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#### **On Creating a Functional Family**

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You can effectively handle workplace laws without passing a bar exam, but you should be familiar enough with state and federal employment laws to recognize potential red flags and take action before an issue develops into a discrimination charge or a lawsuit. This article provides an overview of several important employment laws including [Title VII of the Civil Rights Act of 1964](#), the [Age Discrimination in Employment Act](#) (ADEA), the [Americans with Disabilities Act](#) (ADA), the [Family and Medical Leave Act](#) (FMLA), and the [Fair Labor Standards Act](#) (FLSA).

#### **Whistle While You Work: Whistleblower Laws Affecting Repair Stations**

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Whistleblowing occurs when an employee voices a complaint about a business practice or condition that may violate the law to the employer or a government agency. Enactment of the [Wendell H. Ford Aviation Investment and Reform Act for the 21st Century](#) (AIR-21), among other whistleblower laws, raised the potential exposure for aviation-related employers enormously. Here are the steps the Occupational Safety and Health Administration (OSHA) follows when investigating a whistleblower or retaliation complaint by an employee.

#### **Singing in the Rain: Be Proactive to Avoid Whistleblower Claims**

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Whistleblowers are a protected class just like race, gender, age, or religion. Before taking an adverse employment action against an employee, such as a written warning, demotion, or termination, consider whether that employee is or may be a whistleblower. Your company should also establish a reasonable procedure for employees to report suspicions of wrongdoing or questionable activity.

#### **Don't Trip on the Tarmac: The H-2B Visa**

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Operation Tarmac is an initiative of United States Immigration and Customs Enforcement (ICE) and other federal and state agencies to, among other things, investigate the immigration status of airline-industry workers in the United States. Operation Tarmac affects many ARSA members. If you need to employ a non-U.S. citizen as a mechanic, the H-2B visa will most likely be necessary. An [H-2B](#) visa provides work authorization in situations of temporary need during a demonstrated shortage of U.S. workers.

#### **Don't Trip on the Tarmac: Form I-9**

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Under federal law, an employer must (1) not knowingly hire or continue to employ any person not authorized to work in the United States and (2) complete Form I-9 to verify the identity and employment eligibility of every new employee—whether a U.S. citizen or foreign national—hired on or after November 6, 1986.

#### **Don't Trip on the Tarmac: Special I-9 Issues**

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Our discussion of the I-9 Form continues with a focus on the special problems presented to employers that encounter fake documents and other fraudulent information.

#### **Confederate Southern American is Not a Protected Class**

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Courts have universally concluded that employees do not have a constitutional right to display the Confederate flag on personal items at work and that private employers may ban the display of such items in the workplace. Allowing Confederate symbols in the workplace could potentially expose an employer to liability under Title VII of the Civil Rights Act of 1964 for a hostile work environment.

#### **Don't Let "Change to Win" Defeat Your Company**

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A group of unions recently separated from the AFL-CIO and formed a coalition called "Change to Win." This coalition represents nearly a third of all union members in the country and is increasing funds and efforts to organize labor.

**Article****Page****Don't Let "Change to Win" Defeat Your Company, Part 2**

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The "Change to Win" union coalition will likely lead to an increase in unionization efforts by its members and other unions. The best method to avoid unionization is to maintain positive employee relationships and good human resources practices.

**Employers Can Place Limits on Employee Lawsuits**

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As an employer, you may be able to shorten the length of time during which you can be sued, and it's as simple as amending your employment application.

**Avoiding Legal Liability: Ideas for ARSA Members**

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Use these ten tips to reduce the likelihood of employment litigation, the cost of any litigation, and to increase the chance of winning any litigation.

**Share the Burden of War by Helping a Reservist**

35

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) governs the relationship between military reservists and their employers. The basic principles of USERRA are listed and explained.

