LABOR AND EMPLOYMENT LAW CERTIFICATION EXAM

SAMPLE QUESTIONS

Disclaimer: The following questions are provided to the public as examples of the types of questions that appear on Labor and Employment certification exams, as well as the subject areas that are tested. All questions have been pulled from previous exams and were correct and factual at the time of administration; however, the Labor and Employment Law Certification Committee acknowledges that some question and/or answers may no longer be accurate due to the passage of time since administration. None of these questions will appear on future exams.

Multiple Choice:

1. What is the vehicle weight threshold for application of the "small vehicle exemption" to the Motor Carrier exemption to the FLSA?

   a. 1,000 pounds.

   b. 20,000 pounds.

   c. 10,000 pounds.

   d. 25,000 pounds.

Answer: c.

Authority: Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users Technical Corrections Act of 2008 (TCA), P.L. 110-244, amendment to section 13(b)(1) of the Fair Labor Standards Act (FLSA). (Traditional)

2. Which of the following employees would **NOT** be entitled to FMLA leave?

a. A man seeking leave to care for his child whom he adopted 6 months earlier.

b. A woman seeking leave to care for her dying mother in law.

c. A man seeking leave to care for his same-sex spouse who is undergoing cancer treatment.

d. A woman seeking leave to attend inpatient rehabilitation for alcoholism.

Answer: b.

Authority: **29 CFR §825.112; 29 CFR §825.121; 80 Fed. Reg. 37, 9989 (Feb. 25, 2015); 29 CFR §825.119; (Hybrid)**

3. Which of the following is correct regarding abortion-related rights under Title VII?

a. An employer who offers health insurance must pay for health insurance benefits where medical complications have arisen from an abortion.

b. An employer who offers health insurance need not pay for health insurance benefits where carrying a fetus to term endangers the mother's life.

c. Title VII bars an employer from providing abortion benefits and collective bargaining regarding provision of such benefits.

d. Discharging an employee because the employee had an abortion is lawful under Title VII.

Answer: a.

Authority: 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e- 2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion."); EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, No. 915.003, Sec. I.A.4.c. (June 25, 2015) ("Title VII protects women from being fired for having an abortion or contemplating having an abortion. However, Title VII makes clear that an employer that offers health insurance is not required to pay for coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term or medical complications have arisen from an abortion. The statute also makes clear that, although not required to do so, an

employer is permitted to provide health insurance coverage for abortion. Title VII would similarly prohibit adverse employment actions against an employee based on her decision not to have an abortion. For example, it would be unlawful for a manager to pressure an employee to have an abortion, or not to have an abortion, in order to retain her job, get better assignments, or stay on a path for advancement.") (and citations therein).
(EEO)

4. In order to satisfy the definition of "employer" for purposes of Section 448.07, Florida Statutes, prohibiting wage rate discrimination on the basis of sex, a person or entity is required to employ:

   a. 2 or more employees.

   b. 10 or more employees.

   c. 15 or more employees.

   d. 20 or more employees.

Answer: a.

<u>Authority:</u> According to Section 448.07(1)(b), Florida Statutes, the term "employer" is defined as "a person who employs two or more employees." (Misc./Indiv.)

5. Which of the following are "public employees" as defined under the Florida Public Employee Relations Act?

a. Those persons appointed by the Governor or elected by the people, agency heads, and members of boards and commissions.

b. Those persons holding positions by appointment or employment in the organized militia.

c. Those individuals acting as negotiating representatives for employer authorities.

d. Those persons employed as faculty within the State University System.

Answer: d.
Authority: Section 447.203(3), *Fla. Stat.* (2015).
(Traditional)

6. Which of the following agencies do **NOT** have any investigative or enforcement authority with respect to USERRA violations?

a. The Department of Justice.

b. The Department of Labor.

c. The Equal Employment Opportunity Commission.

d. The Office of Special Counsel.

Answer: c.

Authority: 20 CFR §1002.4; 20 CFR §1002.292; 38 USC §4324 (Hybrid)

7. Fill ‘n Kleen Clinics owns and operates three dental clinics. Each clinic is in a different state. Each clinic consistently employs five employees. One of the clinics is in Florida. Is Fill ‘n Kleen a covered employer under the Florida Civil Rights Act (FCRA)?

a. Yes, because the combined number of employees in the three clinics meets the FCRA’s threshold for employer coverage.

b. Yes, because the number of employees at the Florida clinic alone meets the FCRA’s threshold for employer coverage.

c. No, because the medical proviso to the FCRA’s threshold for employer coverage excludes facilities providing dental services.

d. No, because the number of employees at the Florida clinic does not meet the FCRA’s threshold for employer coverage.

