

2006 And Beyond: RBS' Annual HR Legal Update

Presented by:
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The Ohio Fair Minimum Wage Amendment

New Minimum Wage in Ohio

- \$6.85 as of January 1, 2007
- Annual increases based on the rate of inflation
- Applies to all businesses with annual gross receipts of \$250,000 or more in the preceding calendar year
- Federal minimum wage applies to businesses with annual receipts of \$500,000 or greater

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The Ohio Fair Minimum Wage Amendment

Exemptions to New Minimum Wage

- Federal minimum wage applies to:
 - All employees under 16 years of age
 - Employees employed by a business with less than \$250,000 annual gross receipts
 - The \$250,000 minimum will be increased annually based upon the change in the CPI
 - Employees of a solely family owned and operated business *who are family members of the owner* and revenues greater than \$500,000

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The Ohio Fair Minimum Wage Amendment

Exemptions to New Minimum Wage

- Employees who receive tips may be paid at least 1/2 of minimum wage if tips + wages = minimum wage
- Employers of individuals with mental or physical disabilities who obtain licenses from state
 - Must prove employment opportunities are adversely affected
 - Probably not subject to federal wage law

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The Ohio Fair Minimum Wage Amendment

New Notice Obligations

- At the time of hire, employers shall provide:
 - Employer's name, address, telephone number and other contact information
 - Update such information whenever it changes
- Proposed HB 690
 - "Other contact info" does not include identity of any officer/shareholder/employer/manager
 - Provide changed info within 60 days via internet/bulletin board/paycheck notice

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The Ohio Fair Minimum Wage Amendment

New Notice Obligations

- Practical Advice:
 - Create and incorporate informational sheet into new employee orientation procedure and add to check-off list
 - Ensure all contact information in Handbook
 - Maintain updated website

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The Ohio Fair Minimum Wage Amendment

New Record Keeping Obligations

- Employers must maintain pay records:
 - Name, address, occupation, pay rate, hours worked for each day worked and each amount paid an employee
 - Must be kept for 3 years from last date of employment

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The Ohio Fair Minimum Wage Amendment

New Record Keeping Obligations

- HB 690 delineates pay records
 - Pay rate for non-exempt = base rate of pay
 - Pay rate for exempt = annual base salary only
 - No particular method or form of maintaining such a record is required and may be maintained in more than one record/form as long as one can reasonably review the information requested
 - No such records required pre-January 1, 2007

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The Ohio Fair Minimum Wage Amendment

New Record Keeping Obligations

- HB 690 defines "hours worked"
 - Non-exempt = total amount of time worked in whatever increments employer uses
 - Exempt = no records at all

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The Ohio Fair Minimum Wage Amendment

New Record Keeping Obligations

- Practical Advice
 - Continue maintaining records in regular course of business until know for certain status of HB 690

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The Ohio Fair Minimum Wage Amendment

New Obligation To Provide Pay Records

- Employers must provide such info to:
 - An employee or person acting on behalf of an employee upon request
 - Without charge
- HB 690
 - Such info = pay records
 - Within 60 business days after date of request or less if hardship exists

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The Ohio Fair Minimum Wage Amendment

New Obligation To Provide Pay Records

- HB 690 limits records that must be provided to the employee's own records only
 - Employer may require written request signed and notarized by employee and specifying exact info requested

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The Ohio Fair Minimum Wage Amendment

Anti-Retaliation Provision

- No employer shall discharge, discriminate or retaliate against an employee for exercising any right under the new law or for providing assistance to an employee

The Ohio Fair Minimum Wage Amendment

Enforcement Mechanisms - Administrative

- File a complaint with State of Ohio
 - Employer must comply with investigation and make available records related to investigation and employee(s) who filed complaint

The Ohio Fair Minimum Wage Amendment

Enforcement Mechanisms - Court

- File a complaint in court
 - Within 3 years of violation or 1 year after state ends investigation, whichever is later
 - Include as plaintiff(s) only employees who give written consent that is filed in court
 - Supersedes prior action for wage violations
 - Attorneys fees awarded to successful employee but not to successful employer unless frivolous finding is made

