Employee Hiring/Firing

Chapter 6
Don’t Take Potential Employees at Face Value

Suppose you own a motel and a nice young man, Norman Bates (remember the movie *Psycho*?), applies to you for a job. His résumé looks fine (lots of experience in motel management) and he interviews well. Would you hire him without checking him out further? Hopefully not.

If you don’t at least make a stab at checking his background, you could be held liable for the next Janet Leigh he cuts down to size. Here are cutting-edge approaches you can use to guide your hiring procedures.

**Check them all out.**
Always check with an applicant’s previous employers. Courts sometimes hold employers liable for negligent hiring when an employee injures someone and the employer did not conduct a background check.

**A law—not a shot—for immunity.**
State law gives former employers qualified immunity if they respond to your request and tell you about your applicant’s past job performance with them. They do lose their immunity if they disclose false, misleading or malicious information. When in doubt, check with your lawyer.

**A credit report for credibility.**
For applicants seeking jobs involving the handling of money or prescription drugs, entering customers’ homes, working with children, or driving company vehicles, you should consider a credit report or, at least, a criminal background check.

But do it right. The Fair Credit Reporting Act requires you to get written permission from applicants if you want to get credit reports or background checks for employment purposes.

**Give fair warning.**
And before you turn down a job-seeker based on a credit or background check, you must give him or her a “pre-adverse action disclosure.” And you must include a copy of the Federal Trade Commission document, “Summary of Your Rights Under the Fair Credit Reporting Act.”

But if your applicant is Norman Bates, you might want to mail these documents to him.

—by Joseph B. Swartz, a partner with Weston Hurd Fallon Paisley & Howley, LLP, in Cleveland. This article is taken from an article in the Ohio State Bar Association’s Labor and Employment News.
Know the Law When Using an Outside Agency
To Do Background or Credit Checks

Q.: Can I order a credit check on an applicant before I make an offer of employment?
A.: Yes, if the employee consents in writing. Oftentimes an employer will review a consumer credit report of an applicant for employment as part of a background check. The Fair Credit Reporting Act (“FCRA”) permits an employer to request such a report for “employment purposes,” which may include evaluation of an individual for employment, promotion, reassignment, or retention.

You must make clear and conspicuous disclosure of your intent to get the report to the prospective employee, who must consent in writing. This writing must be separate from the employment application.

If the employer denies employment even in part based on the information in the credit report, the employer must inform the applicant of this fact before taking any such action based on the report. The employer must provide to the prospective employee: 1) a copy of the report; and 2) a written description of the prospective employee’s rights (often referred to as the Consumer Bill of Rights).

The employer cannot request the report after the employee ends his or her employment. An employer is permitted to obtain consumer reports containing additional information, such as reputation and personal characteristics, but only upon notice to the employee. Employers who unlawfully obtain credit reports can be liable to the employee for actual damages, punitive damages and attorney fees as well as subject to criminal liability. Be aware that even the lawful use of credit reports may nonetheless run afoul of the civil rights laws. If an employer’s use of credit reports consistently impacts the hiring of minorities in a negative way, for example, the employer may be liable for discrimination.

Q.: Can I order a criminal background check on an applicant for employment?
A.: Yes, if the employee consents in writing and receives the same protections as he or she would with a credit background check. As confusing as it may seem, Congress regulates criminal reports as part of the Fair Credit Reporting Act.
Q.:  Do you mean that the Fair Credit Reporting Act (“FCRA”) regulates criminal background checks as well as reference checks?
A.:  Yes. Congress originally enacted the FCRA in 1971 to protect individuals from abuses by private companies that created huge databases on individual credit histories. In the years since, these and other businesses have compiled or gained access to criminal records and other information about individuals. Congress responded to this development with an amendment to the FCRA to cover criminal background checks by outside agencies.

Q.:  So what, exactly, are the restrictions on criminal background checks?
A.:  When you use an outside agency to gather information about an individual for “employment purposes,” you must:  1) make a clear and conspicuous disclosure to the individual of your intent to get the report; and 2) obtain his or her authorization in writing in order to get the report. This written authorization must be separate from the employment application.

Q.:  What if the background information is negative?  Can I refuse to hire the person?
A.:  In order to use information obtained from an outside agency for employment purposes, you must:
   1) inform an applicant if employment is denied, at least in part, due to the information in the report; and
   2) provide to the prospective employee a copy of the report and a description in writing of the rights of the prospective employee (Consumer Bill of Rights) before taking any such action based on the report.

You may obtain consumer reports containing additional information, such as reputation and personal characteristics, but only upon additional notice to the prospective employee.

Q.:  What happens if I do not follow the procedures properly?
A.:  You could be liable to the employee for actual damages, punitive damages and attorney fees, and even criminal liability. In other words, you may obtain and use background checks, but you must do so properly.

Q.:  Do employers have other options for gathering background information on applicants or employees?
A.:  Yes. Employers can conduct background and reference checks themselves. If you do not use an outside agency, you can gather information without the restrictions discussed above. In fact, an Ohio law will protect you from lawsuits by employees claiming that you gave or obtained a poor reference about them (see article on reference-checking law).
Q.: What could happen if I decide not to conduct any reference checks at all?
A.: Two things, neither of which is good. First, you may hire an unfit employee. Second, you could face a suit for negligent hiring if the employee hurts someone.

You may be liable for negligent hiring if:
- you hire an unfit employee;
- you fail to make reasonable inquiry into the employee’s background;
- a reasonable inquiry would have led to rejection;
- you knew or should have known that your employee’s contact with others created a risk of harm; and
- you fail to conduct a background check that would have led you to reject the employee, and he or she harms another person while in your employ.

Q.: It sounds like I can get into trouble no matter what I do. What is the best course of action?
A.: Be careful, but do not become paralyzed. First, always conduct reference checks. At a minimum, contact the former employer. If you hire an agency to give you a background check, whether credit or criminal, follow the FCRA procedures (outlined above). Finally, use the reference information wisely. If the candidate is unfit, do not hire him or her.

—by Neil E. Klingshirn, partner in the Akron-based firm of Fortney & Klingshirn, and Maribeth Deavers of the Columbus law firm, Isaac Brant Ledman & Teetor, LLP.
Reference-Checking Law Benefits Employers

Q.: Why was Ohio’s reference-checking law enacted?
A.: In 1996, a reference-checking law was enacted to help protect employers from frivolous lawsuits sometimes brought by disgruntled former employees. Most Ohio employers engage in a form of “due diligence” as part of their hiring process by investigating the backgrounds of prospective employees. Due to the onslaught of workplace violence, employers may face “negligent hiring” suits if they fail to request or obtain accurate information about the job history of potential employees. At the same time, employers who are asked to provide information about former employees are concerned about being sued by the former employees over the release of information. This latter threat has kept many employers from providing detailed reference information about former employees. The intent of the reference-checking law was to ease this “catch-22” situation for employers.

