

THE COMPLETE GUIDE TO HUMAN RESOURCES AND THE LAW

2014 Edition

Dana Shilling

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

Copyright © 2014 CCH Incorporated. All Rights Reserved.

No part of this publication may be reproduced or transmitted in any form or by any means, including electronic, mechanical, photocopying, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.aspenpublishers.com/licensing/default.aspx, or a written request may be faxed to our permissions department at 212-771-0803.

Published by Wolters Kluwer Law & Business in New York.

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

Printed in the United States of America

ISBN 978-1-4548-2542-5

1 2 3 4 5 6 7 8 9 0



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, looseleaves, 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 LAW & BUSINESS SUPPLEMENT NOTICE

This product is updated on a periodic basis with supplements to reflect important changes in the subject matter. If you have purchased this product directly from Wolters Kluwer Law & Business, we have already recorded your subscription for the update service.

If, however, you purchased this product from a bookstore and wish to receive future updates and revised or related volumes billed separately with a 30-day examination review, please contact our Customer Service Department at 1-800-234-1660 or send your name, company name (if applicable), address, and the title of the product to:

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

Important Contact Information

- To order any title, go to www.aspenpublishers.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 – Aspen Publishers, Wolters Kluwer Law & Business, PO Box 990, Frederick, MD 21705.
- To review your account history or pay an invoice online, visit www.aspenpublishers.com/payinvoiced.



Wolters Kluwer
Law & Business

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 2014 edition went to press in August 2013, so it reflects events from mid-2012 to mid-2013.

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 was underway (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; it will take some time for the legal system to define exactly what the implications are depending on the state in which the couples live and where they work.

The 2014 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: American Lawyer Media's excellent Website, <http://www.law.com>, uses very long URLs that are hard to cite; so does plansponsor.com. Therefore, for convenience, citations to cases and articles appearing there are simply cited to [law.com](http://www.law.com); do a search for the name of the article if you'd like to retrieve it.

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](http://www.nytimes.com) and [wsj.com](http://www.wsj.com) Websites.

CONTENTS

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

Preface

PART I PAY PLANNING

Chapter 1 PAY PLANNING

- § 1.01 Introduction
- § 1.02 Decision Factors in Setting Compensation
- § 1.03 Benefits as an Element of Compensation
- § 1.04 Avoiding Discrimination
- § 1.05 Variable Pay
- § 1.06 Wage and Hour Issues
- § 1.07 Minimum Wage
- § 1.08 Determining Who Is an “Employee”
- § 1.09 Staffing Arrangements
- § 1.10 Size of the Contingent Workforce
- § 1.11 Co-Employers
- § 1.12 Applicable Tests
- § 1.13 Benefits for Contingent Workers
- § 1.14 Work Scheduling
- § 1.15 Overtime and Overtime Planning
- § 1.16 Vacations and Vacation Pay
- § 1.17 Garnishments and Deductions for Support Orders
- § 1.18 USERRA

Chapter 2 TAX ASPECTS OF PAY PLANNING

- § 2.01 Introduction
- § 2.02 The Compensation Deduction
- § 2.03 Income Tax Withholding
- § 2.04 FUTA Tax
- § 2.05 Trust Fund Tax Compliance and the 100% Penalty

- § 2.06 W-2s and Other Tax Forms
- § 2.07 Tax Deposits
- § 2.08 Transition to Electronic Filing
- § 2.09 Bankruptcy Issues
- § 2.10 The Interaction Between §§ 409A and 415

Chapter 3

BONUSES AND SEVERANCE PAY

- § 3.01 Introduction
- § 3.02 Bonuses
- § 3.03 Severance Pay

PART II

PENSION LAW

Chapter 4

BASIC PENSION CONCEPTS

- § 4.01 Introduction
- § 4.02 Extent of Coverage
- § 4.03 Effect of Demographics on Plans
- § 4.04 Investment Factors
- § 4.05 Defined Benefit/Defined Contribution
- § 4.06 Other Plan Types
- § 4.07 IRA/Qualified Plan Interface
- § 4.08 Incidental Benefits
- § 4.09 Structure of ERISA
- § 4.10 Required Provisions for All Qualified Plans
- § 4.11 Normal Retirement Age
- § 4.12 Normal Retirement Benefit
- § 4.13 Participation and Coverage
- § 4.14 Vesting
- § 4.15 Break-In-Service Rules
- § 4.16 Plan Limits
- § 4.17 Employee Contributions
- § 4.18 Plan Loans
- § 4.19 Employer's Deduction
- § 4.20 Reversions
- § 4.21 Forfeitures
- § 4.22 Discrimination Testing
- § 4.23 Leased Employees
- § 4.24 Communicating with Employees
- § 4.25 Fiduciary Duty

