

CHAPTER

3

The Legal Framework of Contemporary Human Resources

Chapter Overview

After reading this chapter, readers will:

- Understand the evolution of the regulated environment within which human resources must work in serving a health care organization
- Trace the chronology of legislation affecting employment, beginning in 1932, with a brief explanation of each pertinent law
- Agree that 1964 was a pivotal year in legislation affecting human resources
- Understand highlights of legislation enacted in 1964 and beyond
- Acknowledge 1964 as the beginning of an effort by the federal government to shift considerable social responsibility to employers
- Describe the cumulative effects of employment legislation to date

■ CHAPTER SUMMARY

This chapter is intended to provide readers with sufficient background and knowledge of employment legislation to enable them to develop an understanding of the effects of employment law on the activities of a department manager. It provides a review of the laws affecting aspects of the employment relationship. These pieces of legislation are described using non-legal terminology. In each instance, how the pertinent piece of legislation

approaches its subject is discussed. The importance of each law is reviewed along with the success each has had in addressing a societal need through the legislation's stated intent. Effects of the more significant laws are reviewed along with descriptions of some apparently unintended outcomes.

Case Study: Does Weight Constitute a Disability?

Susan J. applied for a position as a licensed practical nurse at County Memorial Hospital. She had generated an impressive record during her training, possessed good references from prior employment in two different private duty situations, and interviewed well. Susan was clearly very heavy. Helen Harding, the Director of Nursing at County Memorial, estimated her weight to exceed 300 pounds. An ideal weight for her five foot five inch body was 125 to 130 pounds. A reasonable weight range for someone of that height was 120 to 140 pounds. After the interview, Helen extended a tentative offer of employment to Susan. The offer was contingent on passing the hospital's pre-employment physical examination.

The County Hospital employee health physician examined Susan but declined to approve her for employment unless she could first achieve a safer weight, in her case less than 275 pounds. Susan failed to get the job because of her overweight condition. She then filed a complaint with the State Division of Human Rights charging discrimination based on disability, citing Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. She claimed that her only responsibility was to demonstrate that she was capable of doing the job, and that in spite of her physical handicap she could still adequately perform all required duties of the job. Her obesity, she claimed, was due to a medical condition over which she had no control.

County Hospital moved for dismissal of the complaint on three grounds. First, it argued that obesity was not a true physical impairment under the law. Second, it claimed that Susan's condition resulted from her own voluntary actions. Finally, the hospital claimed that she could reduce and control her weight if she so chose.

How might the foregoing situation be resolved? Is obesity truly a disability, or will a different argument prevail? Do you believe that the hospital will be successful in getting the complaint dismissed, or will Susan successfully persuade the Division of Human Rights to act on her complaint? Why?

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■ A REGULATED ENVIRONMENT

An important disclaimer is in order before proceeding with the contents of this chapter. Nothing in this chapter constitutes legal advice, and no such advice should be inferred from its contents. Individuals with questions

about the applicability of any particular point of law should take those questions to the appropriate people in their organization. These may be persons in Human Resources (HR), Administration, or Risk Management who can provide or secure appropriate responses.

The pivotal year when HR began to change for all time was 1964. Internal operations that referred to people were still called personnel in most organizations. Sweeping civil rights legislation came into being with the passage of the Civil Rights Act of 1964. The specific turning point was the appearance of Title VII. This legislation marked the beginning of significant changes in relations between government and business. It marked a change in philosophy that resulted in a completely new direction for government in concern for the citizens of the United States.

Pre-1964: Regulation Minimal and Tolerable

Before 1964, businesses were free to treat employees essentially as they chose, with only two exceptions: wage-and-hour laws and labor-relations laws. Prior to 1964, the only laws that had noticeable impact on the employment relationship were the Fair Labor Standards Act and related state laws, and the National Labor Relations Act.

The Fair Labor Standards Act governs the payment of wages and other related conditions of employment. This and similar laws existing in some of the states are commonly referred to as wage-and-hour laws.

The National Labor Relations Act governed relationships between work organizations and labor unions. Similar laws existed in some but not all states. They were relevant only to organizations where employees were unionized or where active union organization efforts were underway.

Prior to 1964, managers did not have to be knowledgeable about many regulatory requirements. Few legal restrictions impinged on HR operations or on managers in general. The majority of business organizations complied with the wage-and-hour laws as a matter of operating routine. Leaders of organizations where there was a union presence, either being organized or already under contract, generally expected to comply with all applicable labor laws.

Other applicable legislation was in place before 1964, but the Fair Labor Standards Act and the National Labor Relations Act were the only ones having a visible influence on HR operations and department management. These two are discussed more fully in the chronology of legislation that follows.

The turning point of 1964 heralded a change in philosophy concerning government's relationship with business. For years, the governing philosophy had largely been one of hands-off to the maximum practical extent. Employers were only expected to concern themselves with wage-and-hour requirements and restrictions imposed by labor relations legislation. Since 1964, the government has been addressing many of the perceived needs

of individuals by involving employers in meeting those requirements. President Johnson's signature on the Civil Rights Act in 1964 initiated a significant change in the actions that government would be taking on behalf of its citizens. This trend continues to the present day.

■ THE GROWING REGULATORY ENVIRONMENT: AN ANNOTATED CHRONOLOGY OF LEGISLATION

Some of the laws and legislation included in the following chronology will receive little more than a brief, passing description because they are addressed more thoroughly in subsequent chapters. These will be so identified. For others, implications for HR and department managers are briefly reviewed.

Norris-LaGuardia Act (1932)

The first significant piece of legislation to address the growing organized labor movement in the United States was the Norris-LaGuardia Act of 1932. This law reflected an important shift in public policy concerning labor unions, from a posture of legal repression of unions and their activities to one of actual encouragement of union activity. Although the Norris-LaGuardia Act legalized union organizing activities and affirmed workers' rights to organize for collective bargaining purposes, it did little or nothing to directly restrain employers in their conduct toward labor organizations. During the first three decades of the twentieth century, many workers who attempted to organize for collective bargaining lost their jobs because of their involvement with the organizing process. Often, their organizational efforts were countered with violence. Presently the impact of the Norris-LaGuardia Act has waned. It is mentioned here because of its role as a forerunner to subsequent labor legislation.

