



# AGCI CONVENTION PRESENTATION

*Presented by:*

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Offices: St. Louis, MO • Springfield, IL • Phoenix, AZ

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# I. DISCIPLINE/DISCHARGE PROCEDURE

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# I. DISCIPLINE/DISCHARGE PROCEDURE

## 1. Chronology of Facts:

A. Who, what, when, where, why

2. Designate a person in charge of the investigation

3. Identify potential witnesses and preserve potential evidence (including photographs)

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## I. DISCIPLINE/DISCHARGE PROCEDURE (continued)

### 4. Review the collective bargaining agreement for the following:

- Time limits for discipline/discharge
- Procedures for discipline/discharge
- Criteria for discipline/discharge – contract rules
- Review written Company policies and work rules

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# I. DISCIPLINE/DISCHARGE PROCEDURE (continued)

## 5. Conducting the Investigation

- Develop short investigation protocol – who will do what
- Interview witnesses
  - Johnnie's Poultry Rights with regard to potential witnesses
  - Weingarten Rights with regard to employee being disciplined and other employees who could potentially face discipline

**BEST PRACTICE:** *always allow union representative to be present – employers often lose cases “on the line”*

- No retaliation instructions

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# *I. DISCIPLINE/DISCHARGE PROCEDURE (continued)*

## Outline of Weingarten Rights

- Review collective bargaining agreement to see if Weingarten is baked into the contract language
- Although not required, best practice may be to ask employee if they want union representation
- Not entitled to any particular union representation
- If delay in process, isolate employee to cool their heels (and prevent collusion)

# *I. DISCIPLINE/DISCHARGE PROCEDURE (continued)*

## JOHNNIE'S POULTRY RIGHTS – Interview Format

1. The Company is investigating a complaint of [insert type of misconduct] and believes you may have relevant information.
2. Your participation in this interview is completely voluntary – you do not have to participate and if you decide you do not wish to go forward, we can end this interview at any point, including right now.
3. The Company will not retaliate against you in any way whether you elect to participate in this interview or not. You will also not be retaliated against for anything you tell me during the course of this interview.
4. I will ask you questions about the facts related to the investigation. I will not ask questions about, and don't want to discuss, any other issues. I will not ask you questions about your opinion or your activities relating to the union. My sole purpose is to learn the facts about what happened.
5. Are you willing to participate in the investigation or do you want to end the interview now?

# *I. DISCIPLINE/DISCHARGE PROCEDURE (continued)*

## *6. Investigation Report – Factual conclusions and support for those conclusions*

- Signed employee statements or note “refused to sign/refused to make statement”
- Cannot promise confidentiality or anonymity
- May be required to turn over statements to union during grievance investigation if not protected by privilege and/or subjected to harassment/retaliation

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# I. DISCIPLINE/DISCHARGE PROCEDURE (continued)

## Anatomy of Appropriate Discipline

1. Identify what the employee did wrong
  - Kitchen sink approach – every violation
  - Avoid cookie cutter descriptions
2. Identify why the employee's actions were wrong
3. Identify the appropriate discipline to which the employee will be subject
4. Identify consequences if employee repeats conduct (not applicable in discharge situations)

# *I. DISCIPLINE/DISCHARGE PROCEDURE (continued)*

## Key Factors to Consider with Regard to Employee Discipline/Discharge

1. Consistency – Potential “comparable employees – has everyone who engaged in similar conduct been treated in a similar fashion?”
2. Documentation – Has every step of the process been properly documented?
  - Preserving evidence
  - Proving the validity of the Company’s investigation
  - Saving attorney’s fees

# I. DISCIPLINE/DISCHARGE PROCEDURE (continued)

## Key Factors to Consider with Regard to Employee Discipline/Discharge (continued)

### 3. The Appearance of Fairness

- Allowing the employee to tell their side of the story
- Properly following due process and contractual procedures
- Avoiding unreasonable results
- Prompt decision making

### 4. Objectivity

- Just the facts
- No “squishy” generalizations (i.e. “bad attitude”)



## II. HOW TO RESPOND TO A GOVERNMENT INVESTIGATION: EEOC - IDHR - DOL - IDOL

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## *How to Respond to a Government Investigation (continued)*