Answer: a.

<u>Authority:</u> Fla. Stat. § 760.02(7); *Sinclair v. De Jay Corp.*, 170 F.3d 1045 (11th Cir.1999). (EEO)

8. Section 725.07, Florida Statutes, prohibits discrimination against any person with respect to loaning money, granting credit, or providing equal pay for equal services, on the basis of:

a. Sex, marital status, and sexual orientation.

b. Race, color, and national origin.

c. Sex, marital status, and race.

d. Age, sex, race, national origin, religion, handicap, and marital status.

Answer: c.

Authority: See Section 725.07(1), Florida Statutes. (Misc./Indiv.)

Questions 9-11 are based on the following facts:

9. An employer covered by the NLRA discharges an employee because she posted on Facebook a petition directed to her coworkers regarding the limited number of hours for the Company break room. The employer has violated what section of the NLRA?

a. Section 8(d)(4).

b. Section 8(a)(1).

c. Section 8(a)(3).

d. Section 8(b)(2).

Answer: b.

Authority: 29USC§158 (Traditional)

10. Assume that, at the hearing before an ALJ in the case arising from the preceding question, the NLRB General Counsel has successfully established a prima facie case of an NLRA violation. Which of the following is an affirmative defense for the employer?

a. That the employer would have taken the same disciplinary action regardless of any discriminatory animus.

b. That the employer has a long-standing history of labor peace.

c. That the employer's actions were not willful and were in good faith.

d. That the employee's actions were malicious.

Answer: a.

Authority: *Wright Line, Wright Line Div.*, 251 N.L.R.B. 1083 (1980). (Traditional)

11. Assuming the NLRB General Counsel prevails at the hearing in the preceding question, what following remedy is **NOT** available?

a. Backpay.

b. Punitive damages.

c. Cease and desist order.

d. Reinstatement.

Answer: b.

Authority: *Alaska Pulp Corporation*, 326 N.L.R.B. 522 (1998) (Traditional)

Essay:

Big-Fix Auto Repair, Inc., is a Florida company with one location in Metropolis, Florida. Big-Fix's facility has two levels. Big-Fix's car repair shop is on the lower level. All offices (including the executive suite and human resources) are on the upper level. The offices are accessed by taking an elevator or staircase located on one side of the repair shop to the upper level, and then an open-air walkway that leads to the entrance of each office. The walkway overlooks the car repair shop. Big-Fix consistently employs 35 employees, 20 of whom work as mechanics.

Three years ago, Big-Fix hired Eva as a mechanic. Eva, who was 55 years old when hired, was the only female mechanic during her tenure at Big-Fix. She had short gray hair, wore no makeup, and was unmarried. Eva's brother Frank, with whom Eva was very close, also worked at Big-Fix. Big-Fix hired Frank as an accountant 10 years ago. That Eva and Frank were siblings was common knowledge at Big-Fix.

The male mechanics resented Eva and treated her cruelly. They daily called Eva names such as "butch," "old maid," "spinster," "old gray mare," "Rambo," "Rip Van Wrinkle," and "geriatric case." They would make comments such as: "Why don't you go on Social Security?"; "We put in a reservation for you at the nursing home."; "Go get a makeover."; "Dye your hair."; and "No man would marry you." Eva would pretend she did not hear the names and comments or would say, "Please stop it." The men did not treat one another the way they treated Eva. Nor did Eva treat the men the way they treated her.

Big-Fix had an anti-harassment policy that it issued to all employees when hired. The policy directed employees to contact the HR Manager, Hiram, if they believed they were subject to harassment of any nature. Eva did not contact Hiram out of fear the mechanics would treat her worse if she did.

Six months ago, Hiram summoned Eva to the HR office. Hiram said he was investigating "alleged misbehavior of mechanics." Hiram asked Eva if she had observed

any such behavior. Eva burst into tears and told Hiram in detail about how the male mechanics constantly mistreated her.

