# THE COMPLETE GUIDE TO HUMAN RESOURCES AND THE LAW

2015 Edition

DANA SHILLING

Wolters Kluwer

# THE COMPLETE GUIDE TO HUMAN RESOURCES AND THE LAW

2015 Edition

Dana Shilling

Wolters Kluwer

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher and the author(s) are not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional assistance is required, the services of a competent professional should be sought.

—From a *Declaration of Principles* jointly adopted by
a Committee of the American Bar Association and
a Committee of Publishers and Associations



Published by Wolters Kluwer in New York.

Wolters Kluwer serves customers worldwide with CCH, Aspen Publishers and Kluwer Law International products.

Printed in the United States of America

ISBN 978-1-4548-4288-0

1 2 3 4 5 6 7 8 9 0

# The Complete Guide to Human Resources and the Law

**2015 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 2015 Edition

The 2015 Edition provides new and expanded coverage of issues such as:

- Despite serious difficulties with online enrollment, the first cycle of health insurance enrollment under PPACA was completed. See § 18.19[H] for delays in enforcement of the employer mandate, a/k/a the "shared responsibility payment" or "pay or play" requirement. See § 18.19[M] for a guide to the revised schedule for implementation, reflecting the postponements. See § 24.01[D] for record-keeping requirements. Many suits challenge the PPACA requirement that group plans cover contraception, an issue with implications about whether corporations can exercise religious freedom—part of the ongoing national debate about corporate rights. [§ 18.03[D]]
- An IRS final rule was published in February 2014, dealing with the responsibilities of mid-sized employers (50–100 full-time employees in 2014) under the Code § 4980H shared responsibility requirement. These employers will not be subject to penalties until 2016 for failure to provide minimum required levels of coverage—unless they cut their workforce or reduce employees' hours to avoid coverage, or unless they eliminate or materially reduce the health coverage already available to employees. T.D. 9655, *Shared Responsibility for Employers Regarding Health Coverage*, 79 Fed. Reg. 8544 (Feb. 12, 2014). [§ 18.19[H]]

Wolters Kluwer

- The Supreme Court reversed the Sixth Circuit and held that the severance payments constituted FICA wages. The court held that "service" is defined broadly as the entire relationship between employer and employee, so severance payments are made to employees because of service to employers. The list of exemptions says that Supplemental Unemployment Benefit (SUB) payments are treated as if they were wages; the Supreme Court said that this provision was added to relieve terminated workers from the burden of year-end tax liability when they receive SUB payments: *United States v. Quality Stores Inc.*, 134 S. Ct. 1395 (2014). [§§ 1.01, 2.03[A], 3.03[C], 32.01]
- The SEC voted 3–2 in September 2013 to propose a new rule under Dodd-Frank § 953(b), requiring public companies to disclose the ratio of CEO compensation to the median compensation of all the company's employees. The new requirement does not apply to emerging growth companies covered by the JOBS Act, smaller reporting companies, or foreign private issuers SEC press release 2013-186, *SEC Proposes Rules for Pay Ratio Disclosure*, <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539817895> (Sept. 18, 2013). [§ 1.01[A]]
- In September 2013, the Department of Labor adopted a final rule that extended minimum wage and overtime protection to close to two million home health care and personal care workers, although the rule does not take effect until January 1, 2015. The rule change applies to workers such as home health aides, personal care aides, and certified nursing assistants who work for home health agencies, but home care workers who are employed directly by the patient or patient's family are not covered: WHD News Release No. 13-1922-NAT, *Minimum Wage, Overtime Protections Extended To Direct Care Workers By US Labor Department*, <http://www.dol.gov/opa/media/press/whd/WHD20131922.htm> (Sept. 17, 2013). [§ 1.07]
- On March 13, 2014, President Obama signed a memorandum critiquing the current FLSA regulations, which provide that administrative workers are exempt from overtime if they earn over $455 a week. The president ordered the DOL to issue new regulations with a higher minimum, so that low-paid workers such as "managers" of fast food restaurants and convenience stores, would be eligible for overtime unless their earnings more accurately reflected current wage norms: *Presidential Memorandum-Updating and Modernizing Overtime Regulations*, <http://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations> (Mar. 13, 2014). [§ 1.15[B]]
- President Obama announced that he would apply his executive powers unilaterally to require federal contractors to pay a minimum wage of $10.10 on all new federal contracts: *Executive Order—Minimum Wage for*

*Contractors*, <http://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors> (Feb. 12, 2014). [§ 1.07]