The Ohio Fair Minimum Wage Amendment

Enforcement Mechanisms - Court

- Statutory Damages
 - 2 x amount of back pay for failure to pay minimum wage
 - At least \$150 for each day of violation of an anti-retaliation provision sufficient to compensate and deter
 - Payment is not stayed pending appeal

The Workers' Compensation Amendment

Definition of "Injury" Modified

- Previous definition only permitted psychiatric conditions that arose from an injury or occupational disease
 - Where employee sustains head injury and it later turns into psychiatric condition
 - Where employee sustains carpal tunnel and it causes depression

The Workers' Compensation Amendment

Definition of "Injury" Modified

- New definition of injury extends allowable psychiatric conditions
 - Where the claimant's psychiatric conditions arose from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate
 - There must be in existence forced sexual conduct in which claimant actually engaged or participated

The Workers' Compensation Amendment

Definition of "Injury" Modified

- New definition of "sexual conduct"
 - Vaginal intercourse between male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of gender; and without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus or other object into the vaginal or anal cavity of another.
 - Penetration, however slight, is sufficient to complete vaginal or anal intercourse

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The Workers' Compensation Amendment

Definition of "Injury" Modified

- New definition of "sexual conduct"
 - Covers heterosexuals as well as homosexuals
 - Any insertion of anything into the vaginal or anal cavity of another
 - Need not actually engaged in it - - may have only participated in

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The Workers' Compensation Amendment

Definition of "Injury" Modified

- Outstanding Issues
 - What if it happens outside of work at a non-work function between two workers?
 - What if it is alleged to have occurred by a former lover who now has been jilted?
 - What if claimant only participated in vs. engaged?
 - Upon receipt of claim, must the employer notify police of suspicion that a crime may have been committed?

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The Workers' Compensation Amendment

Definition of "Injury" Modified

- Outstanding Issues
 - Workers' comp hearings typically take unsworn, untaped testimony
 - Employers now face liability under workers' comp and anti-discrimination laws, which is antithetical to the workers' comp law in Ohio

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The Workers' Compensation Amendment

Definition of "Injury" Modified

- What this means going forward
 - Ensure your policy prohibiting sexual harassment is intact and distributed
 - Treat notification of new claim same as complaint of harassment
 - Schedule training to all employees in an effort to remind them of company's prohibition against harassment and that any threat of harm or otherwise is never tolerated and must be reported

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The Workers' Compensation Amendment

Definition of "Injury" Modified

- What this means going forward
 - Ensure that an attorney represents your company in such a workers' comp claim and that a court reported is present at the hearing to formally and fully save all testimony at trial

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The Retaliation Provision

Retaliation Defined

- In Ohio, retaliation arises when an employer takes **adverse employment action** against one engaging in protected activity
 - "Adverse employment action" is a materially adverse change in the terms and conditions of employment
 - Both the retaliatory act and harm had to be workplace-related or employment-related and be an "ultimate employment decision"

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The Retaliation Provision

Burlington N&S Railway v. White

■ Facts:

- Female employee operating a forklift complained of sexual harassment against her supervisor.
- Supervisor was disciplined and at same time, female transferred to a truck laborer position at same rate of pay and same shift and that was in the same job description as forklift operator
- A few days after receiving EEOC charge, given 37 day unpaid suspension for insubordination, which was later revoked

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The Retaliation Provision

Burlington N&S Railway v. White

- Female filed retaliation suit
 - Employer argued no retaliation because there was no adverse employment action - - same pay, same shift, within same job classification therefore no material or other change in employment
 - Unpaid suspension not related to complaint and in any event rescinded and employee paid
 - 6th Circuit agreed with both arguments and reversed jury verdict

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The Retaliation Provision

Burlington N&S Railway v. White

■ U.S. Supreme Court held:

- Ohio's definition limiting actionable retaliation to "ultimate employment decisions" rejected
 - The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm
 - The scope must be broad enough to enable employees to feel free to complain and to be free from all effects of retaliation