National Labor Relations Act (1935)

Also known as the Wagner Act, the National Labor Relations Act (NLRA) established a number of rules for the conduct of both unions and employers in labor organizing and collective bargaining situations. Although it seemed largely to favor unions and encourage their presence, the NLRA established some boundaries on what unions could do in their organizing activities. In addition to affirming the right of employees to organize, the NLRA made it illegal for an employer to refuse to negotiate with a union. This requirement assumed that the union had conducted a legal organizing campaign and had won a proper representation (certification) election.

The NLRA created the National Labor Relations Board. This body was charged with administering the Wagner Act by conducting representation elections to determine whether employees in particular groupings (called

bargaining units) wished to have union representation. The NLRA specified that a union chosen by a majority of the employees in an appropriate unit would be the exclusive representative for all employees in the unit. The NLRA delineated a list of unfair labor practices that were punishable by fines. Many unfair labor practices pertain to management reactions to union organization activities. The NLRA has been modified by the Taft-Hartley Act and the Landrum-Griffin Act.

Social Security Act (1935)

The Social Security Act established a basic system of contributory social insurance and a supplemental program for low-income elderly persons. In 1939 it was expanded to provide benefits to survivors of covered workers and dependents of retirees. The Social Security Act has been further expanded to cover workers who had become permanently disabled. Coverage under the Social Security Act was again expanded in 1965 to provide Medicare health insurance coverage for the elderly.

Fair Labor Standards Act (1938)

In part, the Fair Labor Standards Act (FLSA) was intended to reduce the high unemployment rate that typified the years of the Great Depression. Congress intended to reduce the length of a work week to a uniform standard, thus spreading available work over a greater number of workers. In addition to defining a normal work week, the FLSA set minimum pay rates, established rules and standards for the payment of overtime, and regulated the employment of minors. Over the years, FLSA has been amended many times by raising the minimum wage due to changing circumstances imposed by inflation and other economic and social concerns. The FLSA remains as the country's basic wage-and-hour law.

Labor Management Relations Act (1947)

The Labor Management Relations Act amended the National Labor Relations Act and is commonly referred to as the Taft-Hartley Act. As passed in 1935, the NLRA clearly favored unions over employers. The principal intent and subsequent effect of the Taft-Hartley Act was to level the playing field to some extent by more appropriately balancing the responsibilities and advantages of both unions and employers. Taft-Hartley listed additional unfair labor practices. Although many experts still view it as a law favoring labor unions, the Taft-Hartley Act was clearly a change in the direction of management's rights.

Two points are of immediate interest concerning the Taft-Hartley Act. Most mentions of the NLRA are actually in reference to the NLRA as amended by Taft-Hartley. The Taft-Hartley Act was itself amended in 1975

specifically to address not-for-profit hospitals by removing the exemption that had been in place since its original passage in 1947.

Labor-Management Reporting and Disclosure Act (1959)

The Labor-Management Reporting and Disclosure Act is more commonly known as the Landrum-Griffin Act. It further amended the National Labor Relations Act. Because it amended the NLRA as amended by Taft-Hartley, it is sometimes jokingly referred to as an amendment to an amendment. Among its numerous provisions, the Landrum-Griffin Act required employers, including not-for-profit hospitals and other nonprofit health care facilities, to report any financial arrangements or transactions that were intended to improve or retard the process of unionization in detail to the Secretary of Labor. Reporting and disclosure requirements were imposed on unions.

Equal Pay Act (1963)

The Equal Pay Act was an amendment to the Fair Labor Standards Act. It prohibited the payment of unequal wages for men and women who worked for the same employer in the same establishment performing equal work on jobs requiring equal skill, effort and responsibility, and performed under similar working conditions. Simply put, people doing the same work in the same place in the same way have to be paid equally regardless of gender. Although the Equal Pay Act came into being before 1964, it had no noticeable impact on the activities of HR and no effect on roles of department managers. As of 2006, equality of pay rates is not universal. Many men continue to earn more than women for comparable jobs.

Civil Rights Act (Title VII) (1964)

This legislation has led to greater regulation of the employer-employee relationship by the government. Title VII provided the legal basis for all people to pursue the work of their choosing and to advance in their chosen occupations subject only to the limitations imposed by their own individual qualifications, talents and energies. This legislation defined unlawful employment discrimination as the failure or refusal to hire or to otherwise discriminate against any individual with respect to compensation or other terms, conditions, or privileges of employment because of that individual's race, color, religion, sex, or national origin. The Act prohibits setting limits, segregating or classifying employees or applicants for employment in any way that deprives them of employment opportunities or otherwise adversely affects their status as employees because of race, color, religion, sex, or national origin.

The Civil Rights Act of 1964 established the Equal Employment Opportunity Commission (EEOC) to enforce the anti-discrimination re-

quirements of Title VII. The Act was amended in later years to compensate for perceived erosion of its strength and effectiveness owing to a number of Supreme Court decisions.

Age Discrimination in Employment Act (1967)

The Age Discrimination in Employment Act (ADEA) legally established the basic right of individuals to be treated in employment situations on the basis of their ability to perform the job rather than on the basis of age-related stereotypes or artificial age limitations. The ADEA prohibits discrimination in employment on the basis of age in hiring, job retention, compensation, and all other terms, conditions, and privileges of employment. Originally enforced by the Department of Labor, in 1978 enforcement of the ADEA was transferred to the Equal Employment Opportunity Commission. The threshold for defining age discrimination is 40. Therefore, workers age 40 and older constitute a protected class for EEOC purposes.

The ADEA has had a direct effect on retirement. Before ADEA, employers were free to mandate retirement at a specific age. The most commonly mandated age for retirement was 65. When passed in 1967, the ADEA raised the limit such that employers could no longer mandate retirement at any age younger than 70. When the ADEA was again amended in 1986, the age 70 limitation was removed. This means that retirement can no longer be required by any specific age. The sole legal criterion for continuing employment is an individual's ability to fulfill the requirements of the job. Some exceptions exist under which retirement by a stated age can be mandated for a limited number of specific occupations. These include police officers, firefighters, airline pilots, surgeons, and some policy-making executives. In many instances the ADEA has permitted people who wished to keep working to do so. This has ensured the continuing employment of some workers who might otherwise have to depend on government assistance.