Q.: What does the reference-checking law say?
A.: Under this law, anyone who employs one or more persons within the State of Ohio (including private as well as public employers), or acts directly or indirectly in the interest of such a person, is considered an “employer.” An employer who provides job performance information for either a current or a former employee is not liable to that employee, or to the prospective employer, or to anyone else for any harm that may result from disclosing this information unless the greater weight of the evidence shows that the employer:
   1) knowingly disclosed false information with the intention of misleading a prospective employer (or anyone else) in “bad faith” or “with malicious purpose”; or
   2) disclosed information which constitutes unlawful discrimination against the individual’s protected class status (such as race, color, religion, sex, national origin, handicap, age, or ancestry), or violated the employee’s rights under Ohio’s Credit Transaction Act (regarding credit checks).

Q.: How does the reference-checking law differ from the law used to govern these situations in the past?
A.: Before this law was enacted, the common law standard used in Ohio made it easier for employees to win suits against employers because they only needed to show the court that the employer acted with “actual malice,” meaning that the employer either “knew or should have known” that he or she was providing false information.
Under this law and subsequent case law, employees are required to prove that the employer \textit{actually knew} the information he or she was providing was false or acted with reckless disregard for the truth of the information provided. This standard was set to make it more difficult for employees to win suits against employers. Also, the law allows employers to collect reasonable attorneys’ fees and court costs if the lawsuits brought against them are found by the court to be “frivolous” or unwarranted.

Employers are expected to be careful and prudent in their selection of employees under threat of negligent hiring suits in the event a bad hiring decision is made. Quality hiring decisions are enhanced through detailed information of a prospective employee’s prior job history. The reference-checking law makes it less “dangerous” for employers to provide detailed information in response to reference-check requests.

–by Donald R. Keller, Jerry E. Nathan, and Betsy A. Swift, attorneys with the Columbus firm, Bricker & Eckler, LLP, and Timothy J. Owens of the Columbus firm, Owens & Krivda Co., LPA.
Employers Have “Qualified Privilege” When Conveying Information about Employees

Q.: My employee has accused me of including false information in his performance review. Does he have any legal recourse?
A.: As long as you did not know the information was false and did not act with reckless disregard as to its truth or falsity, you are generally free to express your opinion in a performance review, even if that information is false. In Ohio, employers are protected by what is called a “qualified privilege.” This privilege generally allows employers to freely communicate their thoughts about employees.

Q.: What is a “qualified privilege”?
A.: Qualified privilege means that the employer’s communication is protected by law unless:
   • it was not for a legitimate purpose; or
   • it was communicated to a person without a need to know; or
   • it was made with actual knowledge that it was false or with reckless disregard as to its truth; or
   • it was made for a discriminatory reason related to an employee’s race, religion, age, disability, national origin or gender.

Q.: If an employer knowingly communicates false information about an employee, is it considered defamation?
A.: Possibly. Defamation is a false publication (either orally in writing) to a third party that:
   • causes injury to a person’s reputation; and
   • exposes the person to public hatred, contempt, ridicule, shame or disgrace; or
   • affects the person adversely in their trade or business.

However, defamation does not include opinions unless they involve or imply false statements of fact.

Q.: I own a small business, and one of my employees is asking to see a copy of her personnel file. Am I obligated to provide it?
A.: If you are an employer in private industry, Ohio law does not require you to provide copies of personnel files unless there is an employment contract, employee handbook or collective bargaining agreement that says otherwise.

—by Frederick M. Gittes, a partner in the Columbus firm of Gittes & Schulte.
Employee or Independent Contractor?  
Know the Difference

Perhaps no issue of law or business has been as controversial or as pervasive as determining whether workers should be treated as employees or independent contractors. Regardless of the efforts of Congress, the IRS, industry associations and the courts to streamline an approach, this complex issue will continue to require the careful factual and legal analysis of a professional.  Safe harbors provided by Congress in the 1978 Revenue Act remain available, but were hotly contested by the IRS on an industry-specific basis through the ‘90s.  Well-intentioned efforts to provide preliminary guidance on this issue to businesses by the IRS through its SS-8 program have provided disappointing and often costly outcomes, because even when the facts strongly indicate independent contractor status under accepted public Rulings and Procedures, those who apply are almost always determined to be employees.

The issue of the independent contractor/employee dichotomy is contentious because much is at stake. Employees can be much more expensive than contractors, especially for small businesses. Compliance costs in establishing a payroll system, withholding income and employment taxes and filing employment tax returns, depositing payments and issuing W-2s in a timely fashion, almost always require the services of an accountant, even for domestic workers and in-home caregivers. In addition, a business must contribute to the employment taxes for its employee workers, but not for independent contractors. The employer’s portion of FICA, FUTA, Medicare tax, state unemployment tax and workers’ compensation insurance may put a business at a competitive disadvantage against businesses operating with independent contractors. Some businesses use independent contractors to reduce the cost of labor by contracting at rates other than those provided under collective bargaining agreements and reducing the cost of employee benefits such as vacation/sick pay, health insurance, and pension/profit-sharing contributions. With this many opportunities and separate laws in play, businesses have been known to make costly mistakes.

The business owner should be aware that there are positives and negatives when contracting with independent contractors or hiring employees. The purpose of this article is to sensitize the reader to some of the issues so that he or she will better recognize when and how to seek appropriate counsel.

Q.: I am starting up a new business. How do I know whether my workers are employees or independent contractors?  
A.: The best time to deal with this issue is when you are forming your business. You will need an accountant to set up a bookkeeping system, project working capital needs, and establish tax return and other compliance systems. Ask your accountant first. Don’t rely on what you hear that “everyone else is doing.” An
experienced certified public accountant (“CPA”) will be familiar with the 20 common law factors, safe harbor under Section 530 of the 1978 Revenue Act, and the different tests used by the state. Your CPA also should know how competitors treat their workers. Your CPA should also know how competitors treat their workers. Your control over the worker, as well as whether the worker has a significant economic capital investment, licenses, or takes a meaningful risk of loss in connection with his or her services, have an important impact on the answer. There is usually a conservative approach. Your CPA should be able to help.

There are often alternative strategies. Some of these are legal, safe, and can save significant operating costs. Others are reckless or overly aggressive. A good tax, labor or employee benefits attorney is your best choice if you are in a gray area or have special business needs. Many local bar associations have “lawyer referral” services, and can provide you with information about attorneys who have the appropriate expertise and practice in your geographical area.

Your attorney or CPA can help you best if they are part of your professional team. Involve them in your decision-making and know when and how to use them.

Remember, attorney-client communications are confidential and privileged. The IRS cannot compel your attorney to disclose the facts you provide, the questions you have, or the advice given. While the advice of an accountant also must be kept confidential, communications with an accountant are not privileged in the same way. This means that the IRS can, during an examination, compel an accountant to disclose information pertaining to the preparation of tax returns, including the reporting positions taken on employment tax returns. When in doubt, explore any questions involving material risks with an attorney first.

Q.: I was examined by the Ohio Bureau of Employment Services or Workers’ Compensation. The agent concluded that my workers are independent contractors and not employees. The IRS can’t require me to treat them as employees, can they?