**Conducting Investigations of Employees**

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Whether interviewing a complainant, aggressor, co-worker, manager, or any other employee whose identity surfaces during an investigation, you must be careful not to intimidate, persuade, influence, or manipulate the witness(es). Consider these guidelines when conducting an interview of an employee.

**Recent AIR-21 Decisions Expand Employee-Employer Relationship**

38

In a recent claim against Southwest Airlines under the Aviation Investment and Reform Act for the 21st Century (AIR-21), the Administrative Review Board concluded that there must be an employer–employee relationship between the air carrier, contractor or subcontractor employer who violates AIR-21, and the employee who is discharged or discriminated against. This means an employee under AIR-21 may include employees of contractors and temporary agencies.

**Navigating the Joint Employment Maze**

40

The term "joint employment" describes the legal relationship between two employers that have actual or potential legal rights and duties with respect to the same employee or group of employees. In subcontracting and employee leasing situations, a worker may be considered an employee of two entities under many employment laws including the Fair Labor Standards Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Employee Retirement Income Security Act (ERISA).

**Employment Law 101**

42

Since the enactment of the Civil Rights Act of 1991, there has been a near exponential increase in employment discrimination and wrongful discharge lawsuits. This article provides a four-step process to use in hiring and managing workers to increase your company's chance of prevailing against an employment discrimination charge.

**Supreme Court Defines Retaliation—And It's Adverse to Employers**

43

In *Burlington Northern & Santa Fe Railway Co. v. White*, the Court adopted a considerably more flexible, and thus, more amorphous retaliation standard requiring only that "a reasonable employee would have found the challenged action adverse." As a result, retaliation claims against employers will likely increase.

**Article****Page****The Social Security (Mis)Match Game**

44

The Department of Homeland Security (DHS) recently published proposed regulations that would significantly change employer obligations when responding to a letter from either the Social Security Administration (SSA) or DHS that identifies a mismatch between an employee's Social Security number and name. If notified of a mismatch, the employer must first check for clerical errors, and if no error is discovered, the employer must instruct the employee to pursue the matter with the relevant agency.

**An Overview of Title VII of the Civil Rights Act of 1964**

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Title VII of the Civil Rights Act prohibits any employer from discriminating against an individual based on the individual's race, color, religion, sex, or national origin. In general, the statute applies to employers with at least fifteen employees and prohibits discrimination and harassment.

**The Americans with Disabilities Act of 1990: An Overview**

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The Americans with Disabilities Act (ADA) prohibits an employer with fifteen or more employees from discriminating against a "qualified individual with a disability" who can perform "the essential functions" of a job "with or without reasonable accommodation." the ADA is challenging, and definitions provided in the article will help clarify the terminology..

**An Overview of the Family and Medical Leave Act of 1993**

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The Family and Medical Leave Act (FMLA) provides eligible employees guaranteed, unpaid leave for qualified personal and family illnesses and for the birth or adoption of a child. Additionally, FMLA protects the eligible employees' jobs in the process. This article describes the threshold requirements for eligibility and important definitions under the statute.

**Employer Liability at Off-Site Celebrations**

52

Misconduct at company-hosted gatherings can expose your organization to liability for drunk driving and potentially for sexual misconduct of party goers. To minimize the risk to your employees and company, consider these guidelines when hosting functions.

**What the Democrat Controlled Congress May Do in This New Year**

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With Democrats in control of both houses of Congress, they will likely address several issues important to employers such as minimum wage increase, immigration reform, revision of the Family and Medical Leave Act (FMLA), and paid sick leave.

**1-2-3-Stand Clear . . . ZZZZZZZT!**

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Although not required by current OSHA regulations, the agency encourages employers to consider placing Automated External Defibrillators (AEDs) in the workplace. Many states have AED laws that dictate physician oversight, training, and registration. All existing state AED laws protect lay rescuers using AEDs from tort liability provided that the aid is rendered in good faith, without gross negligence, and without objection from the victim.

