The Hidden Rocks of Labor and Employment Law

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The Usual Suspects

- Title VII
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Fair Labor Standards Act
- Family Medical Leave Act
- Indiana Civil Rights Laws

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Hidden Rocks

- Electronic Communications Privacy Act ("ECPA")
- Employee Polygraph Protection Act ("EPPA")
- Fair Credit Reporting Act ("FCRA")
- Genetic Information Nondiscrimination Act ("GINA")
- Health Insurance Portability and Accountability Act ("HIPPA")
- Employee Medical Records
- Pregnancy & New Mothers
- WARN Act
- USERRA
- Sarbanes-Oxley
- Immigration
- Defense Trade Secrets Act
- GDPR
- Miscellaneous Indiana Laws

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Sherman Anti-Trust Act

- **What is required:**
  - The Act forbids any agreement or any other type of joint conduct that "unreasonably restrains" wage competition
  - Express or implied agreements between employers that fix, peg, or stabilize wages or benefits are per se violations of the Act
- **When problems arise:**
  - Wage surveys
  - Anticompetitive agreements
  - Exchanging information with competitors

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Sherman Anti-Trust Act

- **What can you do?**
  - Wage surveys must be managed by third-parties
    - Data must be more than 3 months old
    - All of the salary data employers use must be derived from at least five entities, and no individual entity can represent more than 25 percent of the data
    - Any information disseminated must be aggregated so recipients cannot identify the compensation paid by a particular organization
  - Avoid anti-competitive agreements (no hire, no poach, etc.)

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Jiffy Lube

- Recently named in antitrust class-action lawsuit for including in its franchise agreements “no-poach” and “no-hire” clauses
- Franchisees, likely without employee knowledge, agreed not to employ or seek to employ any person who is employed by or associated with another Jiffy Lube
- Employees’ theory:
  - Absence of competition for employees = wage suppression and stagnation
- One of many large businesses recently facing similar lawsuits

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Out-of-State Employees & the IRS

- **What is required:**
  - Employers are required to withhold state taxes on traveling employees and report the income to the appropriate jurisdiction.
- **When problems arise:**
  - Employees working remotely in other states
  - Employees travel for work and earn income in other states
  - Most states have their own withholding requirements
- **What you should do:**
  - Get assistance from a tax expert

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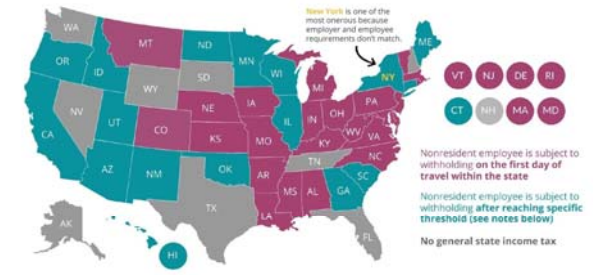

Notes for teal states: *employer* must withhold if nonresident employee (CY indicates a calendar year):

Arizona	is in the state for more than 60 days in a CY.
California	earns in-state wages above the state's "Low Income Exemption Table."
Connecticut	is in the state for more than 15 days in a CY.
Georgia	is in the state for more than 23 days in a CY or if $5,000 or more or 5% or more of total income is attributable to Georgia.
Hawaii	is in the state for more than 60 days in a CY.
Idaho	earns in-state wages of $1,000 or more in a CY.
Illinois	No withholding required if some services are performed in state but employee's base of operations is located out-of-state.
Maine	is in the state for more than 12 days in a CY.
Minnesota	earns in-state wages greater than or equal to the minimum income requirement for filing state income tax return ($10,650 for 2018).
New Mexico	is in the state for more than 16 days in a CY.
New York	is in the state for more than 14 days in a CY and wages earned exceed personal exemptions.
North Dakota	is in the state for more than 21 days in a CY and is a resident of a state that provides similar protections (such as reciprocal agreements; certain occupations not protected).
Oklahoma	earns in-state wages of $300 or more in a calendar quarter.
Oregon	earns in-state wages equal to or exceeding the employee's standard deduction.
South Carolina	earns in-state wages of $800 or more in a CY.
Utah	employer (not employee) does business in the state for more than 60 days in a CY.
Wisconsin	earns in-state wages of $1,500 or more in a CY.