### **GENERAL RULES:**

1. Do not ignore correspondence
  - Requests can be time sensitive and lead to default
  - Failure to respond may result in subpoenas (which are expensive to defend)
  - Failure to Respond can lead to other sanctions
2. The investigator is not your friend
3. Never admit anything (important enough to say twice)

# *How to Respond to a Government Investigation (continued)*

## **GENERAL RULES (continued):**

4. Do not open your files
  - Define the scope of the inquiry
  - Limit the responses to the scope of the inquiry
  - Respond in writing
  
5. Choose your words carefully
  - Seek professional help
  - Proofread, edit and double-check
  - Don't guess

# *How to Respond to a Government Investigation (continued)*

## **GENERAL RULES** (continued):

### 6. Scheduling requested interviews

- Supervisory personnel who can bind the Company are entitled to representation
- Rank-and-file employees are not
- Coercion and retaliation are illegal

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## *How to Respond to a Government Investigation (continued)*

### **CAVEAT: OSHA INVESTIGATIONS**

- Compliance Officer/Presentation of Credentials
- Identification of reason for inspection
  - ▶ Employee complaint (unidentified)
  - ▶ Third party complaint
  - ▶ Plain view inspection
  - ▶ Program/Industry inspection
  - ▶ Referral letter
- Scope of inspection – targeted vs. general

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## *How to Respond to a Government Investigation (continued)*

### **CAVEAT: OSHA INVESTIGATIONS (continued)**

- Always accompany the compliance officer
  - Bring a camera and photograph what he/she photographs
  - Take notes of everything he/she does
- Never admit anything
- The closing conference
- Informal conference
- Notice of Contest

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# *How to Respond to a Government Investigation (continued)*

## **EEOC/IDHR**

- Initial Charge with deadline
- EEOC – soft deadlines with nonformal response
- IDHR – hard deadline with binding responses
- EEOC – Position statement with documents and follow up
- IDHR – Position statement, Interrogatories and probable hearing
- Be thorough and accurate in responses
- Include the kitchen sink
- Seek professional help

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# *How to Respond to a Government Investigation (continued)*

## **DOL/IDOL AUDITS**

- Typically begin with correspondence
- Designate point person for timely response
  - Consider professional assistance
- Postpone initial deadline to gather information
- Consider use of third party site to provide information (like your attorney's office)
- Provide documents prior to agreeing to interviews

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# III. CHANGES TO THE FLSA:

What it Means for  
Contractor's Overtime  
Requirements

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# The “White Collar” Exemptions

The primary exemptions require: 1) a minimum salary base payment; and 2) exempt job duties:

1. **Administrative**: (a) performance of office or non-manual work directly related to management or general business operations of employer or employer’s customers; and (b) exercise of discretion and independent judgment regarding matters of significance.

*E.g., Payroll, HR, Finance, IT, Purchasing, Research*

2. **Executive**: (a) manage the enterprise (or a customarily recognized department/subdivision of the enterprise); (b) regularly direct the work of at least 2 other full-time employees (or equivalent); and (c) have power to hire/fire other employees (or some weight in the hiring/firing process).

*E.g., Upper-level Management*

3. **Professional**: primarily perform work that either requires advanced knowledge in a field of science or learning, usually obtained through a degree, or that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

*E.g., Engineering, Architecture, Accounting*

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# Department of Labor Minimum Salary Base Payment Increase Temporarily Halted

- ▶ The new DOL rule raising the overtime exempt salary threshold from \$23,660 to \$47,476 per year was temporarily suspended by a federal district court judge in Texas.
- ▶ But -- the new salary threshold could resurface if the Judge changes his mind and declines to make the injunction permanent (which will probably be decided in the first quarter of 2017) or if the DOL successfully appeals a permanent injunction to the Fifth Circuit Court of Appeals (which will probably be decided by the end of summer, 2017).
- ▶ Although President-elect Trump opposed the new rule during his campaign, he has not taken an official post-election position.

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# Requirements of the Rule

## The rule would have:

- Required overtime exempt employees to receive a weekly salary of \$913/week (\$47,476/year) – up from \$455/week (\$23,660);
- Provided for automatic increases every three years;
- Applied to: Administrative, Executive, Professional, and a potpourri of other overtime exempt employees.