**Exactly What Is "Retaliation"?**

57

A valid retaliation claim consists of three elements: (1) legally protected activity, (2) adverse employment action, and (3) a "causal nexus" between the protected activity and the adverse action. To help avoid a claim of retaliation, employers should educate and train supervisors, enforce policy consistently, and inform employees of their rights.

**Article****Page****Can Employers Lawfully Prohibit Employees From Discussing Salaries?**

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Many employer policies prohibit employees from discussing information related to their wages and terms and conditions of employment. Such prohibitions can result in legal challenges, and employers must write their policies in a manner that prevents employees from reasonably construing them to be a violation of their rights.

**You Snooze, You Lose!**

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Foreign student graduates are eligible to work in the U.S. for one year after graduation as part of their Optional Practical Training. However, for continued employment, employers need to file a timely application for an H-1B professional work visa.

**Congress Considering Workplace Bills**

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The House recently passed H.R. 493, which prohibits employers and insurers from discriminating against individuals based on their genetic information. If enacted, H.R. 493 will amend Title VII of the Civil Rights Act of 1964. The Employment Non-Discrimination Act (ENDA), recently introduced in the House, would prohibit discrimination based on sexual orientation or gender identity.

**Handling Unemployment Claims – Part 1**

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If an employer contests a discharged employee's unemployment compensation claim, an appeals hearing will be held. A disgruntled ex-employee may potentially use this hearing to gather information for a claim of discrimination or other labor complaint.

**Handling Unemployment Claims – Part 2: Conducting an Internal Risk Assessment Audit**

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A discharged employee may or may not give notice of intended civil or administrative action against an employer. Regardless, a wise employer should conduct a simple and inexpensive internal audit before deciding whether to contest an unemployment claim.

**Handling Unemployment Claims — Part 3**

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Although state laws vary, generally speaking, a former employee is disqualified from receiving unemployment benefits if the employer terminated employment for misconduct connected with work or if the employee left without good cause attributable to the employer. Depending on the circumstance, employers should ask different questions before deciding whether or not to contest an unemployment compensation claim.

**What Can I Do When an Employee Discloses a Problem With Drug Use or Tests Positive for Drugs?**

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If an employee admits to drug use or tests positive for drugs and is covered under the Department of Transportation (DOT) testing requirements, the employer's only options are dictated by federal law. However, if the employee is not covered under the DOT testing requirements, an employer may consider these three options: automatic termination, progressive discipline, or place the employee on a leave of absence and require the employee to enter into a Last Chance Assistance Agreement.

**Who Cares About Employment Recordkeeping Requirements?**

70

Appropriate recordkeeping may be tedious, but it is essential for compliance with federal and state employment laws. Application and employment records are vital when responding to an Office of Federal Contract Compliance Programs (OFCCP) audit or a U.S. Department of Labor (DOL) allegation of a Fair Labor Standards Act (FLSA) violation.

**Article****Page****Employment Records That Should or Must Be Kept**

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An employer should keep personnel records such as applications, resumes, or employment inquiries for one year from the date a decision was made not to hire an applicant or the date the record is created, whichever date is later.

**OSHA Recordkeeping Guidelines**

72

As part of its mission, the Occupational Safety and Health Administration (OSHA) requires employers to prepare and keep records of workplace injuries and illnesses. To assist in dealing with the law, here is a general overview of a few selected forms and their requirements

**A Consumer's Guide to Employment Practices Liability Insurance**

74

This article explains how a business can better protect itself from employee lawsuits and offers “the employment lawyer’s advice,” “scope of coverage,” and other useful tips.

**We Drug Test But How Can I Keep From Hiring a Drug User?**

76

This article provides some helpful insight on drug testing of prospective employees who are not already subject to Department of Transportation/Federal Aviation Administration (DOT/FAA) testing regulations.

**Does It Hurt If I Touch That?**

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Employers often ask what medical information they can get from an applicant or an employee. The circumstances under which an employer may seek medical information are largely governed by the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101, et seq.) and depend on whether the information is being sought from an applicant or a current employee.

