participants, handling claims and appeals, amending the plan, complying with ERISA and tax rules, handling plans in the context of corporate transitions, such as mergers and acquisitions, and terminating a plan.
4. Part IV: Benefit Plans, such as health plans, continuation coverage and portability requirements for health insurance, plans that provide insurance coverage and disability plans.
5. Part V: The HR Function, including hiring and recruitment, HR computing, recordkeeping, corporate communications, employee privacy rights, diversity issues, and work-family issues.

6. Part VI: Employee Relations, not only the major topic of labor law but also occupational safety and health, unemployment insurance, and workers' compensation.
7. Part VII: Substantive Laws Against Discrimination, focusing on Title VII (and sexual harassment, which is considered a form of sex discrimination), age discrimination, disability discrimination, the Family and Medical Leave Act, and wrongful termination suits.
8. Part VIII: Procedure for Handling Discrimination Charges, not only in the context of lawsuits brought by the EEOC, by state regulators, or by private individuals, but by using arbitration and other alternative dispute resolution methods to resolve problems without going to court.

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Unfortunately, items on the Web, and Websites themselves, can "go out of print." In some instances, by the time of the current edition of this book was ready for print, items that I had read or downloaded in the past and mentioned in the text are no longer available online or are not available to the general public. In those cases, the item is cited as "Posted to [name of cite] on [date]."

In late 2008, I switched from using the print editions of the New York Times and Wall Street Journal to using the online editions as research sources, so I no longer had access to page numbers. However, the article title should be searchable on the nytimes.com and wsj.com Websites.

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