A.: Unfortunately, they can, and in many circumstances, they have. The approaches of the state and federal governments are not identical. Even the approaches within the federal government between the IRS and the Department of Labor are not identical.
Q.: I am incorporated and my workers all signed agreements stating that they are independent contractors. If the IRS examines my tax returns and reclassifies my workers, can I be held liable if they failed to pay their taxes?

A.: It’s very possible. The IRS generally can examine and adjust tax returns within three years after the due date or actual filing, whichever is later. If your business has no employees, it may never have filed an employment tax return. Theoretically, all years remain open to adjustment, regardless of the passage of time. Therefore, if you have treated all your employees as independent contractors, you may effectively have no statute of limitations and your risk-exposure may be great.

If your workers are treated as independent contractors but are truly employees, the law imposes an obligation on your corporation to withhold and pay over federal employment taxes to the IRS/Treasury even if the workers may have paid these taxes directly (as if they were self-employed workers). Your corporation can be required to pay the taxes again and the employees may be able to apply for a refund of a portion. The IRS is not bound by the contract between your corporation and its workers, although the contract can provide important evidence of your workers’ status. Unfortunately, if your contract is not carefully worded, your workers may not be classified as you intend.

Many IRS reclassifications have led to the bankruptcy of businesses. Some of the important cases interpreting employee status are decisions made by the Federal Bankruptcy Court. Withholding taxes are not dischargeable in bankruptcy. The IRS can assess the withholding taxes of the corporation against any officer, director or other person who has authority to pay, knows that the tax is due and willfully fails to pay it. Such personal liability can be used as a collection approach for some of these employment taxes in connection with a reclassification of workers. This personal liability is not dischargeable in bankruptcy.

These are extreme examples of what can happen. If you have a reasonable but mistaken belief that your workers were independent contractors and issued 1099 forms as required, there are statutes covering such situations, and your corporate obligation can be reduced. There is a government settlement program which may substantially reduce your exposure. Separate opportunities are available for taxpayers who voluntarily convert contractors to employees, and other, less beneficial opportunities are available even upon audit. The tax and penalties, perhaps even interest, may be reduced or eliminated, but to do so usually requires prospectively treating these workers as employees. If your workers cooperate with you to provide affidavits that they have paid their taxes, you may be able to take credit for some, though not all, of the employment taxes.
In short, it is important to have good advice when establishing your business. If you are examined on an employment tax reclassification issue, involve an attorney early; it can make all the difference.

**Q.: I am a general contractor. One of my subcontractors on an important job is having cash flow problems with his payroll. To keep his workers on the job, he has asked me to either loan him the net payroll or pay his workers directly. If I decide to help him out, could I be held liable for his employees’ employment taxes?**

**A.:** Yes. Either of these accommodations can leave you liable for the employment taxes of the subcontractor if the subcontractor does not deposit the employment taxes on time.

**Q.: I am buying an incorporated business and the seller has extensively used independent contractors. If I buy his stock and these workers were actually employees, can I be held liable? What if I just buy his assets?**

**A.:** If you buy his stock, the IRS and the State of Ohio can still examine, re-determine employment status, and collect against the corporate assets. Sometimes, careful examinations of the facts and a properly collateralized indemnity agreement will suffice. For example, filed tax returns may be examined, and other federal and state records may be examined by the buyer with the seller’s consent. Sometimes enough of the purchase price can be retained by the buyer to cover the potential tax exposure or other seller collateral can be retained by the buyer for a reasonable audit period, during which the seller agrees to hold the buyer harmless from loss. Other times, not. For example, it may be impossible to hold the buyer harmless if the seller must spend all of the proceeds to pay its known obligations.

Buying assets instead of stock can help. However, it is important to check for federal and tax liens and to inquire into pending examinations. Some of these federal and state employment taxes can follow the assets, in some instances even without the filing of a notice of lien.

In buying a business, there are not substitutes for careful examinations of liens, reviews of tax returns, careful evaluations, and well-drafted and collateralized purchase agreements.

—by Gary M. Harden, an attorney with the Toledo firm, Eastman & Smith, LTD.
“Employment-at-Will” Doctrine Has Limitations

Q.: *Due to a loss of business, I need to terminate a long service employee with health problems. Can I do it?*

A.: Except under certain circumstances, an Ohio employer generally has the right to fire an employee without cause according to the “employment-at-will” doctrine. Under this common law doctrine, employees who do not have promises of employment for a specific period of time and are not covered by a collective bargaining agreement are “employees at will,” meaning they may quit at any time, but may also be fired at any time. There are, however, some important limitations on an employer’s ability to fire workers (see below).

Q.: *I always gave a particular employee good reviews and once told him he would always have a job here if he kept up the good work. Does he have a contract?*

A.: Yes, every employee has a contract, including this employee. The contract covers what you will pay for work performed. Employment contracts are generally informal and do not have to be in writing.

The better question, though, is whether this employee has a contract for a specific term of employment. If not, the employment is “at will,” meaning either one of you can terminate the employment contract at any time.

In your case, you told your employee that he would always have a job if he kept up his good work, which he did. Although you meant it at the time, your circumstances have changed and you would like to terminate his employment. Can you do so?

The answer is yes, because you did not commit to employing him for a specific period of time. While it is unwise to make the sort of vague statement you made to your employee about continued employment, Ohio courts will *not* assume, in such a case, that the employer meant to continue the employment forever. Rather, courts will look at all of the circumstances, and not just the one statement you made. For example, a court may consider statements in an employee handbook or a promise such as, “You will have a job until the plant closes,” especially if made with an employee whose job was necessary for closing the plant.

Standing by itself, a promise of employment for “so long as you do a good job” is not specific enough to alter the at-will status of employment.
Q.: I hired a senior executive from California and paid to relocate her family to Ohio. She agreed to repay her moving expenses if she leaves before two years. She also agreed not to compete against me for two years after she leaves. Do these two agreements mean I cannot fire her for two years?
A.: No. You made two agreements for specific periods of time, but neither one of them promised employment for a specific period of time. The non-compete agreement does not cover her employment; rather, it covers the period after her employment ends.

Your promise to repay relocation benefits might look like an agreement to continue employment, but Ohio courts have generally concluded that such a promise defines the scope of an employee benefit and not the length of time of employment.

Q.: What if my employee also belongs to a union? Is he or she an “at-will” employee?
A.: No. Employees covered by collective bargaining agreements can only be terminated according to the terms of the agreement.

Most union contracts, called “collective bargaining agreements,” say an employee represented by the union cannot be fired except for “just cause.” Lack of work, documented poor performance or employee dishonesty may be “good cause” to terminate an employee. If you cannot convince the judge or arbitrator of this, however, the judge or arbitrator can order you to put the employee back to work with lost wages and benefits. In other words, the union could file a grievance challenging this termination, and the union may choose to take that grievance to “arbitration,” where a neutral third party will take evidence and decide whether your reason for the termination is for “just cause.” You will have to convince an arbitrator that your business conditions gave you just cause to terminate an employee, and that this was the proper employee to terminate.