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The Retaliation Provision

Burlington N&S Railway v. White

■ Court's New Definition:

- The "adverse action" now is defined as whether it is material to a reasonable employee
- Would such action likely have "dissuaded a reasonable worker from making or supporting a charge of discrimination"
- Focus on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position

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The Retaliation Provision

Burlington N&S Railway v. White

■ Conduct met new definition:

- New job duties were dirtier, less prestigious, more physical
- Same pay rate irrelevant
- 37 day unpaid suspension, even though later rescinded with pay, still has effect of hindering others from complaining in the future
 - White had to live for 37 days without pay and therefore was harmed

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The Retaliation Provision

Greer-Burger v. Temesi

- Ohio Court's Application of *White*
 - Greer-Burger quit her employment with Temesi's company and filed an unsuccessful harassment suit
 - Five months later, Temesi sues Greer-Burger for malicious prosecution, abuse of process and intentional infliction of emotional distress and seeks compensatory and punitive damages
 - Greer-Burger files OCRC charge of retaliation

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The Retaliation Provision

Greer-Burger v. Temesi

- Retaliation Found to Exist
 - No longer matter that no employment relationship and/or action in existence
 - Temesi's claim for punitive damages defeats overriding purpose of anti-retaliation statutes
 - Punishes an individual for pursuing a discrimination or harassment claim
 - Absent evidence of frivolous suit, a punishment cannot override the underlying purpose of anti-retaliation laws

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The Retaliation Provision

Greer-Burger v. Temesi

- Attorneys' Fees Award Found Proper
 - While any one who is frivolously sued may seek to recover its fees, they may not do so in a retaliatory way
 - Temesi should have filed Rule 11 motion and motion for sanctions in original suit following jury verdict

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Last Chance Agreements

Partlow v. Blue Coral-Slick 50

- Facts
 - Employee put under last chance agreement during his rehab for drug addiction, which stated he agreed to stop using drugs
 - After return to work, he was arrested outside a crack house but stated he had no money to buy it
 - However, he was chewing something that turned out to be cocaine and he later admitted eating crack and he was terminated

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Last Chance Agreements

Partlow v. Blue Coral-Slick 50

- Discharge Did Not Violate Disability Law
 - Partlow was a current drug user and thus not protected by ADA or Ohio law
 - Fact that he had just returned from rehab did not protect him: "While current drug rehabilitation is considered a disability under law, current drug use is not."
 - Agreement was otherwise valid and evidence undeniably established a violation

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WORKFORCE CRISIS: MYTH OR REALITY?

HRDU/RBS UPDATE BREAKFAST
SERIES: Michael S. Duchon

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Key Statistics

- The industrialized world is aging—causing a shift in the age distribution of the general population impacting the labor force
- Three factors are driving this shift:
 - Baby boom
 - Longevity boom
 - Birth dearth

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Baby Boom

- Nearly one-third of Americans—76 million were born between 1946 and 1964
- **QUESTION**—How will companies survive the massive exodus of skills, experience, customer relationships, and knowledge?

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Longevity Boom

- Throughout most of history, the average life expectancy was less than 18.
- 1900—life expectancy at birth in the United States was 47; now it is about 77.
- 100 years ago only 4% of the US population was over 65, now it is 14% and rising

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Longevity Boom

- This is due to breakthroughs in health care and other quality-of-life advances, more people are living longer.

QUESTIONS

- What is middle age?
- When are workers no longer productive?
- At what age do employees stop learning or seeking new challenges?

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Birth Dearth

- Peaking at 3.7 in the mid-1950s, the average number of children per woman in the United States has declined to 2.
- Nearly 20 percent of baby boomers will have no children, and another 25 percent will have only one child.

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Birth Dearth Globally

- Declining birthrates across industrialized nations guarantee a recurrent shortage of native-born younger workers.
 - Italy—1.2
 - Germany—1.3
 - Japan—1.4

These are all below the replacement rate of 2.1 children per woman

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Age Wave

- These three factors will drive the “age wave” causing an unprecedented shift in the age distribution of the population.