Three days after Eva met with Hiram, Big-Fix fired Frank for “embezzlement.” Big-Fix refused to tell Frank the basis for the accusation.

A week after Eva met with Hiram, Big-Fix placed Eva on “suspension without pay for rudeness to coworkers.” Eva was the only mechanic disciplined for rudeness to coworkers. Big-Fix returned Eva to work 30 days later, at which time it told her she was “exonerated” and paid her for all workdays missed during the suspension.

When Eva returned to work, the male mechanics resumed the mistreatment of her but with a difference: They added to their taunts calling Eva “snitch” and “rat”; and they would remove tools from her toolbox when she was not looking. Eva did not report the conduct to Hiram out of fear of reprisal.

Yesterday, Eva resigned from Big-Fix saying, “I cannot endure the abuse any longer.”

Questions:

What potential legal claims under Title VII, the Age Discrimination in Employment Act, and the Florida Civil Rights Act, if any, do Eva and Frank have against Big-Fix? Include in your analysis a discussion of coverage and the elements of those claims. What defenses, if any, may Big-Fix raise to those claims?

Do <u>NOT</u> discuss any of the following: exhaustion of administrative procedures; statutes of limitations or other prerequisites to filing suit; or remedies.

MODEL ANSWER

The applicant should identify and discuss the following issues:

I. Coverage

Title VII and FCRA. Because Big-Fix consistently employed more than 15 employees, it is a covered employer under Title VII and the FCRA for purposes of Eva's and Frank's claims under those statutes.

ADEA. Because Big-Fix consistently employed more than 20 employees, it is a covered employer under the ADEA for purposes of Eva's and Frank's claims under those statutes.

II. Potential Claims and Defenses

Eva has harassment, retaliation, and constructive discharge claims under all three statutes. Frank has a potential retaliatory discharge claim under each of the three statutes. While the statutes are different, the proof requirements under the statutes for these types of claims generally are the same. *See, e.g., Manigault v. Commissioner, Social Security Administration*, 609 Fed. App'x 982, 985 (11th Cir. 2015) ("The same substantive analysis applies to claims of retaliation brought under the ADEA and Title VII") (citing *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311 (11th Cir. 2002)); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (noting that because the FCRA is modeled on Title VII, Florida courts apply Title VII case law when they interpret the FCRA**)**; *Zaben v. Air Prods. & Chems*., 129 F.3d 1453, 1455 n.2 (11th Cir. 1997) (noting that "[a]ge discrimination claims brought under the Florida Civil Rights Act have been considered within the same framework used to decide actions brought pursuant to the ADEA") (citing *Morrow v. Duval County School Board*, 514 So.2d 1086 (Fla. 1987)).

A. Eva: Harassment/Hostile Work Environment

Eva's Proof. To prove an actionable harassment claim, Eva must establish each of the following elements: (1) that she belonged to a protected group; (2) that she was subject to unwelcome harassment; (3) that the harassment was based on her protected

status; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable. *See Reeves v. C.H. Robinson, Inc.*, 594 F.3d 798, 808 (11th Cir. 2010) (en banc).

The fourth element contains both an objective and subjective component: Eva must subjectively perceive the harassment as sufficiently severe or pervasive to alter the conditions of her employment; and her subjective perception must be objectively reasonable from the perspective of a reasonable person in the employee's position. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21–22 (1993); *Reeves,* 594 F.3d at 809.

Factors relevant in determining the objective severity of harassment may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. No particular factor is required. *Id.* Furthermore, the conduct should be viewed cumulatively and in its social context. *Reeves*, 594 F.3d at 807.

Eva can establish all five elements of a harassment claim under Title VII, the ADEA, and the FCRA:

First element: Eva belongs to protected groups. Under Title VII, she is protected from sex discrimination as a woman. Under the ADEA, she is protected from age discrimination because she is over 40 years old. Under the FCRA, she is protected from sex discrimination, marital status discrimination, and age discrimination (any age). Moreover, under all three laws, she is protected from retaliation for opposing discrimination. Although Eva did not initiate her complaint to Hiram, Eva's reporting to Hiram in response to Hiram's question that the male mechanics' harassed her because of her gender, age, and marital status qualified as protected opposition to discrimination. *See Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009).