Q.: Suppose I have no union and my employee has no contract. Can I fire him for any reason?
A.: No. Although you can fire an at-will employee for no reason, you cannot fire an employee for an unlawful reason. Under various state and federal laws, you generally cannot fire an employee:
1) because he/she supports or opposes a union;
2) because he/she complained to you, in concert with at least one other employee, about his/her wage, hours or other terms and conditions of employment;
3) based on race, color, religion, sex, or national origin;
4) because you want a younger work force;
5) for having a handicap that does not interfere with your employee’s job;
6) for refusing to break the law;
7) because a single creditor garnished the employee’s wages;
8) because he/she complained about illegal or unsafe activities;
9) for complaining to appropriate government agencies about safety matters;
10) for serving on a jury or testifying at a civil rights hearing;
11) for filing a worker’s compensation claim; or
12) to prevent her/him from receiving a pension.

However, you can legally terminate an employee simply because you do not like him/her or the way he/she dresses or acts, for instance. The issue is whether or not the reason for your decision is because the employee is in a “protected group” or engaged in “protected conduct” as listed above. If the reason for your decision is unlawful, you cannot fire the employee.

**Q.: If my employee is in a protected group or has engaged in protected conduct, does that mean I cannot fire him?**

**A.:** Not at all. It means you cannot fire the employee because of that reason. You can, however, fire an employee for a legitimate reason. The problem you may run into, however, is that the retaliation and discrimination laws allow employees to ask juries to second-guess employer motives. If you take an adverse employment action against an employee soon after he or she engaged in protected conduct, juries tend to believe that the protected conduct motivated the adverse employment action. This is the case where, for example, an employer suspends an employee for a long-standing attendance problem several days after the employee claimed he or she could not come to work because of poor air quality in the shop. Under these circumstances, a jury might believe that the suspension had more to do with the complaint of poor air quality than with the employee’s poor attendance.

At bottom, treat employees in a protected group or employees who engaged in protected conduct as you would treat any other employee. Apply discipline even-handedly. That way, if you need to take an adverse action against a protected employee, you can show that you dealt with that employee’s performance problem the same way you handled similar problems with non-protected employees.

—by Neil E. Klingshirn, partner in the Akron-based firm of Fortney & Klingshirn.
Know the Law Before Hiring or Relocating Employees for Work in Canada

Whether you already have operations in Canada, or you are thinking of embarking on operations in Canada, you should be aware of important differences in the labor and employment laws that will apply to those individuals you select for work in Canada.

Q: Our company will be sending a few of our employees to work at our branch in Ontario, Canada. Won’t American labor and employment laws simply apply to them while they are relocated?

A: Generally, no. As the law stands right now, U.S. labor and employment laws will not typically apply to issues that may arise during the Canadian phase of their employment, but that may depend on the circumstances of their employment. For instance, if they are not simply “on loan” to the Canadian branch for a short period of time (i.e., in the role of a consultant), if they are going to be on the payroll of the Canadian branch employer, and if they are paying Canadian income taxes, the terms of their employment will most likely be governed by Ontario and Canadian laws.

Q: Are there any laws in Ontario we should know about like the Fair Labor Standards Act here that deal with issues like minimum wage, overtime, and hours of work?

A: Yes. Employment in Canada is regulated by the province in which the employee is working, unless the employer is a federal corporation (e.g., banks, post offices). That means every province has legislation designed to protect all employees working in that province regarding issues like minimum wage, overtime, hours of work, statutory holidays, benefit plans, vacation, pregnancy and parental leave, and termination issues. In Ontario, this legislation is called the Employment Standards Act (“ESA”).

Q: Is there anything special that our company should know about in advance if we have to terminate an employee who is working in our Ontario branch?

A: Yes. There are many differences between Canadian and American employment laws. For instance, “employment-at-will” does not exist in Canada. That means that Canadian courts insist that the relationship between an employer and an employee is a binding contract (even if there is nothing in writing). While either the employee or the employer can “break” that contract for any reason that isn’t discriminatory, and at any time during the employment relationship, notice must be given of either party’s intention to break that contract. If no notice is given, money damages (or notice pay) must be paid.
**Q:** What is “notice pay”?

**A:** Notice pay is the equivalent to the compensation the employee would have received had he or she been given sufficient notice of the employer’s intention to “break the contract.”

**Q:** How much notice is enough?

**A:** Ontario’s ESA sets out the minimum amounts of notice that must be given before employment can be terminated. However, if the employee is a “professional” (e.g., managers, accountants, executives, engineers, computer systems analysts), what constitutes sufficient notice will usually depend on a variety of other factors; such as: 1) the kind of work the employee performs; 2) how long the employee has been working with the company; 3) the employee’s age; and, 4) the job market (how long it will take for the employee to find another job). What constitutes “sufficient notice” can only be assessed on a case-by-case basis.

**Q:** Isn’t “notice pay” the same as “severance pay”?

**A:** No. In Ontario, notice pay is different from severance pay. In almost all cases, any employee who is not being terminated for cause will be entitled to notice pay. Under the ESA, whether or not a terminated employee is entitled to severance pay depends on whether or not the terminated employee has been employed with the company for at least five years; and, how much money your company spends a year on its Canadian payroll; or, how many employees are being simultaneously terminated. So, under certain circumstances, an employer may have to pay both notice pay and severance pay to terminated employees.

**Q:** What if one of our employees becomes disabled while working in Canada? Are we obliged to follow any laws like the Americans with Disabilities Act (“ADA”) here?

**A:** Yes. The Ontario Human Rights Code (“OHRC”) is the law that protects individuals in Ontario from different types of discrimination (race, age, gender, national origin, etc.) and includes disability discrimination. The OHRC imposes an onerous duty on employers to accommodate physically and mentally disabled employees “to the point of undue hardship.”

**Q:** What is “undue hardship”?

**A:** If the Ontario branch of your company finds itself in a situation where one of its employees is unable to work due to medical reasons, the company will generally be expected to accommodate the employee’s disability until it becomes financially impossible for the company to continue doing so. In other words, an Ontario employer has to be on the verge of bankruptcy before it can legally terminate a disabled employee. Otherwise, the employer could be faced with an OHRC charge of discrimination.
Q: If an employee who is working in Canada accuses the company of discrimination, can that employee file a lawsuit?

A: No. Discrimination is not a tort under Canadian law and employees cannot simply file a lawsuit if they believe they have been discriminated against. Employees must file a complaint with the Ontario Human Rights Commission, which is an informal “court” that enforces the Code. Complaints are not heard before judges and juries. Furthermore, if the company's actions are found to be discriminatory, the employee will not always be entitled to any damage awards; instead, the employer may be ordered to amend its discriminatory policies, issue an apology, and/or reinstate the complainant. When a successful complainant is awarded money damages, the cost is fairly modest by American standards: fines are limited to $25,000 and punitive damages are limited to $10,000 (in Canadian dollars).

–by Cindy-Ann L. Thomas, an attorney who is admitted to the Bars of Ohio and Ontario, Canada. Ms. Thomas is with the Cincinnati branch of the law firm of Taft, Stettinius & Hollister, LLP, where she practices management-side labor and employment law.
Employers Must Take Steps to Avoid Hiring Illegal Aliens

**Q.:** I own a restaurant, and often am approached about offering jobs to aliens. What does the law say about whom I can and cannot hire?

