



August 6, 2007

This is Utah SHRM Legal-mail no. 2007-18 prepared for Salt Lake SHRM, the Human Resources Association of Central Utah (HRACU), the Northern Utah Human Resources Association (NUHRA), the Color Country Human Resources Association (CCHRA), the Bridgerland Society for Human Resource Management and Utah at-large members of the national Society for Human Resource Management (SHRM). This update is best viewed in a HTML format. Please reply with “UNSUBSCRIBE” in the subject field if you no longer wish to receive this message.

CONTENTS:

- **HEADS UP... EEO-1 DEADLINE AND NEW FORM**
- **LEGISLATIVE UPDATE**
- **IMMIGRATION NEWS BRIEFS**
- **INVESTIGATION TIPS**
- **COMMENTS ON ACCENT MAY ACCENT BIAS**

HEADS UP... EEO-1 DEADLINE AND NEW FORM: Old news – if you employ 100 or more employees, you must annually file the EEO-1 form reporting employment statistics regarding employee gender, race and ethnicity. New news – there is a new EEO-1 form for the first time this year, setting out new racial/ethnic categories, and it must be filed by September 30, 2007. Because of the new categories, employers probably will have to re-survey employees via voluntary self-identification or visual surveys. You can get more information about the new EEO-1 form, and a copy of it, and details on how to file at : <http://www.eeoc.gov/eo1survey/index.html>

LEGISLATIVE UPDATE: The House of Representatives recently voted to overturn a recent United States Supreme decision limiting the time for bringing equal pay sex discrimination claims. The bill now goes to the Senate. Both Houses of Congress are also considering bills to overturn some other Supreme Court decisions clarifying and limiting the Americans with Disabilities Act (ADA). A House Committee has unanimously approved a bill to prohibit employers from displaying Social Security numbers in any public manner. Finally, the word on Capitol Hill in Washington is that Congress may consider raising the minimum wage again, this time to \$9.50 per hour.

Current law will raise the minimum wage to \$7.25 per hour in three 70¢ increments (effective July 24 of 2007, 2008 and 2009).

IMMIGRATION NEWS BRIEFS: The conventional wisdom, which sometimes is neither wise nor conventional, is that Congress will not enact any comprehensive immigration law reform. In light of this likelihood, several other forces are at work on the immigration reform issue. The Department of Homeland Security is poised to issue new regulations on how employers must react to notices reporting that employee Social Security numbers and names do not match each other. Congress is looking at breaking the comprehensive reform bill into several parts, e.g. passing one bill addressing only the issue of whether employers must use the national pilot Social Security number verification system. A number of states are also considering immigration reform legislation. One common feature of the state legislation I have heard about includes mandated employer use of the national verification system as well as other items, such as stricter penalties on employers who hire undocumented workers.

INVESTIGATION TIPS: Guidelines from the Equal Employment Opportunity Commission (EEOC) require employers to promptly and effectively investigate claims of workplace discrimination, harassment or retaliation. Employers often also must investigate other possible instances of employee misconduct. How do you do it? I have talked about that issue a number of times in these updates. I recently read a national e-newsletter from an HR consultant who outlined ten excellent tips for conducting effective employment investigations. They seemed a good reminder, so here they are:

1. The basic purpose of the investigation is to determine facts necessary to make a workplace decision.
2. Objectivity is a critical component of the overall process and should be a key determiner in the selection of an investigator.
3. The investigation should be conducted in a prompt manner to preserve relevant evidence and enable witnesses to more accurately recall the facts.
4. Preparation for the investigation should include determining the investigator, making a list of potential witnesses, identifying and/or obtaining relevant documents, materials and practices; and developing preliminary questions to be asked. Consideration should be given as to whether to contact legal counsel in developing an overall strategy and/or assisting in the decision-making process.
5. Anyone with relevant information should be interviewed.
6. The entire process should be documented, including interviews, evidence and any action that is taken. Throughout, consideration should be given to the question, “How will the evidence and overall process be viewed if a charge or lawsuit results?”

7. The following “five Ws” should be considered in preparation for the investigation and throughout the process: what happened, when did it happen, where did it happen, who was involved and why did it happen.
8. Promises of confidentiality should be avoided, and instead, management should explain that information will be shared on a need-to-know basis. Also, it is important to communicate that there will be no retaliation for registering a complaint or for participating in the investigation.
9. The interview should begin with broad, open-ended questions that require more than “yes” or “no” responses and give the witness an opportunity to describe events. Follow-up should include asking more specific questions both to clarify what was said and to “peel back the onion” and obtain additional facts. Questions asked should allow the investigator to determine relevant facts and assess the credibility of information provided.
10. At the conclusion of the investigation, a written report should be prepared that documents steps followed, information obtained, decisions reached, any actions taken and other pertinent information. If corrective action is taken, it should be administered in a timely manner.

COMMENTS ON ACCENT MAY ACCENT BIAS: A recent federal Court of Appeals decision emphasizes that an employer’s disparaging comments about an employee’s accent may be direct evidence of workplace discrimination. The case involved an employee who was denied a promotion after her supervisor criticized the employee’s accent. He sued and the court decided his claim was strong enough to go to a jury. The court concluded that “accent and national origin are inextricably intertwined.” Regulations from the Equal Employment Opportunity Commission (EEOC) also state the agency will carefully scrutinize English-speaking requirements at work to ensure they are based on legitimate business needs rather than on bias.

Written by: Employment Attorney, Michael Patrick O'Brien
Utah State and Salt Lake SHRM legal director
Email: mobrien@joneswaldo.com
Phone: 801-534-7315
Website: www.joneswaldo.com



Legal-mail is a legal and legislative update service sent out about twice a month to various Utah SHRM members and chapters. As a courtesy to SHRM, the Utah law firm of Jones Waldo Holbrook & McDonough P.C. underwrites the costs of the service. If you

have any questions or comments, please contact Michael Patrick O'Brien.

Disclosure: These updates are merely updates and are not intended to be legal advice. Receipt of this information does not create an attorney-client relationship.