Second element: Eva was subject to unwelcome harassing conduct. The conduct was harassing because it consisted of daily derogatory name-calling and remarks targeted at Eva by 19 men. Further, Eva did not welcome the conduct, as evidenced by the following: (1) Eva's telling the men to stop the conduct; (2) her bursting into tears and recounting in detail to Hiram how the men mistreated her; and (3) her saying she could not endure the abuse any longer when she resigned. Furthermore, Eva did not engage in like conduct.

Third element: the harassment was based on Eva's protected status under each of the three statutes. As to Eva's protected status as a woman under Title VII and the FCRA, the following terms or remarks were gender-specific or reflected sex stereotyping (hostility for not conforming to stereotypes of how women should look or act): "butch"; "old maid"; "spinster"; "old gray mare"; "Rambo"; "Rip Van Wrinkle"; "Go get a makeover."; "Dye your hair."; and "No man would marry you."

S*ee Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (internal quotation marks, alteration, and citations omitted); *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011) ("All persons . . . are protected from discrimination on the basis of gender stereotype. An individual cannot be punished because of his or her perceived gender-nonconformity.") Further, the men did not engage in similar behavior toward each other.

The following names and comments showed hostility toward Eva's marital status protected under the FCRA: "old maid"; "spinster"; and "No man would ever marry you."

Hostility toward Eva's ADEA- and FCRA-protected age is reflected in the "old gray mare," "Rip Van Wrinkle," and "geriatric case" names and the comments "Why don't you

go on Social Security?" and "We put in a reservation for you at the nursing home."

After Eva reported the harassment to Hiram, Eva's protected status in complaining to Hiram became an additional target of the men, as reflected in the men's "rat" and "snitch" name-calling. Further, the taking of Eva's tools can be construed as retaliatory, as it occurred only after Eva complained and set up Eva to fail in performing her duties. Harassment in retaliation for protected activity is actionable. *See Gowski v. Peake*, 682 F.3d 1299, 1312 (11th Cir. 2012).

Fourth element: The mechanics' harassment was severe or pervasive enough to alter the terms and conditions of her employment and create a discriminatorily abusive working environment. Eva subjectively perceived the harassment as so severe or pervasive that it altered the conditions of her work environment, given that she would tell the men to stop, burst into tears in describing the conduct to Hiram, and ultimately quit because she could not tolerate the abuse anymore.

Furthermore, the environment was objectively severe or pervasive to the point of creating a hostile work environment, from the perspective of a reasonable person in like circumstances. The conduct was frequent and pervasive because it occurred daily and was engaged in by 19 men. The comments were humiliating, as they were all insulting and directed spitefully at Eva. The comments also were severe given their frequency, humiliating nature, and cumulative effect over three years; the number of perpetrators; and the context of Eva's working in a traditionally male occupation and being the only woman out of 20 mechanics. Moreover, although there is no requirement that the conduct impair a harassment victim's work performance, Eva's work performance evidently was affected after her complaint to Hiram. After her complaint to Hiram, the harassment worsened and included conduct directly interfering with Eva's work: the taking of her work tools. Eva reached the point that she could no longer work at Big-Fix.

Fifth element: Because the harassment claim is predicated on Eva's co-workers' conduct, Big-Fix will be directly liable if it knew or should have known of the harassing

conduct but failed to take prompt remedial action. Accordingly, Eva must show either actual knowledge on the part of Big-Fix or that her co-workers' conduct was sufficiently severe or pervasive as to constitute constructive knowledge on the part of Big-Fix. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002).

Eva can argue Big-Fix knew or should have known about the co-workers' harassment before she told Hiram. Eva worked for a small company where management and the workforce were in one building. Further, the open-air walkway to the executive suite and HR Department overlooked the repair shop in the atrium below. Given the conduct was engaged in by so many men on a daily basis in the atrium, a reasonable person would conclude management observed and heard the conduct.

Moreover, when Eva disclosed the harassment to Hiram in detail six months before she resigned due to continued harassment, Big-Fix definitely had actual notice of the harassment. Yet, given that the harassment conduct continued and even worsened, the company failed to take effective action to stop the harassment.

Big-Fix's defenses. Big-Fix might argue that although Eva disclosed the harassment to Hiram, company management never saw nor heard nor otherwise knew about the harassment before she met with Hiram nor after she met with Hiram. Thus, Big Fix could argue, that it had no actual knowledge triggering any duty to address the conduct either before or after Eva complained.