Please note that this map only covers withholding. Many states have different standards for imposing tax on nonresidents (that is, the employee may owe tax even where the employer is not required to withhold). The map does not include reciprocal agreements. Also note that 21 states provide exemptions for nonresidents performing services during a declared disaster.

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Workplace Privacy

Statutes Implicating Privacy

- Electronic Communications Privacy Act ("ECPA")
- Employee Polygraph Protection Act ("EPPA")
- Fair Credit Reporting Act ("FCRA")
- Genetic Information Nondiscrimination Act ("GINA")
- Health Insurance Portability and Accountability Act ("HIPPA")

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Monitoring Employee Communications

- **ECPA / Federal Wiretap Act**
  - Prohibits the intentional interception or disclosure of any wire, oral, or electronic communication where there is a reasonable expectation of privacy – i.e., monitoring phone calls and emails.
- **Two Exceptions**
  - **(1) Prior Consent:** Only requires prior consent from one party to the communication (true in Indiana, but check state law).
  - **(2) "Ordinary course of business," or "business use"**: Interception permitted if undertaken by employers in the (1) ordinary course of their businesses (2) using equipment provided by a communications carrier as part of the communications network.

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ECPA / Federal Wiretap Act cont.

- Ultimately, the Business Exception provides that business-related communications can be monitored without employee consent, in the ordinary course of business, if the employee has notice.
- If the communications concern personal matters, the employer must stop monitoring.
- Employers cannot discipline an employee for personal communications, unless the personal communication violates a company policy.

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Recording Employees in the Workplace

- **Do you have video cameras on site?**
  - They must not record sound
- **Do you monitor employee phone calls?**
  - Employees must have notification that calls are being recorded
  - Employers cannot listen in on personal phone calls recorded on the employer's monitoring system

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ECPA / Federal Wiretap Act cont.

- **Stored Communications Act (SCA) (part of ECRA)**
  - Prohibits intrusions on *stored* communications, including emails and voicemails
  - Does **not** apply to work-related emails and voicemails stored on employer's servers
  - **Personal** email on personal server is still protected, even when accessed on employer-owned device:
    - *Levin v. ImpactOffice LLC* (D.Md. July 10, 2017): former employee could sue employer under SCA where she alleged that her employer accessed her personal emails in her Google Gmail account after she surrendered her company-issued mobile phone

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Monitoring Employee Communications

- **Email, Internet and Voicemail Usage Policy:**
  - An employer should establish a clear policy stating that it will monitor (or record) and review the content of calls, email, in transit and storage, voicemail, computer, and internet
  - Policies should include that passwords exist only to protect against security breaches and are not intended to prevent employer access to computers, email, internet, etc.
- The policy should be widely disseminated to employees with written acknowledgement of receipt and acceptance. This reduces any reasonable privacy expectation and satisfies the prior consent exception
- Employers may need to bargain with the union about the policy
- The policy must be consistently enforced

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FCRA (Fair Credit Reporting Act)

- **FCRA Notices**
  - **Before the background check is performed**
    - Must be in writing and in a stand-alone format
    - Cannot be in the employment application
    - Right to description of nature and scope of "investigative report"
  - **Pre-adverse action**
    - Employer must provide applicant with a copy of the report and a copy of "A Summary of Your Rights Under the FCRA"
  - **Post-adverse action**
    - Employer must provide notice of the action, the contact information for the reporting agency, and a statement that the reporting agency did not make the decision. Applicant must be notified of the right to dispute the accuracy of the report

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Cory Groshek

- Applied to 562 jobs in 18 months, specifically looking for FCRA violations
- Filed 40+ lawsuits or demand letters
- Earned (extorted?) over $230,000 in settlements
- Other companies have faced $1 million+ class action lawsuits:
  - Swift Transportation – settled for $4.4 million
  - Home Depot – settled for $3 million
- Don't fall victim to "Corys." Keep your FCRA disclosure and authorization **completely separate** from other applicant materials or hiring documents

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EPPA (Employee Polygraph Protection Act)

- **Private employers may <u>not</u>:**
  - Use lie detector tests on job applicants or employees
  - Take adverse action against employees/applicant who refuse to take a lie detector test
  - Disclose information obtained during a polygraph test (in the limited circumstances it is allowed)
- **Narrow Exception:**
  - Permitted for testing certain employees of private firms who are reasonably suspected of involvement in a workplace incident (theft, embezzlement, etc.) that resulted in specific economic loss or injury to the employer. Subject to strict testing requirements – call your counsel.