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# Fair Pay and Safe Workplaces Executive Order

## Another federal district judge in Texas blocked portions of an Executive Order that would have required contractors to:

- Report allegations of labor and employment violations as part of the bidding process – including violations of FLSA.
- Refrain from requiring arbitration of certain Title VII claims and torts related to sexual assault and harassment
- Inform employees of whether they are classified as independent contractors on each pay stub, along with other pay information.

The court blocked enforcement of the first two requirements, but not the pay stub disclosures.

# FLSA Poster Update

**The Department of Labor recently issued two updated posters:**

- Fair Labor Standards Act - All employers with any employee covered by minimum wage requirements of FLSA
- Employee Polygraph Protection Act - All employers engaged in interstate commerce with 1+ employee

DOL website has printable copies of the new posters

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# EMPLOYEE RIGHTS

## UNDER THE FAIR LABOR STANDARDS ACT

### FEDERAL MINIMUM WAGE

**\$7.25** PER HOUR

BEGINNING JULY 24, 2009

The law requires employers to display this poster where employees can readily see it.

**OVERTIME PAY** At least 1 1/2 times the regular rate of pay for all hours worked over 40 in a workweek.

**CHILD LABOR** All employees must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor. Youths 14 and 15 years old may work outside school hours in service non-manufacturing, non-mining, non-hazardous jobs with certain work-hour restrictions. Different rules apply in agriculture employment.

**TIP CREDIT** Employers of " tipped employees" who meet certain conditions may credit a part of the wage credit based on tips received by their employees. Employers must pay tipped employees a cash wage of at least \$2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee's tips, combined with the employer's cash wage of at least \$2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference.

**NURSING MOTHERS** The FLSA requires employers to provide reasonable break time for a nursing mother employee who is subject to the FLSA's overtime requirements in order for the employer to express breast milk for her nursing child for one year after the child's birth each time such employee has a need to express breast milk. Employers are also required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by the employee to express breast milk.

**ENFORCEMENT** The Department has authority to recover back wages and an equal amount in liquidated damages in instances of minimum wage, overtime, and other violations. The Department may bring private actions to recover on behalf of employees. Employers may be assessed civil money penalties for each willful or repeated violation of the minimum wage or overtime pay provisions of the law. Civil money penalties may also be assessed for violations of the FLSA's child labor provisions. Heightened civil money penalties may be assessed for each child labor violation that results in the death or serious injury of any minor employee, and such assessments may be doubled when the violator has been determined to be willful or repeated. The law also prohibits retaliating against or discriminating against workers who file a complaint or participate in any proceeding under the FLSA.

**ADDITIONAL INFORMATION**

- Certain occupations and establishments are exempt from the minimum wage, overtime pay provisions.
- Special provisions apply to workers in American Samoa, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico.
- Some state laws provide greater employee protections; employers must comply with both.
- Some employees incorrectly classify workers as "independent contractors" when they are actually employees under the FLSA. It is important to know the difference between the two, because employees (and certain workers who are treated as the FLSA's minimum wage and overtime pay beneficiaries and correctly classified independent contractors) are not.
- Certain full-time students, student teachers, apprentices, and workers with disabilities may be paid less than the minimum wage under special provisions issued by the Department of Labor.



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WAGE AND HOUR DIVISION  
UNITED STATES DEPARTMENT OF LABOR

1-800-457-5099  
TDD: 1-877-457-5097  
www.dol.gov/flsa



5010-108-01-01

# EMPLOYEE RIGHTS

## EMPLOYEE POLYGRAPH PROTECTION ACT

The Employee Polygraph Protection Act prohibits most private employers from using lie detector tests either for pre-employment screening or during the course of employment.

**PROHIBITIONS** Employers are generally prohibited from requiring or requesting any employee or job applicant to take a lie detector test, and from discharging, disciplining, or discriminating against an employee or prospective employee for refusing to take a test or for exercising other rights under the Act.

**EXEMPTIONS** Federal, State and local governments are not affected by the law. Also, the law does not apply to tests given by the Federal Government to certain private individuals engaged in national security-related activities.

The Act permits polygraph (a kind of lie detector) tests to be administered in the private sector, subject to restrictions, to certain prospective employees of security service firms (armored car, alarm, and guard), and of pharmaceutical manufacturers, distributors and dispensers.

The Act also permits polygraph testing, subject to restrictions, of certain employees of private firms who are reasonably suspected of involvement in a workplace incident (theft, embezzlement, etc.) that resulted in economic loss to the employer.