Occupational Safety and Health Act (1970)

Passed in 1970 and effective in 1971, the Occupational Safety and Health Act (OSHA) is a highly influential piece of legislation concerning employee safety in the workplace. The "A" in OSHA indicates either Act or Administration, depending on the specific situation and reference. The intent of Congress in establishing the Occupational Health and Safety Act was to provide all persons with workplaces free from recognized hazards that have the potential to cause serious physical harm or death to employees. The Occupational Safety and Health Administration is authorized to promulgate legally enforceable workplace safety standards, respond to employee complaints and, as necessary, conduct on-site inspections to fol-

low up on employee safety complaints or on lost-workday injury rates that are considered excessive.

On May 25, 1986, OSHA began enforcement of the second phase of an elaborate set of rules known formally as *Hazard Communications*. These rules provide workers with the right to know about any hazardous substances to which they are exposed or handle in the course of performing their job duties. According to OSHA's hazard communication rules, health facilities are required to create and deliver programs for informing and training employees about hazardous substances in their workplace, ensure that warning labels on all incoming containers are intact and clearly readable, and inform and train employees in the nature and appropriate handling of hazardous substances at the time of initial assignment. Suppliers are required to create and distribute a Material Safety Data Sheet (MSDS) for all products containing a hazardous substance that they produce. These must be provided to all purchasers of their product. The OSHA hazard communication rules mandate that employers maintain copies of MSDSs for all hazardous substances in the workplace, supply copies of MSDSs to employees upon request and maintain current copies of MSDSs for all products so that they are accessible to any employee on all work shifts.

Under OSHA regulations, more than 1,000 substances are considered to be hazardous. A number of the states have enacted right-to-know laws with requirements that are similar to OSHA regulations. Federal and state standards for the handling of hazardous substances require that employers distribute material safety data sheets, ensure that warning labels are always in evidence on workplace containers, and be able to produce a written employee orientation program at any time. Department managers are typically assigned the responsibility for ensuring that these regulations are followed and all requirements are fully satisfied within the department or areas under their direct supervision. Personnel from HR usually supply training materials and provide supportive services to department managers.

Health Maintenance Organization (HMO) Act (1973)

This legislation was passed as part of a Nixon administration cost containment initiative, preempting all state regulations that posed any barriers to HMO formation. It set conditions for HMOs to become federally qualified and mandated that most employers offer an HMO option if a federally qualified HMO in the area requested inclusion in their benefits offerings (this condition was eliminated in 1995). In theory the act was intended to reduce costs by eliminating regulatory barriers to HMO development and encouraging the proliferation of what was seen as a more cost-effective health care delivery system.

Rehabilitation Act (1973)

Although disabled persons were mentioned in the Civil Rights Act of 1964, they were addressed separately for the first time in the Rehabilitation Act of 1973. Congress recognized that the handicapped were subject to cultural myths and prejudices similar to those biases that existed against women and ethnic minorities. However, this law applied only to employees of the federal government and to employers doing a specified amount of business with the government.

One portion of the Rehabilitation Act prohibited discrimination in the hiring, promotion, and other employment of the handicapped, essentially paralleling Title VII of the Civil Rights Act of 1964. Another portion required employers doing more than \$2,500 in business with the federal government to apply affirmative action guidelines so as to employ and promote qualified handicapped individuals. Employers having more than 50 employees and fulfilling government contracts worth \$50,000 or more were required to have written affirmative actions programs as required by the Office of Federal Contract Compliance Programs. These employers were required to make reasonable accommodations for the physical or mental limitations of employees or applicants. The Rehabilitation Act is significant because it was a precursor of the Americans with Disabilities Act (1990).

Employee Retirement Income Security Act (1974)

The Employee Retirement Income Security Act (ERISA) established four basic requirements governing employee retirement plans. The Employee Retirement Income Security Act mandated that employees must become eligible for retirement benefits after a reasonable length of service (also known as vesting or being vested); adequate funds must be reserved to provide the benefits promised under the plan; the persons who administer the plan and manage its funds must meet established standards of conduct; and sufficient information must be made available on a regular basis so plan participants, auditors or other interested parties may determine whether ERISA requirements are being met. The provisions of this act were later reinforced by legislation included in the Retirement Equity Act of 1984 that greatly increased the complexity of ERISA and added multiple layers of Internal Revenue Service regulations.

Taft-Hartley Amendments of 1975

The Taft-Hartley Act, which, as noted earlier, was an amendment to the National Labor Relations Act, was itself amended in 1975. This “amendment to an amendment” was created specifically to address not-for-profit hospitals by removing the exemption that had been in place since Taft-Hartley’s original passage in 1947. Beginning in 1975, no longer could

not-for-profit hospitals be considered beyond the reach of labor unions. The exemption was removed, but specific rules were created in recognition of the special circumstances of this vital service which deals in matters of human life. For example, written notice must be provided by a union to the health care institution and the Federal Mediation and Conciliation Service 10 days prior to engaging in any picketing, strike, or other concerted refusal to work. No such notice is required prior to similar actions in other industries.

The 1975 amendments preempt all state labor laws that previously applied to nongovernmental hospitals. Also, the 1975 amendments apply to health care institutions previously covered by the act, such as proprietary hospitals and nursing homes, as well as to all those institutions brought under federal law by these amendments to the act.

A significant element of Congress's intent in passing the amendments was to provide time to transfer patients from a struck or threatened institution to another facility and to obtain limited assistance from another facility without risking secondary strikes or boycotts against the assisting institution.

Pregnancy Discrimination Act (1978)

The Pregnancy Discrimination Act decrees that discrimination on the basis of pregnancy, childbirth, or related medical conditions was in fact unlawful sex discrimination under Title VII of the Civil Rights Act of 1964. From this point forward, pregnancy has been considered to be a medical disability and is treated accordingly as a disability of some 6 to 8 weeks duration. The exact length varies and depends on whether federal or state guidelines are applied.