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HIPAA Privacy Rule

- Prohibits "covered entities" from disclosing "protected health information"
- **Covered Entities**
  - Most employers are **<u>not</u>** "covered entities," and not subject to HIPAA, only: (1) a health plan; (2) a health care clearinghouse; and (3) a health care provider who transmits health information in electronic form
  - **Does not apply to**: employers providing health coverage to employees via health insurance policy. The insurance company is the covered entity (it is considered the health plan) and will be required to comply with HIPAA.
  - ***Caution for Self-Insured Plans***: While the employer is still not considered a "Covered Entity," the employer becomes the entity responsible for the health plan's HIPAA compliance when the plan is not fully insured by an insurance company. Such employers may contract out most of the HIPAA obligations to a service provider, but they will still have some HIPAA responsibilities, and their employees are much more likely to have access to PHI.

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HIPAA cont.

- **Protected Health Information**
  - PHI is individually identifiable health information created or received by a Covered Entity about (1) an individual's past, present or future physical or mental health or condition, (2) the provision of health care to an individual, or (3) the receipt or payment for health care. This can be paper or recorded in any form or medium.
    - Examples: medical record, bill, EOB, diagnosis information, dates of birth, social security numbers, health plan enrollment elections
  - Most of the information contained in an employer's personnel files and records is not PHI.
    - PHI excludes "individually identifiable health information … in employment records held by a covered entity in its role as an employer." Thus even the information held in employment records by health care institutions is generally not governed by HIPAA.

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HIPAA cont.

Permitted Uses

- HIPAA does not require a Covered Entity to obtain an Authorization if a Use or Disclosure involves:
  - Treatment – Transfer from hospital to hospital
  - Payment – Medical records to justify claim
  - Health Care Operations
    - Quality assessments
    - Licensing and credentialing activities
    - Business management activities

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GINA (Genetic Information Nondiscrimination Act)

- **With certain exceptions, GINA:**
  - Prohibits the use of genetic information in making employment decisions;
  - Restricts employers from requesting, requiring or purchasing genetic information; and
  - Places strict limitations on employers' ability to disclose genetic information.
- **The exceptions include:**
  - Inadvertent acquisitions, e.g., a manager overhears an employee speaking with a co-worker;
  - Genetic information voluntarily offered as part of an employer's health or wellness program (certain exceptions apply);
  - Family medical history obtained as part of the FMLA certification process (or similar state laws) for leave to care for a family member with a serious health condition;
- **What is <u>not</u> genetic information:**
  - Information about an employee's or an employee's family member's age or gender; or
  - The fact that an applicant or employee currently has a disease or disorder. <u>However</u>, the fact that an applicant's or employee's family member has a disease or disorder would be considered genetic information under GINA.

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Employee Medical Records

- **Common Employer Pitfalls**
  - Failure to segregate medical records (especially: supervisors files)
  - Failure to keep medical records in secure place
  - Failing to keep employees' medical conditions confidential
  - Failing to use the GINA "safe harbor" language when making medical inquiries
  - Assuming information is "HIPAA protected"

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Pregnancy and New Mothers

- **Pregnancy Discrimination Act**
  - Prohibits discrimination against pregnant employees/applicants in every facet of employment
  - In a nutshell: treat your pregnant employees/applicants the same as any other employee
- **Nursing Mothers**
  - Affordable Care Act requires employers covered by FLSA to provide break time for nursing mothers to express milk
    - If employee does not have office with door, employers must temporarily create or convert a space for expressing milk shielded from view, and free from any intrusion from co-workers and the public.
      - Also required under Indiana law (if 25+ employees)

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Plant Closings and Mass Layoffs

- **WARN Act**
  - Must provide 60+ days notice to workers (or representatives) and to state and local government, in the event of either
  - **Mass Layoff**
    - 500 or more employees within a 30-day period; or
    - 50+ employees if 33% or more of full workforce
  - **Plant Closing**
    - Involving 50 or more employees within a 30-day period
- **No "mini-WARN" Act in Indiana**
- **Preparing for a major layoff? Contact your counsel.**