- The Supreme Court held in early 2014 that, in a unionized operation, the CBA controls whether employees will be paid for donning/doffing time. The Supreme Court characterized putting on and taking off required safety gear as "changing clothes," which is not compensable, because of FLSA § 203(o): *Sandifer v. U.S. Steel*, 134 S. Ct. 870 (2014). [§ 1.15[F]]
- Several additional states granted recognition of same-sex marriage (SSM), although it is difficult to list them because the various statutes and court cases (many of them holding that a state's refusal to issue licenses for SSM violates Equal Protection) are under appeal at various levels. [§ 18.06[A]]
- As a result of the Supreme Court's 2013 decision in *United States v. Windsor*, 133 S. Ct. 2675, the IRS has adopted the position that a same-sex couple are considered married for federal tax purposes if their marriage was legal at the place it was celebrated, whether or not same-sex marriage is legal in the state where they reside or the state where they work: IR-2013-72. [§§ 2.01[B], 18.06[B]]
- Changes were made to the PBGC premium under the Bipartisan Budget Act of 2013 (Pub. L. No. 113-67). The 2014 flat-rate premium is $49/participant for single-employer plans and $12/employee for multi-employer plans. The 2014 variable premium for single-employer plans is $14/$1,000 in unfunded vested benefits, subject to a cap of $412/participant. Starting in 2015, PBGC premiums will be due at the same time, irrespective of the size of the plan. The previous rules set the due date depending on the number of participants in the plan: 79 Fed. Reg. 13547 (Mar. 11, 2014). [§§ 4.01[A], 5.08[B]]
- President Obama signed a presidential memorandum directing the Department of the Treasury to set up a new retirement savings program, the myRA account for people who do not have access to employment-based retirement savings plans. [§§ 4.05, 6.04]
- The Supreme Court permitted enforcement of an ERISA plan's three-year contractual statute of limitations, even though it ended before the plaintiff could have filed suit about her disability claim. The suit was brought within three years of the final claim denial, but more than five years after her first assertion of the claim. The Supreme Court found that the three-year statute of limitations was reasonable and did not violate ERISA, but left the door open for equitable remedies such as tolling, waiver, and estoppels in rare cases where the claim process is so lengthy that the plaintiff cannot file a timely claim: *Heimeshoff v. Hartford Life*, 134 S. Ct. 604 (2013). [§§ 13.05[D], 15.18[D], 20.08, 25.01, 42.05[A]]
- The Supreme Court upheld enforcement of another kind of contract provision that can be used to work around legislative requirements, finding that

contractual forum selection clauses will be enforced except in the most egregious cases. This ruling is favorable for drafters of employment and noncompete agreements who want to avoid involvement of states that forbid noncompete agreements or place limits on their enforcement: *Atlantic Marine Construction Co., Inc. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013). [§ 25.01]

- The 2013 final rules under the Rehab Act and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) were issued by the Office of Federal Contract Compliance Programs (OFCCP) calling for affirmative action by federal contractors in hiring of persons with disabilities and veterans. There is no penalty for failure to meet the goals set out in the regulations, but federal contracts can be revoked if the contractor cannot demonstrate a legitimate effort to meet the target. [§§ 23.12, 24.03, 29.01[A], 34.05[D], 36.10]
- In 2014, the Supreme Court extended the definition of "whistleblower" under Sarbanes-Oxley to include employees of companies that are not publicly traded, but that are contractors for publicly traded companies. The whistleblower provisions of the Dodd-Frank Act are not restricted to public companies but could not be used in this case because it arose before Dodd-Frank's effective date: *Lawson v. FMR Inc.*, 134 S. Ct. 1158 (2014). [§§ 15.11[B], 39.04[B]]
- Joint EEOC and FTC guidance about background checks, published in March 2014, warns employers that whenever background information (from any source) is used to make employment decisions, compliance with anti-discrimination laws (including Title VII, GINA, the ADEA, and the FCRA) is mandatory. The EEOC said that seeking genetic information from applicants or employees is only permissible in rare circumstances. The FTC interprets the Fair Credit Reporting Act to require safeguards, such as notice to the applicant or employee, whenever an employer obtains a credit or criminal background report from a company that compiles background information: EEOC/FTC, *Background Checks: What Employers Need to Know*, <http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm> (March 2014). [§§ 23.08, 24.08, 26.04, 41.01[C]]
- *American Express Co. v. Italian Colors*, 133 S. Ct. 2304 (2013) is an antitrust rather than an employment case, but it has been immensely significant to employment-related arbitration cases because it holds that the FAA does not permit a court to invalidate a contract's waiver of class arbitration on the grounds that the cost of arbitrating small individual claims would outweigh the potential recovery that could be obtained. Employees are usually unsuccessful in seeking to have claims against employers arbitrated on a class rather than on an individual basis. [§ 40.07[C]]
- The Supreme Court reversed the California Court of Appeal, granting certiorari and remanding a putative class action charging violation of California labor

laws. After the case had been stayed for two years, the defendant moved under plaintiffs' employment agreement to compel individual arbitration as prescribed by the employment agreement. The Supreme Court held that the relevant state rule is preempted by Supreme Court precedent: *CarMax Auto Superstores California, LLC v. Fowler*, 134 S. Ct. 1277 (2014). [§ 40.07[D]]