Moreover, although the *Faragher* affirmative defense is unavailable to an employer in cases involving harassment perpetrated by co-workers, an employee's failure to utilize an anti-discrimination policy's grievance process may prevent a finding that an employer had constructive knowledge of such harassment. *See Farley v. Am. Cast Iron Pipe Co.,* 115 F.3d 1548, 1554 (11th Cir.1997).

However, given Big-Fix's failure to take effective action to stop the harassment after Eva complained to Hiram, Big-Fix may have difficulty succeeding on these defenses.

See Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1279-80 (11th Cir. 2002) (holding that a policy must be found ineffective when company practice indicates a tolerance towards harassment or discrimination).

B. Eva: Retaliatory Suspension

Eva's claim. Eva has a potential retaliation claim based on the 30-day suspension. The prima facie case would consist of the following elements:(1) Eva engaged in statutorily protected activity; (2) she suffered an adverse employment action; (3) the adverse action was causally related to the protected activity. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008).

First element: As discussed above (regarding Eva's retaliatory-harassment claim), Eva engaged in protected activity by reporting the harassment while responding to Hiram's questions during its investigation into alleged misbehavior of her co-workers. *See Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 55 U.S. 271 (2009).

Second element: Eva suffered an adverse employment action when she was suspended without pay, even though she was ultimately exonerated after 30 days and paid her lost wages. The standard for determining whether an employment action is adverse for purposes of a retaliation claim is it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006); *Crawford v. Carroll*, 529 F.3d at 973-74. Eva could argue that the prospect of being suspended without pay indefinitely, even if the suspension ended in 30 days and lost wages were paid, would deter a reasonable employee from filing a charge of discrimination. *See Burlington Northern*, 548 U.S. at 73.

Third element: Causation sufficient to raise an inference of retaliation can be shown through a "very close" temporal proximity between the statutorily protected activity and the adverse employment action. *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361,

1364 (11th Cir. 2007). With Eva's suspension occurring one week after her protected activity, the temporal proximity was close enough to raise an inference of retaliation.

Eva might also attempt to bolster the causation showing by contending that the baseless suspension was a ruse to chill her from further complaints about harassment in the workplace.

Big-Fix's defenses. Because Big-Fix exonerated Eva, it cannot raise a defense based on the alleged conduct for which it initially disciplined Eva.

However, Big-Fix could attempt to avoid liability by contending that Eva did not establish the elements of her claim. It might attempt to show that the suspension was not adverse enough to dissuade a reasonable worker from pursuing a charge of discrimination.

C. Eva: Constructive Discharge

Eva's claim. Under the constructive discharge doctrine, an employee generally must show that working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004). However, because Eva's constructive discharge claim is based on harassment, she must make a further showing beyond that required to make out a hostile work environment claim. Eva must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. *Suders*, 542 U.S. at 133-34.

Eva probably can make this showing because after telling Hiram about her co-workers' harassment, the co-workers' harassment not only continued but worsened. They began calling her "snitch" and "rat" and impeded her work by removing tools from her toolbox when she was not looking. Further, she can show that management also engaged in retaliation after she complained to Hiram by suspended her without pay for 30 days and summarily firing her brother.

Big-Fix's defenses. Big-Fix could raise the same defenses discussed above as it would in defending against the harassment claim. Also, it could contend that Eva's quitting was not a reasonable response to the harassment because Eva failed to notify Big-Fix of the harassment continuing after her meeting with Hiram.

D. Frank: Retaliatory Discharge

Frank's prima facie case. Frank would have a potential retaliation claim if he can establish that Big-Fix terminated him in order to retaliate against Eva when she disclosed the sexual harassment to Hiram. The elements of Frank's claim would be the same as those discussed above in relation to Eva's retaliatory-suspension claim. Although Frank himself did not engage in protected activity, Eva's protected activity could satisfy the protected-activity element of a prima facie case of retaliation in such circumstances, especially since it was common knowledge that Frank and Eva were brother and sister. *See Thompson v. North American Stainless, LP*, 562 US 170,173 (2011).

Frank's discharge was an adverse employment action.

That Frank was fired only three days after Eva's protected activity would be sufficient to establish a causal link between Eva's protected activity and his termination.