**Whistleblower or Sour Grapes?**

80

Whistleblower administrative complaints and lawsuits against employers by current and former employees are all the rage. Not only are the claims numerous, but they also make headlines. No employer wants to be part of a complaint or lawsuit, and this article helps explain how an employer can best defend against these actions.

**Do We Need to Keep All This Paper?**

82

What should companies do with all of the applications, resumes, and other forms of employment inquiries they receive throughout the year? Can companies simply store them in the circular file (i.e., the trash can), or do they have to actually keep applications and resumes even though most were not even considered for employment?

**Who Can Have It?**

83

A common question regarding employees is whether an employee or some third party (e.g., an attorney representing an employee) has a right to access or copy the information in the employee’s personnel file. What obligations, if any, does an employer have when asked to provide an employee or some other third party with information from an employee’s personnel file?

**Business Records**

84

The business records of any company are vitally important to its proper functioning. Virtually all of the documents created by an employee are considered business records. Records can be in electronic or paper form. Thus, items that you may not at first blush consider important such as interoffice e-mails, desktop calendars, and printed memoranda are indeed business records.

**Article****Page****Employees 2, Employers 0—Employers: The Losses Will Continue to Mount**

85

As the Bob Dylan song says, "The times they are a-changin'." The administration of President Barack Obama is just weeks old, but employers are already starting to feel the effects. The labor and employment law landscape is fast changing and may well be unrecognizable soon.

**Be Wary: President Obama Is Solidly Pro-Labor**

86

The Employee Free Choice Act may be introduced as early as March 9, 2009, and President Obama has already declared his support. However, his pro-labor support has already been shown by the issuance of an Executive Order revoking an earlier Executive Order from President George W. Bush that required federal contractors to post a notice in non-exempt worksites informing employees of their rights not to join a labor union and not to pay fees for union expenses unrelated to representation issues such as political purposes.

**What Do the New Amendments to the Americans with Disabilities Act Mean for Employers? Does Every Employee Now Have a Disability?**

87

The first months of President Obama's administration have brought many changes to labor and employment laws. The first major change, however, occurred at the end of President George W. Bush's administration when the Americans with Disabilities Act Amendments Act (ADAAA) of 2008 was signed into law. The ADAAA dramatically broadens the definition of "disability." As a result, a substantially larger number of people may be considered "disabled" and protected by the Americans with Disabilities Act's (ADA's) prohibitions on employment discrimination and reasonable accommodations requirements.

**Can I Require My Mechanics to Speak, Read and Write in English?**

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In May 2009, television station WFAA in Dallas, TX, ran an investigatory news report on aircraft technicians who cannot read English. According to WFAA's report, hundreds of aircraft technicians at the Federal Aviation Administration-certificated maintenance facilities in Texas—more than 230 facilities—do not speak English and are unable to read aviation repair manuals.

**Employers Are Facing Many Challenges Under USERRA**

89

Many aviation mechanics and employees have military backgrounds, and quite a few still serve in a reserve role. Repair stations may have personnel who have been or will be called up to active duty. After the completion of their service, these employees may seek reinstatement. Consequently, employers should be aware of their obligations under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

**When Employees Come Marching Home**

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This article is a continuation of the discussion regarding USERRA. It assumes that the employer granted leave to an employee under USERRA and discusses the employer's obligations when the employee returns.

**Are You Ready for H1N1? Basics on Employer Pandemic Planning**

92

Is your business ready to address issues related to the H1N1 virus (formerly known as swine flu)? Have you considered how to prevent the spread of the virus in the workplace or what to do in the event your employees are affected by the virus? If H1N1 becomes a pandemic, businesses and other employers will play a key role in protecting employees' health and safety and limiting the negative impact to the economy and society. Proper planning by employers for this contingency is critical to successfully performing that role.