The law does not preempt any provision of any State or local law or any collective bargaining agreement which is more restrictive with respect to lie detector tests.

**EXAMINEE RIGHTS** Where polygraph tests are permitted, they are subject to numerous strict standards concerning the conduct and length of the test. Examinees have a number of specific rights, including the right to a written notice before testing, the right to refuse or discontinue a test, and the right not to have test results disclosed to unauthorized persons.

**ENFORCEMENT** The Secretary of Labor may bring court actions to restrain violators and seek civil penalties against violators. Employees or job applicants may also bring their own court actions.

**THE LAW REQUIRES EMPLOYERS TO DISPLAY THIS POSTER WHERE EMPLOYEES AND JOB APPLICANTS CAN READILY SEE IT.**



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## IV. WITHDRAWAL LIABILITY:

Where Do We Go From Here?

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# MPRA

1. The Multiemployer Pension Reform Act of 2014 was enacted in December 2014. The MPRA made major changes to the law of multiemployer pension funds.
2. Permits the merger and partition of multiemployer plans
  - a) The Pension Benefit Guaranty Corporation's (PBGC) may give financial and other assistance to facilitate the merger of multiemployer plans if in the best interest of at least one of the plans and not adverse to the beneficiaries of the other plan.

- 
- b) Additionally, upon application of a plan sponsor, the PBGC may order the partition of a multiemployer plan in critical and declining status if
- ▶ the PBGC determines all reasonable measures have been taken to avoid insolvency (including the maximum benefit suspensions set forth elsewhere in the statute);
  - ▶ it reasonably expects partition of the plan will reduce the PBGC's expected long-term loss with respect to the plan;
  - ▶ partition is necessary for the plan to remain solvent; and
  - ▶ the PBGC certifies to Congress that its abilities to meet existing financial assistance obligations to other plans will not be impaired by such partition.

3. Allows the suspension or reduction of benefits prior to insolvency. If a pension fund is in critical and declining status it can amend or suspend benefits.

- a) A plan is in critical and declining status if it is projected to become insolvent during the current plan year or any of the 14 succeeding plan years.
- b) A “retiree representative” must be selected to advocate for the interests of the retired members of the plan in plans with 10,000 or more participants.

- 
- c) Conditions for reductions or suspensions: The plan sponsor of a critical and declining plan may amend or suspend benefits if:
- ▶ the plan actuary certifies the plan is projected to avoid insolvency, taking into account the proposed changes, and
  - ▶ the sponsor determines the plan is still projected to become insolvent unless benefits are reduced or suspended although all reasonable measures to avoid insolvency have been taken.

d) Limits on reductions or suspensions:

- ▶ The monthly benefits of any participant or beneficiary cannot be reduced below 110 % of the monthly benefit guaranteed by the PBGC. The guarantee amount depends on the pension plan and your credited years of service under the plan.
- ▶ additional limitations on the amount benefits can be reduced for individuals over 75 years old.
- ▶ No reductions for individuals 80 and above.
- ▶ No benefits based on disability may be suspended.
- ▶ Any suspension of benefits shall be reasonably estimated to achieve the level that is necessary to avoid insolvency.



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4. **Election of critical status:** Plan sponsors of multiemployer plans that are not in critical status under the Pension Protection Act of 2006 but are projected to be in critical status in any of the five succeeding plan years may elect to be in critical status effective for the current plan year.
  5. **Employer relief from certain contribution increases in withdrawal liability:**
    - a) Reversing the current position of many pension funds, surcharges under the PPA are disregarded in:
      - ▶ determining the allocation of unfunded vested benefits to an employer (except under the direct attribution method), and
      - ▶ calculating the high contribution rate used in determining the amount of the employer's withdrawal liability periodic payment.



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f) *Approval of suspensions (continued)*

- ▶ No suspension of benefits can take effect prior to a vote of the participants of the plan, and the suspension shall take effect following the vote unless a majority of plan participants and beneficiaries vote to reject the suspension.
- ▶ However, if the Secretary of the Treasury determines the plan is “systemically important”, the Secretary can permit the proposed benefits suspensions despite the rejection vote. A plan is considered “systemically important” if the PBGC projects the present value of projected financial assistance payments exceeds 1 billion dollars if suspensions are not implemented.