CONTENTS

- § 4.26 Bankruptcy Effects
- § 4.27 Factors in Choosing a Plan Form

Chapter 5

DEFINED BENEFIT PLANS

- § 5.01 Introduction
- § 5.02 Benefit Limits
- § 5.03 Benefit Forms for Defined Benefit Plans
- § 5.04 Mortality Tables
- § 5.05 Funding the Defined Benefit Plan
- § 5.06 Benefit Accruals
- § 5.07 Notices of Reduction of Benefit Accruals
- § 5.08 PBGC Compliance
- § 5.09 Reportable Events
- § 5.10 Special Rules for At-Risk Plans

Chapter 6

DEFINED CONTRIBUTION AND 401(k) PLANS

- § 6.01 Introduction
- § 6.02 Defined Contribution Plans
- § 6.03 New Comparability Plans
- § 6.04 401(k) Plans
- § 6.05 401(k) Antidiscrimination Rules
- § 6.06 Distributions from the 401(k) Plan
- § 6.07 Administration of the 401(k) Plan
- § 6.08 Investment Advice for Participants
- § 6.09 401(k) Plans Respond to the Economy

Chapter 7

CASH BALANCE PLANS

- § 7.01 Introduction
- § 7.02 Cash Balance Plans: Pros and Cons
- § 7.03 “Whipsaw” and Financial Factors
- § 7.04 Case Law on Cash Balance Plans
- § 7.05 The Conversion Process
- § 7.06 December 2002 Regulations: Proposal and Withdrawal
- § 7.07 Cash Balance Plans Under the PPA and WRERA

Chapter 8

NONQUALIFIED PLANS

- § 8.01 Introduction
- § 8.02 Taxation of Nonqualified Plans

§ 8.03 Prohibited Transactions and Corrections

Chapter 9

EARLY RETIREMENT AND RETIREE HEALTH BENEFITS

- § 9.01 Introduction
- § 9.02 ADEA Issues of Early Retirement Incentives
- § 9.03 Disclosures to Employees
- § 9.04 EEOC Manual on Early Retirement Incentives
- § 9.05 ERISA Issues
- § 9.06 Phased Retirement
- § 9.07 Retiree Health Benefits: Introduction
- § 9.08 The Right to Alter or Terminate Retiree Health Benefits
- § 9.09 Tax Issues for Retiree Health Benefits
- § 9.10 MPDIMA and the Medicare Interface
- § 9.11 SOP 92-6 Reports
- § 9.12 Implications of the Employer's Bankruptcy
- § 9.13 401(h) Plans

PART III

PENSION PLAN ADMINISTRATION

Chapter 10

ADOPTING AND ADMINISTERING A PLAN

- § 10.01 Introduction
- § 10.02 Determination Letters
- § 10.03 Prototype and Master Plans
- § 10.04 Routine Tax Compliance
- § 10.05 ERISA Compliance Issues

Chapter 11

COMMUNICATIONS WITH EMPLOYEES AND REGULATORS

- § 11.01 Introduction
- § 11.02 Summary Plan Description (SPD)
- § 11.03 Summary Annual Report (SAR)/Annual Funding Notice
- § 11.04 Individual Account Plan Disclosures
- § 11.05 Notices of Reduction of Benefit Accruals
- § 11.06 Other Notices and Disclosures
- § 11.07 Disclosure on Request
- § 11.08 Electronic Communications
- § 11.09 Disclosure of Documents to the DOL and PBGC
- § 11.10 Form 5500

Chapter 12
PLAN DISTRIBUTIONS

- § 12.01 Introduction
- § 12.02 Cashout
- § 12.03 Lump Sums
- § 12.04 Anti-Alienation Rule
- § 12.05 QJSA/QOSA Payments
- § 12.06 Post-Death Payments
- § 12.07 The Required Beginning Date
- § 12.08 Divorce-Related Orders
- § 12.09 Reduction of Benefit Forms
- § 12.10 Rollovers
- § 12.11 Withholding
- § 12.12 Plan Loans as Deemed Distributions