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Impact

- Few organizations are really preparing for this transformation of the workforce.
- While our markets are targeting an older population of consumers, managers are still encouraging mature workers to retire early—(e.g. GM, Ford, GE, Rockwell International, HP).

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Impact

- This is a mistake:
 - Even though the U.S. workforce continues to grow, the rate of growth will decline from 12 percent this decade to only 4 percent between 2010 and 2020, then three percent between 2020 and 2030.
 - Translates from today’s annual growth rate of just over 1 percent to an anemic 0.3 percent around 2020.

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Impact By Age Segment

- 16 to 24 year old is growing by 15 percent due to the “echo boom”
- 25 to 34 year old is growing at half that rate
- 35 to 44 year old—prime executive development is actually declining

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Impact By Age Segment

- Baby boomer generation moving through middle age and its vanguard nearing retirement age, the **fastest** growth rates are in the **three oldest** age segments.
- Steady growth comes only from the 55 plus cohort, the fastest growing segment (84 million Americans of boomer age).
- Mature workers will constitute proportionally more of the future workforce.

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Impact By Age Segment

- During the next 15 years, 80 percent of the native-born workforce growth in North America—and even more so in Western Europe will come from those over 50.
- 55 to 64 year olds constitute over 12 percent of the workforce, up from 10.2 percent in 2000.

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What Are Organizations Planning On Doing?

- In essence employers should be planning to double the proportion of workers fifty five and older
- Unprecedented and therefore unfamiliar managerial challenges are associated with all age cohorts:
 - Younger workers who eschew large corporations;
 - Disillusioned mid-career workers who burn out from work and family pressures;
 - Mature workers who want to keep contributing to the organization

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How Does Impact Vary by Industry?

- Labor shortages affect different industries and employers in different ways:
 - Public utilities will face a mass retirement of skilled technicians and management (i.e., First Energy—over 50% of their management will retire over the next 5 to 7 years)
 - Medical profession has had a shortage of nurses for years—this will only worsen as baby boomers continue to age
 - Teaching profession (during the next 7 to 10 years over 50% of the teachers will be retiring)

QUESTION

How will your industry be affected?

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When Will the Shortage Start?

- Demographic and economic projections indicate that the shortage of workers will start soon and grow significantly
- Employment Policy Foundation (EPF) estimates that 80 percent of the impending labor shortage will involve *skills*, not the numbers of workers potentially available.

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What Variables Affect This Projection?

- Complex set of variables shape the timing, and extent of these deficits.
 - **Economic conditions** and the **rate of job creation** govern the demand for workers
 - Turn-of-millennium recession and the effects of September 11 on the U.S. economy reduced this demand and presumably delayed the shortages.

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Job Creation

- EPF estimates that 23 million net new jobs this decade will outstrip the supply of workers by a wide margin.
 - Productivity gains also reduce the demand for labor.
 - BLS (Bureau Labor Statistics) workforce projections are based on the historical productivity growth rate of 1.5 percent per year.
 - Better automation and information flow enable companies to do more with fewer workers.

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What Factors Impact Job Creation?

- Net export of jobs delays or reduces labor shortages (the number of jobs off-shored in an average year amounts to only two-tenths of 1 percent of total jobs).
- Immigration policies, including the number of work visas allowed for skilled workers, will affect the labor pool (2020, immigration will account for virtually all of the United States' net workforce growth).

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What Factors Impact Job Creation?

- Education is just not the number of workers but what they can do—factors heavily into every new job they can do.
 - Technological demands of even unskilled entry level jobs are increasing, and professional and technical fields are already experiencing shortages (i.e., need for technicians with robotic experience)
 - BLS estimates that approximately 56 percent of workers gather, process, or use some form of automated information in their work

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What Factors Impact Job Creation?

- EPF 35 percent of the labor force works in management, professional and technical occupations that demand extensive education, on-going training, independent thinking and decision action.
- BLS estimates that one in five new jobs this decade will be in business services the fastest growing sector.