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USERRA

- Members of the uniformed services are entitled to return to their civilian employment upon completion of their service
- Must be reinstated with the seniority, status, and rate of pay they would have obtained had they remained continuously employed by their civilian employer
- Reasonable efforts must be made to enable returning employees to refresh or upgrade their skills to enable them to qualify for reemployment
- Also protects military members from discrimination in hiring, promotion, and retention on the basis of present and future membership in the armed services

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USERRA

Arroyo v. Volvo Group of North America, LLC dba Volvo Parts North America (7th Cir. 2015)

- Employee took significant amount of military leave for multiple deployments and training
- Supervisor sent several frustrated emails to other members of management:
  - Complaining the employee only contacted him once during her 13 month deployment to Iraq, to which management responded, "Unfortunately, there isn't a lot we can do … we have to wait for her. Sorry it isn't what you wanted to here."
  - During treatment for PTSD, the supervisor complained that the employee was "really becoming a pain with all this."
  - While absent for an ER visit, the supervisor joked that there were rumors the employee was in Hawaii
- Employer implemented new discipline policy, which caused employee to earn occurrences for tardiness and led to her termination
- Court reversed summary judgment on USERRA discrimination claims and revived ADA claims

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Whistleblowing: Sarbanes-Oxley Act (SOX)

- SOX is a financial compliance, accounting and whistleblower law regulated by the SEC – only applies to publicly-held companies
- **What employers need to know**:
  - Prohibits employers (including its officers, employees, contractors, subcontractors or agents) from taking adverse or negative employment action against protected employees, referred to as whistleblowers.
  - Employees are protected when reporting violations of
    - Federal securities laws;
    - SEC rules or regulations; or
    - Federal laws relating to shareholder fraud.
  - To a federal agency, member of Congress, or any person with supervisory authority over the employee; or by participating in a proceeding relating to securities fraud.

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Jury Awards Whistleblower $1.5 Million

- Employee for pharmaceutical comp
- Company issued press release saying positive results from drug testing
- In reality, testing failed and employee sent email to company's VP and general counsel saying company is
  - "committing fraud against shareholders since representations made to the public were not consistent with the actual results of the relevant clinical trial, and [employee] think[s] this is illegal."
- Employee later terminated
- Company pays $5 million in total damages

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Immigration

- **I-9s**
  - Must be completed by employee no later than first day
  - Must be completed by employer within 3 days
  - Employer must retain I-9 for as long as employee is employed
  - For terminated employees:
    - Retain I-9 for 3 years after hire date; or
    - 1 year after fire date, whichever is later
  - Do not request more documents than required to show citizenship
  - **Remote workers**
    - Employer must use trusted agent or representative near employee to review employee's documents in person and attest to authenticity
    - Ex: attorney, accountant, local HR professional, librarian, notary
    - Review all remotely-completed forms

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Defend Trade Secrets Act

- Provides a cause of action in federal court for misappropriated trade secrets and includes whistleblower protection
- Enacted in 2016, the law requires notice in new and revised nondisclosure agreements about a whistle-blower's right to disclose trade secret information to federal enforcement authorities
- Include language from statute in any agreement addressing trade secrets (non-disclosure agreements, separation agreements, severance agreements, etc.)

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The GDPR – Be Aware

- The European Union (EU) General Date Protection Regulation (GDPR) took effect on May 25, 2018
- Any organization that does business with citizens in the EU will have to comply with these regulations or face significant penalties
- Imposes strict and broad requirements for processing HR data, and creates new rights for applicants, current employees, and departing employees
- The GDPR permits data protection authorities in the EU to fine up to 20 million euro or 4 percent of a company's worldwide revenue (whichever is greater) for serious violations of the GDPR

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Miscellaneous Indiana Laws

- **Jury Duty / Court Witnesses**
  - Employers cannot take adverse action against employee who are called to jury service or who are missing work to appear as a witness in court, but employers do not have to provide paid leave
- **Firearms at Work**
  - Cannot prohibit employees from keeping firearms locked and out of sight in their own vehicle, even in employer parking lot
  - Can otherwise restrict or prohibit employees from possessing or carrying firearms on employer property or while performing job duties
- **Criminal History**
  - Employers can ask about criminal records in job applications if such questions exclude expunged arrests and convictions.

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