Big-Fix's defenses. Once Frank established his prima facie case, the burden shifts to Big-Fix to articulate a legitimate, nondiscriminatory reason for his firing. Big-Fix could meet this burden merely by producing evidence that it fired Frank for embezzlement.

Frank's pretext showing. Once Big-Fix meets its light burden, the burden shifts to Frank to show that Big-Fix's reason is pretextual. Frank might be able to establish pretext by showing Big-Fix's failure to accord him due process before firing him. Big-Fix fired Frank without disclosing to him the basis for its embezzlement allegation and thus denying him an opportunity to rebut allegation or provide other evidence to exonerate him. Further, Frank might attempt to show that the allegation was false and contrived, as

well as that his long tenure at Big-Fix in the accounting position demonstrated that Big-Fix in actuality trusted him and would not have discharged him so abruptly.

Short Answers:

1. What is a “hot cargo” agreement?

Answer: A “hot cargo” agreement is an unlawful (i.e., an unfair labor practice) agreement between any union and employer whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. There are exceptions for agreements in the construction industry relating to subcontractors on a construction site and agreements in the garment industry involving jobbers, manufacturers or those performing parts of an integrated process of production.
Authority: See 29 U.S.C. § 158(e).

2. Describe the differences, if any, between bringing a class action against a private entity under Title VII and bringing a collective action against a private entity under the ADEA.

Answer: In contrast to Title VII class actions, ADEA collective actions do not use procedures specified by Rule 23 of the Federal Rules of Civil Procedure. The enforcement provisions of the ADEA generally follow the collective-action procedures of the Fair Labor Standards Act. Under the collective-action procedures of the FLSA, no class certification procedure exists to determine numerosity, commonality, typicality and representativeness. The only statutory criteria is that the putative plaintiffs be similarly situated.

Class members in Rule 23 class actions under Title VII are automatically bound by a judgment unless they opt out. By contrast, potential plaintiffs in an ADEA collective action suit must affirmatively opt in to the suit by filing a written consent with the court. Thus, while there may be numerous plaintiffs in an ADEA representative action, there are no absent class members as in Title VII class actions.

Authority: 29 U.S.C. § 626 (incorporating by reference 29 U. S. C. § 216(b)); Fed. R. Civ. P. 23. (EEO)

3. Identify five (5) of the qualifying events that would permit a qualified beneficiary to elect COBRA continuation coverage.

Answer:

a. The death of the covered employee

b. The termination of the covered employee's employment for any reason other than gross misconduct

c. A reduction in the covered employee's number of hours of employment, if resulting in a loss of coverage

d. The divorce or legal separation of the covered employee from the employee's spouse

e. The covered employee becoming entitled to benefits under title XVIII of the Social Security Act

f. A dependent child ceasing to be a dependent child under the generally applicable requirements of the plan

g. A proceeding in a case under title 11, commencing on or after July 1, 1986, with respect to the employer from whose employment the covered employee retired at any time.

Authority: 29 U.S.C. sec. 1163. (Hybrid)

4. Identify the requirements for applicability of the limited exemption to the Employer Polygraph Protection Act for ongoing investigations.

Answer:

(A). the ongoing investigation must involve economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage. (1 point)

(B). the employee must have had access to the property that is the subject of the investigation. (1 point)

(C). the employer must have a reasonable suspicion that the employee was involved in the incident or activity under investigation. (1 point)

(D). the employer must execute a statement, provided to the examinee before the test, that:

(i) sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees, (ii) is signed by a person (other than a polygraph examiner) authorized to legally bind the employer, (iii) is retained by the employer for at least 3 years, and (iv) contains at a minimum—(i) an identification of the specific economic loss or injury to the business of the employer,

(ii)a statement indicating that the employee had access to the property that is the subject of the investigation, and (iii) a statement describing the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation. (2 points)

Authority: 29 U.S.C. § 2006(d). (Misc./Indiv.)

5. How is the 12-month leave period determined for FMLA purposes?

Answer: The employer can use the calendar year, a specific fixed 12-month period (such as June 1 to May 31), the 12-month period measured forward from the date an employee's first FMLA leave began, or the "rolling" method, which measures the 12-month period from the date of the leave last taken.

Authority: 29 CFR 825.200.
(2001, 2009, 2010) (Note: modified 2015 to add 12-month measured forward, point allocation) (Hybrid)