**Article****Page****Is Everyone Disabled Now? The EEOC Readies New ADA Regulations**

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The ADA Amendments Act (ADAAA), which became effective January 1, 2009, overruled many Supreme Court decisions favorable to employers. Congress believed that the Court's decisions restricted the ADA and it sought to expand the law to what it originally intended. This "expansion" through the enactment of the ADAAA will greatly expand the number of disability claims employers will face. The change will make it easier for employees to seek protection and establish a disability under the ADA.

**Can I Test My Employees for English Proficiency?**

95

Can an employer require technicians to read, write, understand, or speak English? The answer, generally, is yes, provided those requirements are job related and necessary for safety or other justifiable business reasons. This article explores whether an employer can test for English proficiency as well as the ability to grasp and understand technically required instructions such as those found in aeronautical repair manuals.

**The Genetic Information Nondiscrimination Act of 2008: Some Things You Need to Know About "GINA"**

96

As of November 21, 2009, Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employment discrimination based on "genetic information." Many employers are unaware of GINA, while others assume that none of their employment practices will be affected by the new law. However, all employers need to be familiar with GINA and modify their employment policies and procedures accordingly.

**Employers Should Be Aware of Domestic Violence Leave Laws**

98

Many employers take the position that while domestic or sexual violence is deplorable, it is the affected employee's problem and not an issue for the employer. However, employers should know that a growing trend among states is to enact laws that create legal obligations for an employer such as providing victims of domestic or sexual violence time off from work.

**"The Cat's Paw and the Monkey"**

99

The "cat's paw" theory is a way of proving employment discrimination when the decision-maker is admittedly unbiased, but the employee is able to demonstrate that the discriminatory animus of a non-decision-maker should be imputed to the decision-maker because the former has singular influence over the latter and uses that influence to cause an adverse employment action.

**Egg Shell Skulls in the Workplace: Revisiting a Civility Code**

100

In the world of the workplace, more and more employers are discovering that while most employees—the thick skulls—can handle tough talk, the odd raised voice or the occasional use of profanity can offend some employees and make them feel "harassed" and "mistreated" to the point of suffering emotional distress.

**There's a New Sheriff in Town!**

101

Secretary of Labor Hilda Solis introduced a New Public Awareness Campaign warning that "a new sheriff is in town." The campaign is designed to enforce wage and hour laws on behalf of low-wage and immigrant workers. The campaign is called "We Can Help."

**It's Time to Revisit Background Check Policies**

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Checking an applicant's references and background is a crucial step in the hiring process. However, the employer must advise an applicant in writing that a background check will be conducted, obtain the applicant's written authorization to obtain the records, and notify the applicant if a decision not to hire is based on what a check discloses.

**Article****Page****All About Workplace Violence**

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Workplace violence is not specifically addressed by any federal law or statute, and no federal law prohibits or regulates workplace violence. Nevertheless, without a policy prohibiting workplace violence, companies are at risk of incurring liability on several fronts.

**Fitness for Duty Examinations: A Preemptive Strike**

106

Under the Americans with Disabilities Act, an employer may, under certain circumstances, require an employee to undergo a fitness for duty medical examination (FFDE) to determine if the employee is disabled. If an employer can demonstrate that the employee's performance problems are related to a medical condition, the employer can raise what is commonly referred to as a "business necessity" defense to a potential ADA unlawful inquiry claim.

**Religious Expression vs. Religious Harassment in the Workplace**

107

Title VII of the Civil Rights Act of 1964 prohibits employers with fifteen or more employees from discriminating against employees based on their religion. As with other categories under Title VII, the prohibition extends to harassment and retaliation. Religion includes not only traditional, organized religions but also religious beliefs that are new, uncommon, not part of a formal church or sect, theistic beliefs, and non-theistic moral or ethical beliefs.

**Guess What's Coming to Town!**

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On December 22, 2010, the National Labor Relations Board (NLRB) published a proposed rule that requires every employer subject to the National Labor Relations Act (NLRA) to post a notice informing employees of their NLRA rights. It is estimated that the rule would affect the vast majority of the six million small businesses in the United States.