Consolidated Omnibus Budget Reconciliation Act (1986)

The Consolidated Omnibus Budget Reconciliation Act (COBRA) is a complex piece of legislation that addresses many concerns. However, most pertinent to employment is the provision that COBRA allowed for the extension of group insurance coverage to employees and their dependents on a self-pay basis for set periods of time for those who would otherwise lose group health or dental benefits due to a loss of employment, change in employment status, or other defined events. The maximum period for COBRA benefits is 36 months. The length of the period depends on the qualifying event or the reason for accessing COBRA. By making it possible for these employees and dependents to remain on the group contracts under which they had been covered, COBRA shifted to employers a portion of the cost of health coverage for many individuals who would otherwise be uninsurable except under government programs. As far as health insurance is concerned, COBRA simply provides temporary or stopgap coverage.

Persons who continue coverage under COBRA must secure other insurance after the eligibility period expires. Insurance coverage can be continued up to 18 months for laid-off employees, up to 29 months for disabled individuals, and up to 36 months for dependents following separation, divorce, or the death of the previously covered employee. However, should the employer go out of business or for some other reason terminate its health insurance plan, all rights under COBRA immediately cease.

Immigration Reform and Control Act (1986)

The Immigration Reform and Control Act (IRCA) requires employers to review and, as necessary, modify their hiring practices. They must institute procedures to verify that all job applicants are United States citizens or otherwise legally authorized to work in the United States. This law established civil and criminal penalties for knowingly hiring, recruiting, referring, or retaining in employment persons designated as unauthorized aliens. The act prohibits employers from discriminating against job applicants on the basis of citizenship status or national origin.

Much initial business reaction to IRCA was strong, vocal, and negative. Because IRCA forces employers to take steps to screen out illegal immigrants (the majority of whom enter this country with employment as a goal), many organizational heads have expressed the belief that businesses are being made to perform a function that more correctly belongs within the purview of the federal government. Skrentny provided the following early assessment of the act, “This onerous piece of legislation for business turns every employer in the country, whether he or she hires a housekeeper or 10,000 auto workers, into an arm—an agent or a cop, if you will—of the Immigration and Naturalization Service (INS).”¹

Most employment legislation specifies the minimum size organization to which it applies. For example, the Family and Medical Leave Act applies only to employers with 50 or more employees. The Immigration Reform and Control Act pointedly applies to all employers of one or more employees. The basis for this requirement is the premise that a significant number of undocumented aliens find work as household help.

This legislation has created work in the form of a verification document known as the I-9 Form which is ordinarily completed in HR as part of the hiring process. Each new employee or employee-to-be must furnish specified proofs of identity and, in the instance of legal aliens, proof of authorization to work in the United States. After examining (and usually copying) the appropriate proofs, a representative of the employer signs the I-9 attesting to having seen the documents. An employer has three business days from the date of hire to complete an I-9 Form. This requirement changes to the first day of employment if the term of hire is to be less than three days. Completed I-9 Forms are retained in employees’ personnel files, where they are subject to audit by the Immigration and Naturalization

Service. Financial penalties may be imposed for missing or incomplete I-9 Forms. Significant legal repercussions can be imposed if illegal aliens are discovered in the work force.

Some critics have claimed that the Immigration Reform and Control Act has resulted in increased employment discrimination. Employment applicants who look or sound foreign, especially Asians and Hispanics, are often faced with an increased likelihood of discrimination by employers who may shy away from hiring them because they fear inadvertently hiring illegal aliens and thus exposing themselves to action by the INS. Laws affecting employment have proliferated to such an extent that some of them occasionally come into conflict with each other. Title VII of the Civil Rights Act declares that discrimination on the basis of race or national origin is illegal while the Immigration Reform and Control Act encourages closer scrutiny of applicants on the basis of national origin.

Pension Protection Act (1987)

This act requires organizations with under-funded pension plans to make additional payments to the Pension Benefit Guarantee Corporation (PBGC). The PBGC is a government agency established to guarantee benefit payments to participants of legally qualified defined-benefit pension plans. In addition to increasing employers' payments to the PBGC, this legislation reduces or eliminates the deduction of contributions by employers for better-funded plans.

Drug-Free Workplace Act (1988)

The Drug-Free Workplace Act requires organizations having \$25,000 or more in federal contracts or grants to make good-faith efforts to maintain a drug-free workplace and to establish drug education and awareness programs for their employees. As a precondition to receiving a contract or grant, the law requires an organization to certify that it will provide and maintain a drug-free workplace. The manager of any department involved in the fulfillment of any portion of an appropriate federal contract or grant will be involved at several points in the following process. An organization must notify all employees in writing (via a published statement) that the possession, use, manufacturing, or distribution of a controlled substance in the workplace is prohibited. The statement must include the penalties that will be imposed for violations of company rules. Each organization must establish a drug-free awareness program to inform employees of the dangers of drug abuse in the workplace; comply with the external requirement of a drug-free workplace as a condition of seeking and accepting contracts and grants; note drug counseling, rehabilitation, or employee assistance programs that may be available to them; and enu-

merate the penalties to which the organization may be exposed for violations that occur in the workplace.

An organization must require that each individual employee who is to be involved in the fulfillment of an appropriate contract or grant possess a copy of the organization's published statement concerning controlled substances. Furthermore, the organization must notify all employees receiving the controlled substances statement that they are expected to abide by all terms of the statement and notify their employer of any criminal drug statute conviction for a violation in the workplace no later than five days after conviction. Within ten days of receiving such a notice of criminal drug statute conviction, the granting or contracting agency must be notified of the conviction. Within 30 days of receiving notice of an employee's criminal drug statute conviction, an employer must take appropriate disciplinary action against the employee, or require the employee to complete an approved drug-abuse assistance or rehabilitation program in a satisfactory manner. Finally, each employer must make a good-faith effort to maintain a drug-free workplace through implementation of the foregoing procedures and requirements.