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What Factors Impact Job Creation?

- Other hot occupations various categories of computer engineers and users (e.g., desktop publishing), nurses, medical and home care assistants, sales and customer service representatives.
- By 2010 25 percent of all workers will be in **professional** occupations.

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What Are Our HR Challenges Ahead of Us?

- How do we work with the three career cohorts (mature workers, mid-career workers, and young workers) and how to engage their commitment and bring out their best performance

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Questions to Ponder for Mature Workers?

- How do we recruit and retain them?
- How do we capitalize on their knowledge and organizational connections?
- How can we overcome regulatory organizational barriers to make "flexible retirement" work?
- How do we overcome age bias and develop a reputation as a mature-worker-friendly environment?

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Questions to Ponder for Mid-Career Workers?

- How do we keep them engaged and productive by offering a wide variety of work, flexible work arrangements, and benefits that enable work-life balance?
- How can we emphasize career redirection and other means of personal reinvention and recommitment?

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Questions to Ponder for Young Workers?

- How do we go about recruiting, motivating, and retaining them?
- How do we minimize our turnover rates?
- How do we assimilate them into the organization rapidly and effectively?
- How do we keep them engaged and productive by giving them "say and stake" and fulfilling their desire for independence, learning and rapid growth?

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What Are Some Opportunities to Customize the Employer-Employee Equation

- In order to satisfy workers of all ages and lifestyles we need to look at the following components:
 - Flexible work arrangements (information-age economy)
 - Engender productivity and loyalty
 - Flexible learning
 - Flexible compensation

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Business Strategy & Total Rewards Strategy Integration

- Three key drivers:
 - Organizational Culture (values, norms, mores)
 - Business Strategy (operational excellence, product leadership, or customer intimacy)
 - HR Strategy (help drive "critical success factors")

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Business Strategy & Total Rewards Strategy Integration

- Build a Total Rewards Strategy:
 - Compensation
 - Fixed and variable pay (pay-at-risk)
 - Benefits
 - Challenge of shrinking health-care benefits and expanding health care premiums.
 - Work-Life
 - Programs that help employees do their jobs effectively (flexible scheduling, telecommuting, child-care programs)

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Business Strategy & Total Rewards Strategy Integration

- Build a Total Rewards Strategy:
 - Performance & Recognition
 - Pay-for-performance strategies—talent management, performance involves the alignment of organizational and individual goals toward business success
 - Development & Career Opportunities
 - Motivating and engaging the workforce requires planning for the advancement and/or change in responsibilities to best suit individual skills, talent and desires.

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Outputs

- Total Rewards Strategy that enables you to attract, retain, and motivate key talent
- Results in employee satisfaction and engagement
 - Climate survey
 - Turnover analysis
 - Exit interview analysis
- Results in increased organizational productivity and profitability (we are here for the long haul)

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How Are You Going to Attract, Retain & Build Key Talent?

BRAINSTORMING IDEAS

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WORKFORCE CRISIS: MYTH OR REALITY?

Good luck on your journey to attracting, retaining, and motivating key talent in in the coming workforce challenges we face.

Michael S. Duchon (HRDU)

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Smoke Free Workplace

- Issue 5 passed – 58% - 42%
- Focus of campaign on bars and restaurants
- Much broader than advertised

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Smoke Free Workplace

- LAW APPLIES TO:
 - All public places
 - All places of employment
- VERY FEW EXCEPTIONS

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Smoke Free Workplace Exemptions

- Exempt from the law:
 - Private residence
 - Home based businesses must comply during business hours and;
 - When non-resident employees are present

Smoke Free Workplace Exemptions

- Family owned businesses where all employees are related to the owner and business is not open to the public
- Hotel Rooms

Smoke Free Workplace Exemptions

- Nursing Homes:
 - Smoking permitted in indoor smoking areas for residents only so long as smoking area is separately enclosed and ventilated
 - No employee may be required to accompany a resident into the smoking area