**A.:** Ever since passage of the Immigration Reform and Control Act of 1986 (“IRCA”), it has been a violation of federal law for any employer (even of one employee) to knowingly employ an alien not authorized to work in the United States, or to hire anyone (citizen or alien) without keeping special records that verify the employment status of all employees.

**Q.:** What steps do employers have to take to avoid employing illegal aliens?

**A.:** Employers generally must require every new hire, even U.S. citizens, to complete a Form I-9, titled the “Employment Eligibility Verification Form,” published by the U.S. Immigration and Naturalization Service (“INS”). The I-9 process requires employers to maintain a difficult balance made even more difficult in the aftermath of the events of Sept. 11, 2001. On the one hand, IRCA requires employers to insist that all new hires present documentation to verify their identity and work eligibility. On the other hand, the Form I-9 requirements are designed to prevent unnecessary or discriminatory inquiry into the employee’s nationality, and IRCA generally prohibits employers from discriminating against non-citizens who are eligible to work.

**Q.:** What documents must employers review to complete the Form I-9?

**A.:** To fulfill its I-9 obligations under IRCA, employers must require new hires to supply documents to establish their identity and their employment eligibility. Most new hires will need to supply one document to establish their identity (a driver’s license or any other document found on “List B”) and another to establish their employment eligibility (a birth certificate or any other document found on “List C”). A few documents establish both identity and employment eligibility (such as a passport or some other document found on “List A” on the back of the Form I-9).

**Q.:** Are photocopied documents acceptable?

**A.:** No, with one exception: certified copies of birth certificates are acceptable.

**Q.:** What are the earliest and latest dates for completing an I-9 Form?

**A.:** The form cannot be completed until the applicant is offered a job, and it must be completed no later than three days after the employee starts working, unless the employee is an alien who submits a “receipt” showing an application to the INS for a valid employment authorization document, and then supplies the document within 90 days.
Q.: Do I, as an employer, need to keep a copy of the documents presented to verify identity and employment eligibility?
A.: No, but you should. Keep in mind, however, that if you choose to keep a copy for one new hire, you must keep copies for all new hires.

Q.: Where and for how long must I keep I-9 forms?
A.: Keep all I-9s and supporting documentation in a file that is separate and apart from any personnel file, for a period of three years after the date of hire or one year after the termination of the employment relationship, whichever is later.

Q.: Is it my responsibility to determine whether or not the documents presented to me are authentic?
A.: If the new hire presents qualifying documentation that reasonably appears genuine and relates to the person presenting it, the employer must accept it; it cannot discriminate against non-citizens by insisting on any particular form of documentation or on additional documentation requirements for proof of identify or employment authorization beyond those established by IRCA. If the documentation turns out later to be fraudulent, and you have otherwise complied with the I-9 rules, you will not be subject to sanctions. More generally, IRCA prohibits employers with four or more employees from discriminating on the basis of citizenship status, which occurs when adverse employment decisions are made based upon an individual’s real or perceived citizenship or immigration status. Examples of citizenship status discrimination include employers who hire only U.S. citizens or U.S. citizens and green card holders, employers who refuse to hire asylees or refugees because their employment authorization documents contain expiration dates, and employers who prefer to employ unauthorized workers or temporary visa holders rather than U.S. citizens and other workers with employment authorization.

Q.: If a graduating foreign student applies for an opening for which he or she is clearly qualified, but can obtain employment eligibility only if I apply to the INS on his or her behalf, am I legally required to submit the application?
A.: No. An employer has no obligation to obtain permission to employ an otherwise ineligible foreign national.

Q.: What should I do if I rehire a person who previously filled out a Form I-9 for me?
A.: You can use the old Form I-9 if you rehire the person within three years of the date the original I-9 was completed. You may also choose to complete a new I-9 instead.

Q.: What are the penalties for failing to prepare or maintain a Form I-9?
A.: An employer can be fined anywhere from $100 to $4,000 per violation, depending upon the severity of the offense.
**Q.** What are the penalties for discrimination based on citizenship status?

**A.** Penalties for discrimination range between $275 and $2,200 for each victim for the first offense, $2,200 to $5,500 for the second offense, and $3,300 to $11,000 for the third offense.

—by Barton A. Bixenstine, an attorney associated with the Cleveland law firm, Ulmer & Berne, LLP.
Employees today are ready, able and willing to leave your job for one with your competitor, who may even have recruited them. Small business owners are particularly vulnerable to “employee raiding” by larger competitors.

To protect their investment in employees, small business owners increasingly turn to non-competition agreements. Through such agreements, employees agree not to compete with their employers for specified periods of time in particular locations. For example, an employee may agree not to compete with a Columbus-based employer while employed and for one year following employment within a five-mile radius of downtown Columbus.

**Q.: Are non-competition agreements enforceable?**

**A.:** Courts generally will enforce non-competition agreements if:

1) the employer proves it has a legitimate business interest to protect;
2) the employee’s right to compete is restricted only enough to protect the employer’s business interest;
3) the employer gave the employee something in exchange for the non-competition agreement; and
4) the agreement does not injure the public.

Most courts will enforce a non-competition agreement for a year or two in the same geographical area that the employee worked.

CAVEAT: If you do business outside Ohio, some other states refuse to enforce such covenants.

**Q.: What are some examples of an employer’s legitimate business interests?**

**A.:** An employer can legitimately prevent an employee from taking advantage of relationships or information acquired as a result of the employment. If an employer gives a new employee its customer list, for example, the employer can enforce an agreement preventing the employee from contacting those customers on behalf of a competing business.

**Q.: Must I give my employees anything in return for signing non-competition agreements?**

**A.:** Yes. To enforce such a contract, you should give the employee something for signing it. The best thing to give in exchange for a non-competition agreement is a job. In other words, if you require a non-compete at the time of employment and as a condition of employment, you have given the employee
enough to make the agreement enforceable. If you want a current employee to sign a non-compete, provide a modest signing bonus. Some courts require more.

Therefore, you may wish to wait until you are ready to adjust the employees’ pay to ask for the agreements. Your employees could choose, then, to sign the agreement or forego a raise.

Q.: How can a non-competition agreement injure the public?
A.: The public may be harmed if there is an undersupply of the service your employee provides. For example, a physician’s group cannot prevent a doctor it employs from treating patients who might not otherwise receive medical help due to a shortage of doctors.

Q.: What if my employees refuse to sign?
A.: You might consider hiring other employees. You must weigh the risk that an employee might use information to compete against you against the cost of hiring a new employee. If the risk of competition is too great, ask all future employees to sign the agreement as a condition of their continued employment. Ohio law allows you to fire or refuse to hire an employee who does not sign a non-competition agreement.

Q.: I need to terminate an employee who I have reason to believe might compete against me. Can I get a non-competition agreement from that employee before the termination?
A.: Yes, if the employee agrees and you provide something of value for it, such as severance benefits. However, such an individual is in a very good bargaining position and may demand more than you are able or willing to pay.