All health care institutions have an interest in keeping their work environments free from dangers to patients, visitors, and employees created by the use of illegal drugs or controlled substances. For a number of years, drug abuse in the workplace has made it necessary for employers to develop and implement different means of addressing this growing problem. Although the requirements of the Drug-Free Workplace Act apply only to employees receiving federal contracts and grants, conscientious management practices suggest that a comprehensive policy and drug-free awareness program be implemented for all employees. Conscientious departmental managers should have a strongly vested interest in displaying a high level of concern for maintaining a drug-free work environment whether or not there are external requirements for doing so.

Employee Polygraph Protection Act (1988)

The Employee Polygraph Protection Act (EPPA) prevents most private-sector employers from requiring job applicants or current employees to take polygraph (lie detector) tests. Under EPPA, the routine use of polygraph tests is permitted only in organizations that produce and distribute controlled substances and in those concerned with nuclear power, transportation, currency, commodities, or proprietary information.

In most organizations, an employee may be asked to submit to a polygraph when other evidence gives management reason to suspect an individual of wrongdoing. This is sometimes referred to as reasonable suspicion or, somewhat inaccurately, as reasonable cause. However, an employee may not be disciplined or discharged solely on the results of a polygraph test. Under EPPA, an employer may not ask an employee or job applicant

to submit to a polygraph test other than in the situations already delineated. Furthermore, an employer may not take any adverse action against an employee or applicant for refusing to take a polygraph test. Finally, the results of a polygraph test to which a person has submitted for one specific reason cannot be used for a different purpose.

Worker Adjustment and Retraining Notification Act (1988)

The Worker Adjustment and Retraining Notification Act (WARN) requires employers with 100 or more employees at any individual site to provide advance notification of major reductions in force. An employer must provide 60 days notice of an impending layoff of 50 or more employees, and must notify local government and the appropriate state agency, bureau or unit responsible for dislocated workers that provides employment and training services.

Americans with Disabilities Act (1990)

The Americans with Disabilities Act (ADA) provides individuals with disabilities with the same protections afforded to minorities and other protected groups under the Civil Rights Act of 1964. The ADA calls for access equal to that available to others in regard to employment, transportation, telecommunications, and ensuring that all services and facilities are available to the public, whether under private or public auspices.

Disabilities are broadly defined under the Americans with Disabilities Act, including, in addition to physical limitations ordinarily thought of as disabilities, hearing and visual impairments, paraplegia and epilepsy, HIV or AIDS, and literally dozens of other conditions. The list of recognized disabilities is long, and it continues to expand as legal challenges continue over what constitutes a disability.

The ADA prohibits potential employers from asking about a job applicant's medical conditions, if any, and imposing major limitations on pre-employment physical examinations. Under the law, a physical examination cannot be conducted until after a job offer has been extended. If a physical examination reveals a medical condition that does not affect the person's ability to perform the major functions of the job being sought, an employer may be expected to make a reasonable accommodation to the needs of the applicant. The key to applicability of the ADA lies in an individual's ability to perform satisfactorily the major functions of a job. Thus, an individual cannot be denied a job because an impairment prevents performance of a minor or non-essential activity. Each employer may find it necessary to make a reasonable accommodation for the condition providing such accommodation does not cause unreasonable expense or hardship.

From time to time each department manager may have reason to be familiar with some aspects of the law concerning disabilities. Involvement surely will be required should a need arise to make a reasonable accommodation for one or more employees in the department. However, it is not always possible to identify an individual who is disabled. Unlike race or gender, disabilities may not be visually apparent.

Managers should not be concerned unless they know factually that a disability exists. To obtain protection available under anti-discrimination laws, employees must identify themselves as being disabled. If a disability is neither apparent nor declared, then the employee in question should be treated the same as any other worker. Managers who suspect the presence of a disability that has not been declared are advised not to inquire about the situation with the employee in question. Furthermore, they should not offer unsolicited advice to an employee about a possible but undeclared problem. Such a course of action has been ruled as treating an employee in a different manner and is against the law.

The Americans with Disabilities Act has frequently been in the news. A decade after its passage, lawyers argued before the Supreme Court that the ADA went too far in allowing disabled public employees to sue state and local governments in federal court.² States and localities generally have immunity against such lawsuits unless Congress has documented sufficient discrimination in the states to deny them that immunity. The federal government must invoke its power under the 14th Amendment to ensure that people have equal protection under the law. States have contended that Congress has been lax in demonstrating that individual states were not enforcing their disability laws.

In a 2002 decision, the Supreme Court unanimously narrowed the number of people covered by the ADA. The opinion held that “Merely having an impairment does not make one disabled for purposes of the ADA,” that a person’s ailment must extend beyond the workplace and affect everyday life, and that the ability to perform tasks that are of central importance to most people’s daily lives must be “substantially limited” before an individual can qualify for coverage under the original legislation that was intended to protect the disabled from discrimination because of physical impairments.³ In other words, the Court ruled that individuals who could function normally in daily living could not claim disability status because of physical problems that limited their ability to perform some manual tasks on the job.

In another opinion that was viewed by some as a defeat for disabled workers, the Supreme Court ruled that disabled workers are not always entitled to premium assignments intended for more senior workers.⁴ The practical implication of this ruling is that, in the majority of instances, seniority can take precedence over disability. In continuing its series of clarifications and rulings limiting rights under the ADA, the Court ruled

that disabled workers cannot demand jobs that would threaten their lives or health.⁵ This ruling arose from a case in which a worker with a particular medical condition wanted to return to his original position although it was considered medically risky for him to do so. The ADA's requirement for reasonable accommodation has always made exceptions for those who may be a threat to the health or safety of others on the job. This decision interpreted the exception as applying to workers who may present a risk only to themselves. Legal scholars consider it likely that the Americans with Disabilities Act will continue to be refined through Supreme Court future decisions.

Older Workers Benefit Protection Act (1990)

The Older Workers Benefit Protection Act (OWBPA) amended the Age Discrimination in Employment Act (ADEA) by clarifying the authority of the ADEA relative to employee benefits. Although still requiring equal benefits for all workers, as a result of several legal decisions, the ADEA allowed reductions in benefits for older workers in situations where added costs were incurred to provide the benefits. The OWBPA removed employers' option to justify lower benefits for older workers. It requires that any waivers or releases of age discrimination must be voluntary and part of an understandable, written agreement between employer and employee. In other words, this law prohibited an employer from unilaterally providing a reduced benefit to an employee on the basis of age.