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5. Employer relief from certain contribution increases in withdrawal liability (continued):

- b) In certain circumstances, contribution increases under a PPA funding improvement plan or rehabilitation plan also are disregarded in the same manner as surcharges.
- c) These changes may have a significant impact on the calculation of withdrawal liability, on the amount of an employer's payment amount, and on the application of the 20-year cap to withdrawal liability payments.

6. **Improved pension fund disclosure obligations.** The administrator of a pension fund is now required to produce a much improved list of information and documents to employers, including
- a) the plan document,
  - b) trust agreement,
  - c) summary plan description,
  - d) the fund's annual report,
  - e) annual funding notice,
  - f) actuarial reports,

6. *Improved pension fund disclosure obligations (continued):*

- g) quarterly, semi-annual or annual financial reports which have been in the fund's possession at least 30 days,
- h) audited financial statements for any plan year,
- i) any application filed with the Secretary of the Treasury for an extension and the determination on that application.

## II. THE CENTRAL STATES RESCUE PLAN

1. After the MPRA was enacted and signed into law, Central States began moving forward with its Rescue Plan, a plan to reduce and suspend benefits to stave off insolvency.
2. Central States submitted its proposed Rescue Plan on September 25, 2015 to the U.S. Department of the Treasury.
3. There were a multitude of comments opposing the Plan.
4. On \_\_\_\_\_, Treasury rejected the Plan.

## II. THE CENTRAL STATES RESCUE PLAN *(continued)*

### 5. Treasury cited three principal reasons:

- a) The Rescue Plan did not have a reasonable chance of success.
  - The Fund estimated the annual rate of return on its investments would be 7.5%. The Treasury's Special Master flatly rejected this assumption, finding that it did not take the current status of the economy into account and that it was "significantly optimistic".
  - In order to be able to project zero benefit payments for new entrants on its 20 year balance sheet, the Fund also used an assumption that the average age of new employees entering the Fund would be 32 instead of using the same demographic age mix that the Fund uses for other actuarial purposes.

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## II. THE CENTRAL STATES RESCUE PLAN *(continued)*

- b) The Rescue Plan did not fairly share the pain. The Special Master also found that the Rescue Plan failed to include an “equally distributed suspension of benefits” because it reduced the benefits for UPS retirees more substantially than it reduced the benefits non-UPS retirees and failed to credit UPS retirees for the entirety of their service.
- c) The notices drafted by the Pension Fund for its Rescue Plan were confusing because they were not written to be understood by an average plan participant as required by law. (As if any pension document in the history of mankind ever was . . . .)

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## II. THE CENTRAL STATES RESCUE PLAN *(continued)*

### 6. Aftermath

- The Trustees met with the Fund's actuaries and legal advisors to carefully consider the next steps. The Trustees concluded that due to the passage of time, Central States could no longer develop and implement a new plan that complies with the final MPRA regulations issued by Treasury on April 26, 2016. Therefore, there will be no new pension rescue plan application.
- In a letter dated May 20, 2016, the Pension Fund announced it would not seek to submit an amended Rescue Plan. The Fund responded briefly to the Treasury's rejection and criticized the Treasury's failure to discuss the issues with the Fund prior to rejection.

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## II. THE CENTRAL STATES RESCUE PLAN *(continued)*

### Where Does the Fund Stand?

- ▶ The Fund projects it will **run out of money within ten years**.
- ▶ The Pension Benefit Guaranty Corporation (PBGC), the government's pension insurance program, is also **projected to run out of money**.
- ▶ Withdrawal Liability **Worsens**:
  - ▶ 2015 UVBs: \$23.5 Billion – Up \$4.1B from a 2010 withdrawal
  - ▶ 10-year all-employer contribution pool: \$5.8B -- Down \$4.1B from a 2010 withdrawal. This may make an employer's allocation fraction worse.
- ▶ The Market Value of Assets **Slips**: \$17.9B (12/31/2015) Down \$1.9B from 12/31/2010.
- ▶ Active Participants Continue to **Decline**: Down 9,273 since 12/31/2010
- ▶ Annual Benefit Payments **Exceed** Contributions by More Than \$2 Billion
- ▶ The Fund Stated It **Needs \$11 Billion** in Funding to Avoid Insolvency.

# Concluding Thoughts



Questions ?  
Comments?



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