Q.: Is there any other way I can protect myself if I do not have non-competition agreements with my employees?
A.: Yes. Ohio prohibits employees from misappropriating “trade secrets” from former or current employers. Examples of trade secrets include confidential customer lists and pricing information and secret formulas and methods. Keeping trade secrets as “secret” as possible and preventing employees from misusing confidential information may effectively limit their ability to compete against you.

Q.: Can I do anything to stop another employer from hiring my employee to compete against me?
A.: Yes. If the other employer knowingly causes the employee to breach a non-competition agreement, you can sue the new employer for unlawful interference with the non-competition agreement between you and your former employee.

Know How To Handle Retaliation and Whistle-Blowing

Q.: Why should I worry about retaliation suits?
A.: If employees engage in “protected conduct,” they can claim “retaliation” for later discipline or termination. If successful, they can recover significant monetary damages.

To survive the threat of retaliation claims employers must:
1) recognize protected conduct when they see it;
2) respond properly to the protected conduct; and
3) base all adverse employment decisions on legitimate business reasons.

Q.: What is retaliation?
A.: The gist of a retaliation claim is that an employer “gets back” at an employee for doing something that is protected by law. To win a retaliation claim, an employee must prove that:
1) he/she engaged in protected conduct;
2) he/she was demoted, disciplined, fired or otherwise suffered some adverse employment action; and
3) his/her protected conduct was a cause of the adverse employment action.

Q.: Is whistle-blowing the same thing?
A.: Not quite. Whistle-blowing is a form of protected conduct (i.e., reporting an employer for alleged violations of law or safety regulations). For an employee to win a retaliation suit against an employer, the employer would have to respond to the whistle-blowing or other protected conduct by doing something that adversely affected the employee’s job (such as demoting or firing that employee).

Q.: What are some other examples of protected conduct?
A.: Other examples of protected conduct include:
1) asking for overtime pay;
2) filing a complaint with the Department of Labor;
3) reporting sexually harassing conduct;
4) serving for the armed forces or reserve; and
5) applying for medical benefits or leave.

A less obvious example occurs when an employee complains about general working conditions on behalf of others, even if the conditions comply with the law. Federal labor law prohibits retaliation against an employee who engages in such “concerted activity.” Generally speaking, an employee engages in protected conduct any time he or she exercises an individual right or does something of public importance.
Q.: How do I know what conduct is protected?
A.: Get to know your employees’ rights. When employees exercise their rights, they engage in protected conduct. They also engage in protected conduct by doing things valued by the public, such as reporting wrongdoing or serving their country or community.

Q.: What should I do if my employee engages in protected conduct?
A.: 1) Do not get angry.
2) Address the complaint made by the employee.
3) Make future employment decisions as if the employee had not engaged in the protected conduct.

Q.: Does this mean I can’t fire someone after he or she does something protected?
A.: Not at all. It means you cannot fire someone because he or she did something protected. So long as your reason for terminating an employee’s employment is legitimate, you have not broken the law. The problem for employers is that retaliation suits let juries second-guess your motives. If, for example, you terminate your employee very shortly after that employee engages in protected conduct, juries will be inclined to believe that the protected conduct caused the termination.

Q.: What if the employee engaged in so-called “protected conduct” with no basis whatsoever. Can they really sue me?
A.: Maybe not. The U.S. Supreme Court recently ruled that an employee could not win a suit claiming retaliation for complaining about sexual harassment where the alleged harassing conduct was such that a reasonable person would not consider it to be sexual harassment. Therefore, the Court held, the employee had not engaged in protected conduct at all and therefore could not pursue a retaliation claim.

As a practical matter, if it appears that the employee has engaged in protected conduct, respond to the conduct in good faith, without getting angry or straying from sound business justifications for any employment action. Theoretically, you can lawfully discipline an employee for making a completely groundless, bad faith complaint. You should, however, contact legal counsel beforehand and expect a challenge from the employee.

Q.: How can I survive the threat of a retaliation suit?
A.: 1) Recognize protected conduct and respond to it properly.
2) Always base employment decisions on a good business reason. Test yourself by asking whether you would do the same thing if the employee had not engaged in the protected conduct.
3) Document (write down) the reasons leading up to adverse employment actions. If the reason is discipline for poor performance, write down the fact of poor performance before you discipline the employee.
4) Finally, consult legal counsel in a close case. Legal counsel can show you how to demonstrate your good intent and negate the suggestion of unlawful retaliation.

Remember, if it looks like you got mad and then got even, you are fair game for a retaliation suit.

What You Should Know about Severance Payments

Q.: *Is there a law that requires employers to provide severance pay?*
   A.: No. An employer has no obligation to provide severance pay. The only benefit that employers must by law provide is unemployment compensation.

Q.: *I have in the past paid severance to employees that I had to fire. Do I have to give the same severance to others?*
   A.: If you create a severance plan, employees covered by the terms of the plan are entitled to the benefits provided by the plan. However, you can create, modify or abolish a severance plan as you see fit. Most employers, particularly small employers, choose to have no severance plan at all.

In your case, the issue is whether you created a severance plan by having paid severance in the past. The mere fact that you gave severance payments to other employees in the past will not, by itself, create a severance plan. However, if you have been so consistent in the past that existing employees can tell how much they will receive and when, they could make a claim for severance benefits. In such a case you should consult legal counsel.

Q.: *I am willing to pay severance, but I want my employee to promise not to sue me in exchange for it. Can I do that?*
   A.: Yes. So long as you do not have a plan in place that requires you to pay the same severance without getting a release, or so long as your plan conditions severance payments on a release of rights (i.e., a promise not to sue), you can condition severance benefits on your employee’s promise not to sue.

Q.: *Why do I have to wait 21 days for the employee to accept the severance pay? Can he or she accept it before that time?*
   A.: The 21-day waiting period must be honored only in cases of age discrimination (although it has been adopted through practice to apply to most releases). Therefore, in order for an employee’s promise not to sue for age discrimination to be enforceable, an employer must give the employee 21 days to consider the offer. This is to prevent “gun-to-the-head” decisions by employees. As a legal matter, the employer cannot rescind the offer during the 21-day waiting period, which gives the employee time to consider it. Generally speaking, if the employee wants to accept the offer before the end of the waiting period, he or she can do so.
Q.: What happens to the waiting period if my employee counter-offers, asking for a better package?
A.: Technically, once the employee asks for a better package, he or she has “rejected” your offer by making the counter-offer, which you can now accept or reject. If you are willing to accept the employee’s counter-offer, you may not have to wait 21 days.

Q.: How much should I offer as severance?
A.: Evaluate any claims that the employee may have. Find out what the claims are worth if he or she were to win, the chances that they have of winning, and the attorneys’ fees and court costs that they will likely pay in an effort to win. You should then compare this (plus the aggravation and uncertainty of litigating), to the value of the package that you will offer. An employee should be willing to accept substantially less in severance than what he or she might recover from uncertain and costly litigation.

Q.: When should I negotiate a severance package with an employee?
A.: Severance typically will not come up until an employer makes a decision to terminate employment. At that point put an offer on the table to start the discussion and negotiate to the best of your ability.