Civil Rights Act (1991 Amendments)

Adding to the original Civil Rights Act of 1964, the 1991 amendments allowed employees to receive compensatory and punitive damages from employers who committed violations with malice or reckless disregard for an individual's protected rights. They allowed women and disabled workers to sue for compensatory and punitive damages, a right they previously did not have. This legislation provided for jury trials in such discrimination cases. Previously, these had been handled with non-jury processes. For employers, the overall impact of these amendments was to increase the likelihood of longer and costlier legal processes and to increase potential penalties.

Family and Medical Leave Act (1993)

The Family and Medical Leave Act (FMLA) applies to eligible persons in organizations having 50 or more employees. The FMLA defines eligible employees as those having been employed for at least one year and having worked at least 1,250 hours during the previous 12 months. These persons are permitted to take up to 12 weeks of unpaid leave during any 12-month period when unable to work because of a serious health condi-

tion, or to care for a child upon birth, adoption, or foster care, or care for a spouse, parent, or child with a serious health condition. Under specified circumstances, leave may be taken intermittently or on some reduced time schedule. This has the potential to extend any given leave over a period longer than 12 calendar weeks. Employees who are entitled to a set amount of paid time off are ordinarily required to use that time as part of their 12 weeks. Most employees on leave ordinarily use up their available paid time off rather than experiencing their entire leave without pay. The Family and Medical Leave Act does not take precedence over any state or local laws that happen to provide greater leave rights.

While on approved leave, employees must continue to receive health care benefits but are not entitled to accrue vacation, sick time, or seniority. The employer must guarantee that, upon returning from leave, an employee will be reinstated to the previous position held or placed in a fully equivalent position with no loss of benefits or seniority.

In many situations, the Family and Medical Leave Act has made life considerably more difficult for department managers. When an employee in an essential position takes leave, that position and its responsibilities must be covered. Some positions cannot be left vacant for a few days, let alone for a 12-week period. Filling the position and later returning the employee to an equivalent position is not readily accomplished. Courts and other external agencies have repeatedly interpreted equivalent as essentially the same in all aspects: pay, benefits, tasks, and responsibilities. Some courts have ruled that equivalent extends to reinstating similar hours and shifts. Because equivalent has been so strictly interpreted, the safest course of action for managers is to preserve the original position of the person on leave. Managers are often advised to juggle coverage until the employee returns from leave. This often requires the use of temporary employees, overtime, reassignments, and other means. The practical result of the FMLA is that staffing and scheduling has become more difficult and time-consuming for some managers.

Retirement Protection Act (1994)

The Retirement Protection Act strengthens and accelerates funding of under-funded pension plans and increases Pension Benefit Guarantee Corporation (PBGC) premiums for plans that pose the greatest risk. It improves the flow of pension related information for workers and increases the PBGC's authority to enforce compliance with pension obligations.

Small Business Job Protection Act (1996)

Despite the title of this legislation, its provisions are not restricted to small businesses. This legislation included the 1996 increase in the minimum wage. It increased pension protection and made it easier for workers to roll

over (change to another fund or plan) their retirement savings upon changing employment. It simplified pension administration to an extent and reduced the vesting period for selected multi-employer plans from 10 years to 5 years. The act allows specified smaller employers to establish simplified 401(k) plans for their employees.

Health Insurance Portability and Accountability Act (1996)

The full impact of the Health Insurance Portability and Accountability Act (HIPAA) was not felt until several years after its passage. Ironically, the portions of HIPAA causing the most frustration and necessitating the most effort by organizations and HR personnel had little or nothing to do with the title of the act.

HIPAA consists of five sections or titles. Titles I, III, IV, and V address the issue of continuity and the ability to renew health insurance coverage for employees who change employers or otherwise lose their jobs, promote the use of medical savings accounts, and establish standards for long-term care coverage.⁶ HIPAA eliminated the possibility of individuals being denied coverage because of pre-existing medical conditions. It further requires insurance companies to provide coverage for small employer groups or to individual employees who lose their group coverage.

The effects of Titles I, III, IV, and V of HIPAA on most HR departments and personnel were barely noticeable. In the majority of instances, required legal notifications were taken care of by the administrative services of organizations' different health plans. However, the true impact of HIPAA became felt in April of 2003.

In terms of effort required by health care organizations and HR personnel, the significant section of HIPAA has been Title II, "Preventing Health Care Fraud and Abuse, Administrative Simplification, and Medical Liability Reform." This is often referred to as "Administrative Simplification." The irony in this nomenclature is that for many organizations, the impact has been anything but simple. Receiving the most attention of the contentious components of Title II has been the portions having to do with patient privacy.

The majority of health care organizations were required to be in compliance with HIPAA's Privacy Rule by April, 2003. The same deadline applied to other organizations that provided HR services related to health care and benefits. Two other pertinent deadlines for compliance included the Transactions and Code Sets Rule (October, 2003) and the Security Rule (phased in on two dates). Healthcare providers with large health plans, large employer-sponsored group health plans, and health care clearinghouses were required to be in compliance by April, 2005. Providers of small health plans had to be in compliance by April, 2006.

Compliance with the Security Rule usually begins by appointing a security officer, often the same person who serves as a privacy officer. The next step is to assess risks related to information systems. The third step is to develop policies and procedures and training programs that are appropriate for a particular organization. According to legal experts, compliance is an ongoing process that involves periodic audits, re-evaluation and implementing procedural changes as needed.⁷

The Privacy Rule has affected nearly all health care plans and all health care providers. Physicians' offices, hospitals, laboratories, pharmacies, dentists, medical equipment dealers, billing services and others providing administrative services have all been required to implement systems designed to protect patient information in all forms, protect all patient information from malfeasance, implement specific data formats and code sets, provide mechanisms to stop fraud and conduct periodic audits to prevent abuse. All subcontractors and suppliers coming into contact with patient information must comply with the Privacy Rule. All contracts and other arrangements must define the acceptable uses of patient data.