- In June 2014, the Supreme Court ruled that it violates the RFRA to require closely held corporations to abide by contraception mandate, because corporations are "persons" as defined by the RFRA, and free exercise of religion is not restricted to non-profit organizations. The Supreme Court held that the RFRA was enacted to protect business owners from having to choose between their religious convictions and complying with the law: *Burwell v. Hobby Lobby*, No. 13-354/*Conestoga Wood Specialties v. Burwell*, 134 S. Ct. 2751 (2014). [§ 18.03[D]]
- The Supreme Court ruled that the NLRB lacked a quorum, because the appointments of several members were invalid. The appointments were characterized as recess appointments, but the Supreme Court held that they were made at a time when the Senate was not actually in recess, because it re-convened for pro forma sessions every three days. The NLRB announced that, after there was a full board of Senate-approved members, the NLRB ratified all of the decisions cast into doubt by the Supreme Court ruling: *NLRB v. Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014). [§ 30.01[A]]
- The Court ruled that workers who provided home care to Medicaid recipients in Illinois were partial public employees who had the right to refuse to pay fair share fees (agency fees paid to unions by non-members). The Supreme Court held that the home care aides primarily worked for the elderly and disabled people who received the care, not for the clients, and requiring them to pay agency fees violated their First Amendment rights. However, the Supreme Court did not expand this holding to a more general rule that conventional public employees are exempt from paying agency fees: *Harris v. Quinn*. 134 S. Ct. 2618 (2014) [§ 30.06[A]]
- The Highway Transportation Funding Act of 2014, Pub. L. No. 113-159 extends the MAP-21 pension plan funding stabilization provisions, allowing employers to use "rate smoothing" to reduce the amount that they have to contribute to satisfy their minimum funding obligations. [§§ 4.01[B], 5.01[A], 5.05[I], 7.07[A], 11.03]
- In a mid-2014 Supreme Court case, the Court rejected the presumption of prudence that had generally been applied in "stock drop" cases. The Supreme Court held that ESOP fiduciaries have the same duties as other fiduciaries, although they are relieved of the obligation of diversifying the plan's portfolio. To assert a breach of the duty of prudence, a complaint must plausibly allege a lawful alternative course of conduct that would have yielded better results.

Fiduciaries never have an obligation to violate securities laws by using inside information: *Fifth Third Bancorp et al. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). [§§ 4.25, 6.01, 6.09[B], 15.03[C]]

**10/14**

---

**For questions concerning this shipment, billing, or other customer service matters, call our Customer Service Department at 1-800-234-1660.**

**For toll-free ordering, please call 1-800-638-8437.**

# About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, ftwilliam.com and MediRegs family of products.

**CCH** products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

**Aspen Publishers** products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

**Kluwer Law International** products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleafs, books, and electronic products for comprehensive information in many areas of international legal practice.

**Loislaw** is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

**ftwilliam.com** offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

**MediRegs** products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

## WOLTERS KLUWER SUPPLEMENT NOTICE

This product is updated on a periodic basis with supplements and/or new editions to reflect important changes in the subject matter.

If you would like information about enrolling this product in the update service, or wish to receive updates billed separately with a 30-day examination review, please contact our Customer Service Department at 1-800-234-1660 or e-mail us at: *customer.service@wolterskluwer.com*. You can also contact us at:

**Wolters Kluwer**
**Distribution Center**
**7201 McKinney Circle**
**Frederick, MD 21704**

**Important Contact Information**

- To order any title, go to *www.wklawbusiness.com* or call 1-800-638-8437.
- To reinstate your manual update service, call 1-800-638-8437.
- To contact Customer Service, e-mail *customer.service@wolterskluwer.com*, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to: Order Department—Wolters Kluwer, PO Box 990, Frederick, MD 21705.
- To review your account history or pay an invoice online, visit *www.aspenpublishers.com/payinvoices.*

# 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 2015 edition went to press in August 2014, so it reflects events from mid-2013 to mid-2014.

In this time period, there were few dramatic legal changes but, as usual, changes were made in areas such as tax law and ERISA compliance (including updates to correction programs).

Economic problems continued, affecting business in many ways including hiring and compensation. The process of PPACA implementation began, with the first cohort of sign-ups for health coverage (despite delays and challenges to the legality of the statute as a whole), and employers faced questions of how to provide health benefits affordably while still complying with PPACA obligations.

The Supreme Court's June 2013 decision that part of the federal Defense of Marriage Act was unconstitutional requires employers to treat legally married same-sex couples as spouses for various tax and benefit-related purposes. In 2013–2014, same-sex marriage was recognized in several additional states, with the status of other states awaiting resolution of court challenges, and the IRS espoused the principle of recognizing same-sex marriages for tax purposes if they were celebrated in a state in which same-sex marriage is legal. The new 2015 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.

NOTE ON WEB SOURCES: Several Websites that are frequently cited, such as benefitslink.com, plansponsor.com, and Lexology.com, use very long URLs that are hard to cite. Therefore, for convenience, citations to cases and articles appearing there are simply cited; do a search for the name of the article if you'd like to retrieve it. I cite to online editions rather than print editions of the New York Times and Wall Street Journal.

For older online references, wherever possible I include the latest update of the resource, and the date I accessed it—a date on which the resource was available online. Unfortunately, the URL may change, or the item may no longer be available online, or may be behind a paywall when you attempt to access it.

# PART I
# PAY PLANNING

# CONTENTS

*A complete table of contents for each chapter appears at the beginning of the chapter.*