Another point to discuss severance is, ironically, at the beginning of employment. A valued prospect may be able to obtain an up front commitment for severance pay in an employment agreement. If that the price of severance is reasonable compared to the value of obtaining an employment agreement, consider agreeing to it. In addition, severance pay can be structured to cover some or all of a period of non-competition. If so, courts are much more willing to enforce the non-competition agreement, since the employee is receiving something to live on during the non-competition period.

Q.: Are there any rules of thumb for how much severance an employer will pay?
A.: Not really. Again, an employer generally has no obligation to provide severance payments. Experience shows that employers rarely offer severance pay to hourly workers. Employers who offer severance will typically provide one week per year of service to employees below the officer or executive rank, and up to a month per year of service to executives and officers. In addition, some severance plans cap benefits at a specified level.

For most small employers, severance pay comes up only in exchange for a release of rights or to help a valued employee make a transition to new employment after losing his or her job through no fault of their own. In those cases you should look at what is fair and appropriate, and what the employee will accept.

—by Neil E. Klingshirn, partner in the Akron-based firm, Fortney & Klingshirn.
Q.: What does the EEOC (U.S. Equal Employment Opportunity Commission) do?
A.: The EEOC and a similar state agency, the Ohio Civil Rights Commission (“OCRC”), enforce laws that prohibit employment discrimination based on age (for employees over 40), sex, pregnancy, race, national origin, disability, creed or religion.

Q.: Is all discrimination unlawful?
A.: No. For example, you do not have to hire someone who lacks qualifications. You could also refuse to hire anyone born under the sign of Aquarius, without breaking the law. Why?

Discrimination laws respond to specific, invidious biases that have worked their way into employment decisions. These biases lack any valid business justification and have been used to deny people employment opportunities because of the bias.

While a bias against people born under the sign of Aquarius lacks any business justification, it is not so widespread that Aquarians generally are at a disadvantage when it comes to employment opportunities. Congress has thus only authorized the EEOC to investigate and remedy discrimination based on age, sex, pregnancy, race, national origin, disability, creed or religion.

Q.: Can I refuse to hire someone who is not qualified?
A.: Yes. Moreover, as the employer, you can decide what qualifications are necessary for your job. You cannot, however, use different qualifications for protected and non-protected class members (for example, women but not men have to pass a skills test) or set qualifications that exclude a disproportionate number of protected class members (for example, minimum lifting requirements that disqualify a greater percentage of women than men), where such requirements are not necessary to perform the job in question.

Q.: Could I be charged with employment discrimination even if I do not discriminate?
A.: Yes. Applicants or employees can file a charge of discrimination with the EEOC or the OCRC even if you based your decision on a legitimate, non-discriminatory reason. Once a charge is filed against you, the EEOC or the OCRC will investigate your hiring practices.
**Q.: Does the EEOC investigate anything other than discrimination?**

**A.:** Yes. The EEOC also investigates charges of “retaliation.” An employee can claim retaliation if:

1) he or she files or helps investigate a charge of discrimination;
2) you take an adverse employment action (fire, demote or discipline the employee); and
3) the employee can show a causal connection between the two.

(For further information about retaliation suits, see, “Know How To Handle Retaliation and Whistle-Blowing,” also in this handbook.)

**Q.: What should I do if I am charged with discrimination?**

**A.:** Consult legal counsel. You need to give the EEOC a thorough explanation of your employment decision. This explanation must balance the EEOC’s need to investigate the charge with your interest in keeping confidential employment decisions confidential. Legal counsel can help you balance these interests.

Make sure you do not give the EEOC a false explanation for what you did. You are better off if you give no reason for taking an adverse employment action than if you give a false reason. If the EEOC discovers that the reason you gave was false, it can find you liable for discrimination on that basis alone.

—by Neil E. Klingshirn, a partner in the Akron-based firm, Fortney & Klingshirn.
Employers Must Comply with the Americans with Disabilities Act

**Q.:** What employers are covered by the Americans with Disabilities Act (“ADA”)?

**A.:** Private employers, state and local government employers, employment agencies and labor unions with fifteen or more employees are covered. (Federal employees and employees of federal contractors may be covered under a different law, the Rehabilitation Act of 1973. This Act has some different requirements, including a 30-day time limit for filing complaints about rights violations.) Note also that the ADA’s state law counterpart, at Ohio Revised Code Chapter 4112., applies to employers with four or more employees in Ohio.

**Q.:** What employment activities are covered by the ADA?

**A.:** The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

**Q.:** Who is protected by the ADA?

**A.:** Employees and applicants with a disability (that is, who are substantially limited in a major life activity by reason of a physical or mental impairment) are covered, so long as they are able to perform all the essential job duties of the position in question, given reasonable accommodations if necessary. Also covered are persons with a history of a disability, or who are regarded (even mistakenly) by the employer as having a disability.

**Q.:** Is everyone with a physical or psychiatric diagnosis covered by the ADA?

**A.:** No. The ADA has a two-part definition of “individual with a disability.” First, the person must have a physical or mental impairment. This can include “emotional or mental illness.” Second, the impairment must result in a substantial limitation in one or more major life activities such as thinking, concentrating, learning, working or caring for oneself. The limitation must also be long-term in nature. Therefore, not everyone with a disorder will be covered by the ADA, because some disorders are short-term in nature or result in only minor limitations in functioning.

In addition, the person must be substantially limited in a major life activity even in light of the effects of available mitigating measures. Thus, a person whose poor vision is corrected by eyeglasses, or whose depression is substantially alleviated by medication, would not be considered an individual with a disability.
Q.: Can a person with a psychiatric diagnosis be excluded from coverage for other reasons?
A.: There are several exclusions from coverage. People who use controlled substances for unlawful purposes, including those who take any prescribed drug without the required supervision of a licensed health care professional, are not protected by the ADA when the covered entity acts on the basis of such use. However, the ADA does protect people who are participating in or have completed a supervised drug rehabilitation program and no longer use illegal drugs. The ADA also excludes sexual compulsions, preferences and disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current use of illegal drugs.

Alcoholism is a covered disability, but behavioral manifestations such as on-the-job drinking or working while alcohol impaired are not covered.

People who have disabilities but pose a “direct threat to health and safety” of themselves or others that cannot be eliminated by reasonable accommodations are not covered by the ADA. People with mental disabilities cannot be excluded based on general, stereotypical assumptions about dangerousness, however. Any threat must be based on sound medical judgment and objective evidence of factors such as the duration of the risk, the nature and severity of the potential harm, the likelihood that harm will occur, and the imminence of the harm. Of course, a person with a disability must be able to perform the essential job functions with or without reasonable accommodations in order to be covered by the ADA.