HIPAA has impacted not only HR but also very nearly all departments and divisions of any health care organization. Although there may be future modifications in some of its rules and mandated procedures, the heightened emphasis on personal privacy and the confidentiality of patient information is here to stay.

■ GREATER RESPONSIBILITIES AND INCREASED COSTS FOR ORGANIZATIONS

The foregoing chronology is incomplete. There are state laws that often vary from state to state. Other federal statutes have employment implications. These are introduced in other chapters.

An obvious conclusion from the foregoing chronology is that the final two decades of the twentieth century were accompanied by the federal government spreading its influence over an increasing number of aspects of the employment relationship. In addition to creating added work for HR personnel by designating what cannot be done or imposing new requirements, many of these laws have created new or tighter boundaries within which managers must operate.

The pattern of employment legislation during the late twentieth and early twenty-first centuries has been to compel employers to be more socially responsible for their employees. This is especially evident in significant pieces of legislation such as the Americans with Disabilities Act and the Family and Medical Leave Act. Legislation affecting social responsibility and rules of conduct for interactions between employers and their employees imposed added work responsibilities and supporting systems

to organizations. These requirements have increased the cost of doing business and thus increased costs to the ultimate consumers of all goods and services.

It is true that some new laws have required only minor changes in procedures or modest alterations in recordkeeping practices. However, most have clearly increased the cost of doing business because provider organizations and their customers are the only entities available to pay the increased costs. Legislators know very well that costs are associated with implementing any new law. Legislators and senior managers are often far from agreement concerning the costs of implementing new legislation. When elected officials create new programs, they are undoubtedly aware that only three options exist to cover the costs associated with implementation. Legislators can discontinue an existing program to free up funds. This rarely occurs because it is politically unpopular. Legislators can raise taxes. This is even more unpopular. In the current political climate, it is tantamount to committing political suicide. Finally, legislators can find other parties or organizations (someone else) to bear the costs of new legislation. The entities that have been paying to implement most of these laws affecting the employment relationship are businesses and other commercial enterprises. Ultimately, the costs are passed along and paid by individual consumers.

■ A CUMULATIVE EFFECT

Exhibit 3-1 presents a listing of all of the foregoing laws by decade of passage. It is not difficult to see the shift from the pre-1964 concerns with collective bargaining and wage and hour issues to the growing post-1964 concerns with social responsibility.

A simple comparison of the pre-1964 years with the present day demonstrates how significantly the employment environment has changed. Although very few of the laws reviewed replaced features of earlier legislation, most of the legislation enacted since 1964 has exerted new and often different influences on how work organizations treat employees and how managers can direct their own departments. The accumulation of nearly four decades of legislation affecting the employment relationship has transformed personnel from the days of an employment office to the modern HR department. A contemporary department manager must comply with countless rules for supervising and directing employees. Although the accumulation of new legislation seems to have slowed somewhat, most experts agree that the future is likely to bring more, not less, regulation.

A new law can come into being in a relatively brief period of time, yet the changes in human behavior required by that law can require a very long time to implement. A useful illustration is provided by Title VII of the

Exhibit 3-1 Summary of Employment Legislation by Decade

1930s

- Norris-LaGuardia Act (1932)
- National Labor Relations Act (1935)
- Social Security Act (1935)
- Fair Labor Standards Act (1938)

1940s

- Labor-Management Relations (Taft-Hartley) Act (1947)

1950s

- Labor-Management Reporting and Disclosure (Landrum-Griffin) Act (1959)

1960s

- Equal Pay Act (1963)
- Civil Rights Act (Title VII) (1964)
- Age Discrimination in Employment Act (1967)

1970s

- Occupational Safety and Health Act (1970)
- Rehabilitation Act (1973)
- Health Maintenance Organization (HMO) Act (1973)
- Employee Retirement Income Security Act (1974)
- Taft-Hartley Act Amendments (1975)
- Pregnancy Discrimination Act (1978)

1980s

- Consolidated Omnibus Budget Reconciliation Act (1986)
- Immigration Reform and Control Act (1986)
- Pension Protection Act (1987)
- Drug-Free Workplace Act (1988)
- Employee Polygraph Protection Act (1988)
- Worker Adjustment and Retraining Notification Act (1988)

1990s

- Americans with Disabilities Act (1990)
- Older Workers Benefit Protection Act (1990)
- Civil Rights Act Amendments (1991)
- Family and Medical Leave Act (1993)
- Retirement Protection Act (1994)
- Small Business Job Protection Act (1996)
- Health Insurance Portability and Accountability Act (1996)

Civil Rights Act of 1964. Employment discrimination has been prohibited by law for more than four decades, but problems of discrimination continue to exist in many organizations. However, the work force in the United States is becoming increasingly diverse. Organizations that eliminate discrimination will be the ones best able to properly value and manage this diversity.

Discrimination cannot be legislated out of existence. Discrimination is extremely personal as it resides in individual attitudes, likes, and dislikes. It is the product of both home and culture. Therefore, no job is completely immune from the possibility of discrimination.

For the greater part of four decades employee rights have been an extremely active legal topic in the federal and state legislatures and thus in the courts. We can expect this interest in individual rights to continue, probably even to intensify from time to time. The employment environment has changed and will continue to change. Those who manage within this environment must either change with it or be left behind.

■ CONCLUSION

The legal aspects of HR have changed dramatically in the past 70 years. The emphasis on the right of workers to form unions and establishing basic parameters such as length of a working week and establishing a minimum wage has changed. The emphasis of most recent legislation has been grounded in social responsibility. Government has compelled employers to become more socially responsible. In the process, the costs of government-mandated changes have been shifted to consumers.

American workers can expect equal access to employment and receive equal pay for similar jobs. They can expect to work in safe surroundings without being discriminated against on the basis of age, gender, race, religion, national origin, or personal preference. Persons with disabilities must be treated like any other workers. They can expect to work in an environment that is free of drugs and harassment. American workers can take time off during a pregnancy or illness. They can expect access to health care benefits after losing their jobs. To a degree, pension rights have been established. Information related to one's health is now protected and considered to be private.