Chapter 13
PROCESSING AND REVIEWING CLAIMS AND APPEALS

- § 13.01 Introduction
- § 13.02 Third-Party Administrators (TPAs)
- § 13.03 Health Plan Claims
- § 13.04 HIPAA EDI Standards
- § 13.05 Case Law on Claims
- § 13.06 *Glenn* and the Standard of Review
- § 13.07 Case Law on Claims Procedural Issues

Chapter 14
AMENDING A PLAN

- § 14.01 Introduction
- § 14.02 Flexibility Through Amendment
- § 14.03 Change in Plan Year
- § 14.04 Reduction in Forms of Distribution
- § 14.05 EGTRRA, CHIPRA, and PPACA Conforming Amendments
- § 14.06 ERISA 204(h) Notice
- § 14.07 Amendments to a Bankrupt Sponsor's Plan
- § 14.08 Issues Highlighted by the IRS

Chapter 15
**ENFORCEMENT AND COMPLIANCE ISSUES
FOR QUALIFIED PLANS**

- § 15.01 Introduction
- § 15.02 Who Is a Fiduciary?
- § 15.03 Fiduciary Duties

- § 15.04 Duties of the Trustee
- § 15.05 The Employer's Role
- § 15.06 Investment Managers
- § 15.07 Duty to Disclose
- § 15.08 Penalties for Fiduciary Breach
- § 15.09 ERISA § 502
- § 15.10 ERISA § 510
- § 15.11 Other Enforcement Issues
- § 15.12 Liability of Co-Fiduciaries
- § 15.13 Bonding
- § 15.14 Indemnification
- § 15.15 Prohibited Transactions
- § 15.16 Payment of Plan Expenses
- § 15.17 Service Providers
- § 15.18 ERISA Litigation
- § 15.19 Correction Programs

Chapter 16

EFFECT OF CORPORATE TRANSITIONS ON PENSION AND BENEFIT PLANS

- § 16.01 Introduction
- § 16.02 Choice of Form
- § 16.03 The Anticutback Rule
- § 16.04 Notice of Reduction of Benefits
- § 16.05 The Minimum Participation Rule
- § 16.06 In-Service Distributions and Rehiring
- § 16.07 Tax Issues
- § 16.08 The PBGC Early Warning Program
- § 16.09 Stock Options

Chapter 17

PLAN TERMINATION

- § 17.01 Introduction
- § 17.02 Termination Types
- § 17.03 The PBGC's Role
- § 17.04 Involuntary Termination
- § 17.05 Plan Reversions
- § 17.06 Effect on Benefits
- § 17.07 Reporting and Compliance
- § 17.08 Payment of Expenses

PART IV
BENEFIT PLANS

Chapter 18
EMPLOYEE GROUP HEALTH PLANS (EGHPs)

- § 18.01 Introduction
- § 18.02 The Health Care Landscape
- § 18.03 Benefits Mandates
- § 18.04 Dental Plans
- § 18.05 Prescription Drug Coverage
- § 18.06 Domestic Partner Benefits, Civil Unions, and Same-Sex Marriage
- § 18.07 Tax Issues in EGHPs
- § 18.08 Health-Based Discrimination
- § 18.09 Health Savings Accounts (HSAs) and Archer MSAs
- § 18.10 Medical Expense Reimbursement Plans
- § 18.11 Flexible Spending Accounts (FSAs)
- § 18.12 EGHP Structures
- § 18.13 Managed Care
- § 18.14 Employer Liability for Health Plan Actions
- § 18.15 Labor Law Issues in the EGHP
- § 18.16 Qualified Medical Child Support Orders (QMCSOs)
- § 18.17 The Employer's Right of Subrogation
- § 18.18 Defined Contribution, CDHP, and HRA Plans
- § 18.19 Health Care Reform Under PPACA

Chapter 19
HEALTH INSURANCE CONTINUATION AND
PORTABILITY (COBRA AND HIPAA)

- § 19.01 Introduction
- § 19.02 COBRA Continuation Coverage
- § 19.03 COBRA and the FMLA
- § 19.04 COBRA Notice
- § 19.05 Health Insurance Portability

Chapter 20
DISABILITY PLANS

- § 20.01 Introduction
- § 20.02 Employment-Based Plans
- § 20.03 State Mandates
- § 20.04 Compliance Issues
- § 20.05 Case Law on "Total Disability"
- § 20.06 Effect of Plan Amendments