Q.: Does the ADA protect people who do not have disabilities but have a relationship to or association with a person with a disability?
A.: Yes. The ADA prohibits discrimination based on “relationship or association” in order to protect people from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning disabilities. For example, the ADA would protect a person with a disabled spouse or child from being denied employment because of an employer’s unfounded assumption that the applicant would use excessive leave to care for the disabled spouse or child. It also would protect a person who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

Q.: Can a potential employer make inquiries about an applicant’s disabilities?
A.: Employers may not ask any questions about the presence or nature of a disability on job applications or during job interviews. Instead, the employer should define the essential functions and conditions of the job and then ask the applicant about his or her qualifications to perform the job. Employers can ask disability-neutral questions such as questions about job history (e.g., gaps in
employment). For more detailed information about what questions are appropriate for employers to ask, consult the Job Accommodation Network’s Web site: www.jan.wvu.edu or contact that organization at (800)526-7234. (The Job Accommodation Network in the United States is a service of the President’s Committee on Employment of People with Disabilities. In Canada, the Job Accommodation Network is a service of Human Resource Development Canada/Canadian Council on Rehabilitation and Work.)

**Q.:** Does a person with a mental disability lose the right to get a reasonable accommodation for the mental disability if he or she fails to disclose the existence of a disability during the hiring process?

**A.:** No. Employees may disclose that they have a disability after many years on the job and request reasonable accommodation at that time. Of course, an employer is only required to make accommodations for known disabilities of applicants or employees.

**Q.:** Once a person with a mental disability has been offered a job, can the employer require a “post-offer medical examination?”

**A.:** Yes, as long as all applicants in the job category, and not just those suspected of having a disability, are required to be examined. After a “conditional job offer” has been extended, there are no limits on inquiries about the presence or nature of a disability. However, the employer may only withdraw a job offer if the applicant cannot perform the essential functions of the job with or without reasonable accommodations.

**Q.:** Does an employer have the right to require documentation of the employee’s disability and the need for accommodations?

**A.:** Once on the job, the employer may ask questions that are “job-related and consistent with business necessity.” When an employee asks for reasonable accommodations, the employer is entitled to information to substantiate that request and to work out an effective accommodation.

**Q.:** What is a reasonable accommodation?

**A.:** Reasonable accommodation is a modification or adjustment to a job or work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. It includes adjustments in policies or procedures and other modifications to assure that qualified people with disabilities have rights and privileges in employment equal to those of non-disabled employees.
Q.: What kinds of actions are required to make reasonable accommodations?

A.: Examples of reasonable accommodation include making facilities readily accessible and usable by a person with a disability; job restructuring; modifying work schedules; acquiring or modifying equipment; reassigning an employee to a vacant position for which the person is qualified; or providing private or quiet work space. To find a list of possible reasonable accommodations for people with physical and psychiatric disabilities, consult the Job Accommodation Network’s Web site at: www.jan.wvu.edu.

Q.: Are there limitations on the duty to provide accommodations to employees?

A.: Yes. Employers are not required to lower quality or quantity standards in order to make an accommodation, nor are they required to provide personal use items such as glasses or hearing aids. Employers are not required to create new job positions, nor to find a position for an applicant who is not qualified for the position sought.

In addition, an employer is not required to make an accommodation if it would impose an “undue hardship” on the business. Undue hardship is defined as “an action requiring significant difficulty or expense” when considered in light of the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the business. Generally, a large business would be expected to make greater effort or spend more money to make accommodations than a small business.

Regular and predictable attendance is commonly viewed as a minimum standard of performance, although employers might be required to tolerate some additional absences for treatment needs, such as short-term hospitalization. There are other laws, such as the Family and Medical Leave Act (“FMLA”) and state workers’ compensation laws that can provide additional rights or restrictions on job leave or absences.

Q.: Does the ADA protect confidentiality?

A.: Yes. Any information about an employee’s disability must be stored on separate forms and treated as a “confidential medical record.” The information must be stored separately from other personnel files in a locked cabinet or other secure storage container, where only specifically designated people can access it. However, there are five exceptions to the confidentiality requirements:

1) Supervisors and managers may be informed about necessary work restrictions and other necessary accommodations.
2) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment, or if any special procedures are required in case of fire or other evacuations.
3) Government officials should be provided access to information when investigating disability anti-discrimination compliance.
4) Relevant information may be provided to workers’ compensation offices.
5) Relevant information may be provided to insurance companies when the company requires a medical examination to provide health or life insurance to employees.

The information should not be shared with anyone else without the explicit consent of the person with a disability.

**Q.: May the employer or the employer’s health insurer deny employees all health insurance based on a history of mental illness?**

**A.:** No. Employers may not enter into or participate in any contractual relationship that has the effect of discriminating against employees with disabilities. If the insurer discriminates, the employer must provide other insurance that is comparable to the insurance coverage of employees who do not have disabilities. An individual with a “pre-existing condition” may be denied coverage for that condition, but cannot be denied coverage for illnesses or injuries unrelated to the pre-existing condition. Insurance policies also may limit coverage for certain procedures or treatments, but may not entirely deny coverage to a person with a disability. Consequently, a person with a history of mental illness could be denied treatment for that pre-existing condition, or have limitations imposed for coverage of it, but could not be denied treatment for other, physical illnesses.

**Q.: How might my employees enforce their rights under the ADA?**

**A.:** Employees likely will try to resolve disputes with the employer before taking formal action. Sometimes questions about the existence of a disability or the necessity for an accommodation may be resolved if the employee provides the employer with documentation. If informal measures fail, federal law requires that the person with a disability file an administrative complaint before a lawsuit can be filed.

An administrative complaint with the U.S. Equal Employment Opportunity Commission (“EEOC”) must be filed within 300 days of the date the violation occurred. Ohio law also allows the filing of a complaint with the Ohio Civil Rights Commission (“OCRC”). This must be done within six months of the date the violation occurred. If either agency investigates and determines that there has been a violation, the agency can negotiate a resolution or sue in court. If the agency fails to negotiate or concludes that there is no discrimination, it will issue a letter to the complainant who may then sue in court.
Possible remedies include: hiring; reinstatement; back pay; court orders to stop discrimination; or orders to provide reasonable accommodation. Compensatory damages may be awarded for actual monetary losses and for future monetary losses, mental anguish, and inconvenience. Punitive damages may be awarded as well, if an employer acts with malice or reckless indifference. Attorneys’ fees also may be awarded.

Note: The Supreme Court has ruled that state employers are immune from monetary damage awards under Title I of the ADA. State employees can still obtain injunctive relief under the ADA, however. In addition, money damages remain available for state employees for similar claims under the Rehabilitation Act of 1973.

Under some circumstances, employment contracts (e.g., union agreements) can limit the action an employee can take. For example, if carefully worded, an employment agreement might require that discrimination disputes be resolved through binding arbitration.

The administrative agencies can be contacted at:

U.S. Equal Employment Opportunity Commission (call to find out which office covers your county):

Cleveland District Office
1375 Euclid Ave., Room 600
Cleveland, Ohio 44115
(216)522-2001

Cincinnati District Office
525 Vine St., Suite 810
Cincinnati, Ohio 45202
(513)684-2851
(800)669-4000 (both offices)

Ohio Civil Rights Commission
220 Parsons Ave.
Columbus, Ohio 43215
There are six regional offices.
Call (614)466-9353 to find out where to file.

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