Human resources personnel must be familiar with the requirements of the legislation discussed in this chapter. This task has made the jobs and activities of HR employees more complex and challenging. Compliance with the legal requirements has imposed additional costs on organizations. Most experts expect that this trend will continue although the pace of implementing changes is likely to slow.

Returning to the initial case study, it is reasonably certain that County Hospital's request for dismissal of the complaint will be unsuccessful. The Americans with Disability Act prohibits potential employers from imposing major limitations on pre-employment physical examinations. Concerning Susan and her complaint, the potential employer should attempt to negotiate a reasonable agreement and offer her employment in some capacity, rather than allow the State Division of Human Rights to conduct a full investigation and run the risk of imposing a costly settlement. The Division might consider Susan to be a handicapped person (anyone who has a physical or mental impairment that substantially limits one or more major life activities). If it so rules, the Division can then sue County Memorial Hospital on Susan's behalf.

However, Susan's case is far from cut and dried. Different jurisdictions have rendered varying decisions related to any disability. For example, a New York state court ruling declared obesity to be a handicap, but a Pennsylvania decision stated that obesity can be but is not always automatically a handicap. As is often the case with disputes that arise under some aspect of employment law, clarification of the law in its application is left to the courts. Courts in different jurisdictions and locations do not always see the same situation in the same light.

References

1. Skrentny, R. (1987). Immigration reform—What cost to business? *Personnel Journal*, 66(10), 53-59.
2. Hearst News Service. (2000). High Court Scrutinizes Disabilities Act. *Democrat & Chronicle*, Rochester, NY, October 12.
3. Newsday. (2002). High Court Limits Disability Law. *Democrat & Chronicle*, Rochester, NY, January 9.
4. Associated Press. (2002a). Seniority Outweighs Disability, Court Says. *Democrat & Chronicle*, Rochester NY, April 30.
5. Associated Press. (2002b). Top Court Disallows Dangerous Jobs for Disabled. *Democrat & Chronicle*, Rochester, NY, June 11.
6. Entin, A. (2001). Implementing HIPAA: A manager's blueprint. *The Health Care Manager*, 20(2), 49-59.
7. Hagan, K. T. (2004). HIPAA Security Rule. Available at: <http://www.schwabe.com/showarticles.asp?Show=49>. Accessed December 22, 2005.

Discussion Points

1. Why is 1964 and the passage of the Civil Rights Act (Title VII) a turning point in the evolution of HR? Stated differently, other than 1964 representing the beginning of a steady flow of regulations to follow, what occurred that constituted a change of direction? Why?

2. Define and describe a contemporary bargaining unit as defined by the National Labor Relations Act. How, if at all, does it differ from a bargaining unit in 1935?
3. When and how was the Equal Employment Opportunity Commission established? What is its purpose?
4. What is a bona fide occupational qualification? Provide at least two specific examples.
5. What is the intended goal of the right-to-know laws? In your opinion, have they been successful? Why or why not?
6. Well before the passage of the Americans with Disabilities Act, in some instances employers were required to provide reasonable accommodation of the limitations of an employee or applicant. When did this occur, and what were the conditions under which this requirement applied?
7. What appears to have been the primary intended purpose of the Employee Retirement Income Security Act? Why was this legislation deemed to be necessary?
8. What have been the primary effects of the Immigration Reform and Control Act on businesses?
9. Pose two hypothetical examples of situations in which a health care employer might legally require a polygraph (lie detector) test as a condition of either initial or continued employment.
10. Viewing the Family and Medical Leave Act from the perspective of a working department manager, describe the ways in which this legislation has affected a supervisor's ability to manage.

Resources

Books

- Buckley, J. F., & Green, R. M. (2004). *State by State Guide to Human Resources Law 2005*. Frederick, MD: Aspen.
- Guerin, L. (2005). *Create Your Own Employee Handbook: A Legal and Practical Guide with CD* (2nd ed.). Berkeley, CA: NOLO Publishing.
- Kaiser, S. E. (2004). *Develop an Affirmative Action Program as a Risk Management Tool*. Lincoln, NE: iUniverse.
- Shilling, D. (2004). *The Complete Guide to Human Resources and the Law*. Amsterdam: Wolters Kluwer Company.

Periodicals

- Edelman, L. B. (1992). Legal ambiguity and symbolic structures: Organizational mediation of civil rights law. *American Journal of Sociology*, 87, 1531-1576.
- McGlothlen, C. A. (1999). 7th Circuit ruling allows employers to cap AIDS benefits. *AIDS Policy Law*, 14(14), 7-9.

- O'Brien, G. V., & Ellengood, C. (2005). The Americans with Disabilities Act: A decision tree for social services administrators. *Social Work, 50*(3), 271-279.
- Popovich, P. M., Scherbaum, C. A., Scherbaum, K. L., & Polinko, N. (2003). The assessment of attitudes toward individuals with disabilities in the workplace. *Journal of Psychology, 137*(2), 163-177.
- Ritchie, A. J. (2002). Commentary: Implementation of the Americans with Disabilities Act in the workplace. *Journal of the American Academy of Psychiatry and Law, 30*(3), 364-370.
- Sassi, F., Carrier, J., & Weinberg, J. (2004). Affirmative action: The lessons for health care. *British Medical Journal, 328*(7450), 1213-1214.
- Schiff, M. B. (2004). A primer on case law under the Americans with Disabilities Act. *Tort Trial and Insurance Practice Law Journal, 39*(4), 1141-1196.
- Takakuwa, K. M., Ernst, A. A., & Weiss, S. J. (2002). Residents with disabilities: A national survey of directors of emergency medicine residency programs. *Southern Medical Journal, 95*(4), 436-440.
- Weill, P. A., & Mattis, M. C. (2003). To shatter the glass ceiling in healthcare management: Who supports affirmative action and why? *Health Services Management Research, 16*(4), 224-233.
- Westreich, L. M. (2002). Addiction and the Americans with Disabilities Act. *Journal of the American Academy of Psychiatry and Law, 30*(3), 355-363.