**An Update on Reverse Discrimination: What About the "N" Word?**

109

Generally, employers understand that Title VII of the Civil Rights Act prohibits race-based discrimination against employees. Does "race" include white employees as well as minorities? In a recent case, a United States district court in Philadelphia reiterated that Title VII is not limited to discrimination against members of any particular race and does apply to white employees.

**Updates and Reminders!**

110

The Supreme Court of the United States concluded that a male employee claiming he was fired because his fiancée filed a sexual discrimination charge against their mutual employer may pursue a Title VII retaliation claim. His fiancée was, clearly a "person aggrieved" who engaged in a "protected activity" under Title VII when she filed a sex discrimination charge and most certainly would have had a claim for retaliation if she had been terminated for filing the charge. The Court extended the definition of "person aggrieved" to include her fiancée, because he was an employee and entitled to protection under Title VII.

**Americans with Disability Act (ADA) Changes Could Increase Discrimination Claims and Employer Liability**

111

The Equal Employment Opportunity Commission published its final rule interpreting the Americans with Disabilities Act Amendments Act (ADAAA). The Act, which took effect in January 2009, not only overruled several decisions by the United States Supreme Court, but significantly broadened the definition of "disabled" to dramatically expand the number of people who qualify as "disabled."



**Article****Page****The Office of Federal Contract Compliance Programs: More (Bad) News**

113

The Office of Federal Contract Compliance Programs (OFCCP) proposed changes to the audit scheduling letter and itemized listing sent to supply and service contractors. Undoubtedly, compiling this extra information will create additional burdens for federal contractors, which are already burdened by proposed revisions to the affirmative action obligations with respect to covered veterans, Executive Orders requiring posting notices advising employees of their rights under federal labor laws, and interim regulations requiring publication information about their executives' compensation.

**Once Again - Bad News and More Bad News for Employers!**

114

With the demise (we hope) of the Employee Free Choice Act (EFCA), the Obama Administration's Democratic majority on the National Labor Relations Board has developed an alternative to facilitate successful union elections. Using the Board's rulemaking process, organized labor's "quickie election" option may soon become a reality.

**Extended Leave as an Accommodation**

116

When Congress enacted the Family Medical Leave Act (FMLA), there was considerable discussion about to whom it should apply. Congress settled on employers with fifty or more employees. By doing so, Congress acknowledged the "undue hardship" on small employers to provide their employees twelve weeks of unpaid leave. Unfortunately, the "reasonable accommodation" language in the Americans with Disabilities Act (ADA) may require small employers to provide unpaid leave.

**More About Concerted Activity**

118

Have you added the new "Employee Rights Under the National Labor Relations Act" poster to your office wallpaper? "Wait," you say, "Our company is not unionized; do we have to do this?" The answer is "yes" because it involves "concerted activity." The term concerted activity is buried in the National Labor Relations Act (NLRA), which makes the requirement applicable to all employers engaged in interstate commerce—virtually every employer.

**Beware of Greeks Bearing Gifts**

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The Internal Revenue Service (IRS), is offering a "gift" to employers. If an employer agrees it has misclassified employees as independent contractors, the IRS has promised to assess employment taxes at a reduced rate with no penalties, interest, or audits for only the tax year before the agreement was made.

**All About Association Discrimination**

120

When John received a charge of discrimination from the EEOC, he was confused. The charge was filed by a former employee who alleged that John fired him in violation of the Americans with Disabilities Act. The problem was that the employee was the perfect specimen of health. As John read on, he discovered that it wasn't about the employee's disability, but rather the disability of the employee's wife, who John never employed. How could this be?

**Emerging ADA Issues**

122

Does requiring a high school diploma violate the Americans with Disabilities Act (ADA)? This question has been addressed by the Equal Employment Opportunity Commission but only in an informal discussion so far.