Smoke Free Workplace Exemptions


- Private Clubs
- Retail tobacco stores in operation prior to December 7, 2006
- Retail tobacco store is defined as a store that derives more than 80% of its revenue from tobacco sales

Smoke Free Workplace

- No smoking in place of employment at any time
- "Place of employment" defined as enclosed area under direct or indirect control of employer

Smoke Free Workplace

- "Place of Employment" includes:
 - Offices
 - Meeting rooms
 - Production/warehouse areas
 - Restrooms
 - Hallways
 - Garages
 - Company owned or leased vehicles




Smoke Free Workplace

- Smoking also prohibited in areas under control of employer “immediately adjacent” to exits and entrances
- Includes
 - Lobbies
 - Entrance ways
 - Immediately outside front doors

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Smoke Free Workplace

- Smoke may not enter any area where smoking is prohibited through:
 - Entrances
 - Windows
 - Ventilation systems

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Smoke Free Workplace Where can Employees Smoke?

- Where can you allow employees to smoke?
 - In ventilated areas far enough away from building to ensure smoke does not get in
 - In their personal vehicle
 - On an “outdoor patio”

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Smoke Free Workplace Where can Employees Smoke?

- “Outdoor Patio” defined as either:
 - Area with roof and walls on not more than two sides; or
 - No roof regardless of number of walls;
 - Must be physically separated from enclosed area

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Smoke Free Workplace Where can Employees Smoke?

- “Outdoor Patio”
 - If windows or doors form part of the barrier between the patio and the enclosed area the openings shall be closed
 - If the windows or doors do not prevent smoke from coming in smoking is prohibited on the patio

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Smoke Free Workplace

- Compliance by today – December 7, 2006
 - Remove all ashtrays and other cigarette receptacles from any area where smoking is prohibited
 - Post no smoking signs at entrances to the public place or place of employment
 - All signs to include complaint phone number

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Smoke Free Workplace

- Enforcement
 - Department of Health to enact regulations within six months of effective date
 - Complaints called in to 866-559-OHIO
 - If Department of Health concludes there is a violation:
 - Warning letter on 1st offense
 - Fine for second and further offenses
 - Between \$100 to \$250 per violation
 - Each day of violation shall constitute a separate violation

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Smoke Free Workplace

- Adopt Company Policy
 - Include –
 - Where smoking is prohibited
 - Where smoking is permitted
 - How to report violations – toll free number and/or human resources
 - “Compliance is mandatory and policy violations subject to standard disciplinary policy”
 - No retaliation language
 - Tobacco cessation opportunities?

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New Electronic Discovery Rules

- If you are sued what electronic documents will you be expected to produce
- Currently applies only in federal courts
- Places burden on lawyers and litigants

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New Electronic Discovery Rules

- Immediately upon filing of the case no electronically stored information may be destroyed
- Attorney is to identify with the company’s IT personnel what electronically stored information exists

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New Electronic Discovery Rules

- Company does not have to produce electronically stored information if it is not reasonably accessible because of undue burden or cost
- The company must prove undue cost or burden

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New Electronic Discovery Rules

- No penalty to the company if electronically stored information is lost as a result of "routine, good faith operation of an electronic information system"
- Once case is filed no electronically submitted information regarding the issues in the case may be destroyed

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New Electronic Discovery Rules

- Lessons:
 - Develop an electronically stored information routine destruction policy with your IT professional
 - Be prepared for lots of questions regarding IT matters from your attorney when a suit is filed
 - **REMEMBER** – If it is in your e-mail or on your computer it is on your letterhead

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Case Law Update

- *Ash v. Tyson Foods*
 - Referring to African-American employee as "boy" can be evidence of racial discrimination
 - Supreme Court says Court's have to consider speaker's meaning "including context, inflection, tone of voice, local custom and historical usage"

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What To Expect in 2007

- Democrats control in U.S. House and Senate
 - Health insurance reform
 - Minimum wage
 - Cut interest rates on student loans
 - Ethics reform

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What to Expect in 2007

- Strickland in as Governor
- Strong Republican majorities in Ohio House and Senate
 - Education funding
 - Health care reform

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