§ 20.07 Claims Procedures and the Standard of Review After *Glenn*

§ 20.08 Appeals of Claim Denials

Chapter 21

INSURANCE FRINGE BENEFITS

§ 21.01 Introduction

§ 21.02 Life Insurance Fringe Benefits

§ 21.03 Long-Term Care Insurance Plans

Chapter 22

OTHER FRINGE BENEFITS

§ 22.01 Introduction

§ 22.02 Stock Options

§ 22.03 Cafeteria Plans

§ 22.04 Education Assistance

§ 22.05 Employee Assistance Programs (EAPs)

§ 22.06 Miscellaneous Fringes

§ 22.07 Voluntary Employee Benefit Associations (VEBAs)

§ 22.08 Fringe Benefit Plans: Tax Compliance

§ 22.09 ERISA Regulation of Welfare Benefit Plans

PART V

THE HR FUNCTION

Chapter 23

HIRING AND RECRUITMENT

§ 23.01 Introduction

§ 23.02 Productive Hiring

§ 23.03 Analyzing Job Requirements

§ 23.04 Recruitment

§ 23.05 Search Firms

§ 23.06 Job Applications

§ 23.07 Establishing Terms and Conditions

§ 23.08 Reference Checks

§ 23.09 Nondiscriminatory Hiring

§ 23.10 Pre-Employment Testing

§ 23.11 Immigration Issues

§ 23.12 ADA Compliance in Hiring

§ 23.13 Credit Reporting in the Hiring Process

CONTENTS

Chapter 24

RECORDKEEPING

- § 24.01 Introduction
- § 24.02 OSHA Records
- § 24.03 Title VII Recordkeeping and Notice Requirements
- § 24.04 FMLA Records
- § 24.05 Immigration Records
- § 24.06 Employment Tax Records
- § 24.07 Unemployment Insurance Records
- § 24.08 Record-Retention Requirements

Chapter 25

CORPORATE COMMUNICATIONS

- § 25.01 Introduction
- § 25.02 Employment Contracts
- § 25.03 Employee Handbooks
- § 25.04 Work Rules
- § 25.05 Systems of Progressive Discipline
- § 25.06 Employee Evaluations
- § 25.07 Mandatory Predispute Arbitration Provisions
- § 25.08 Defamation
- § 25.09 Privileged Statements
- § 25.10 Duty to Communicate
- § 25.11 Responses to Reference Checks
- § 25.12 Negotiated Resignations
- § 25.13 Releases
- § 25.14 Sarbanes-Oxley and Dodd Frank Notices

Chapter 26

PRIVACY ISSUES

- § 26.01 Introduction
- § 26.02 Polygraph Testing
- § 26.03 Drug Use in the Workplace
- § 26.04 Criminal Record and Credit Checks
- § 26.05 Genetic Testing
- § 26.06 Searches and Surveillance
- § 26.07 HIPAA Privacy Rules

Chapter 27

THE ROLE OF THE COMPUTER IN HR

- § 27.01 Introduction
- § 27.02 Internet Research

- § 27.03 Recruiting Via the Internet
- § 27.04 Benefits Management Online
- § 27.05 Legal Implications of E-Mail and Social Networking
- § 27.06 Federal Rules on Digital Communications

Chapter 28

WORK-FAMILY ISSUES

- § 28.01 Introduction
- § 28.02 Employer-Provided Day Care
- § 28.03 Breast Feeding in the Workplace
- § 28.04 Adoption Assistance
- § 28.05 Corporate Elder Care Activities
- § 28.06 The Corporate Elder Care Role
- § 28.07 Dependent Care Assistance Plans

Chapter 29

DIVERSITY IN THE WORKPLACE

- § 29.01 Introduction
- § 29.02 The Glass Ceiling
- § 29.03 Diversity Training
- § 29.04 Diversity Audits
- § 29.05 English-Only Rules
- § 29.06 Promoting Diversity

PART VI

EMPLOYEE RELATIONS

Chapter 30

LABOR LAW

- § 30.01 Introduction
- § 30.02 Sources of Labor Law
- § 30.03 Employee Status
- § 30.04 Elections, Certification, and Recognition
- § 30.05 The Appropriate Bargaining Unit
- § 30.06 Union Security
- § 30.07 The Collective Bargaining Process
- § 30.08 Elections After Certification
- § 30.09 Strikes
- § 30.10 The WARN Act
- § 30.11 Labor Law Issues of Shared Liability
- § 30.12 Employer Domination