

EEOC Compliance Manual Emphasizes Subtle Forms of Discrimination Based on Race or Color

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The EEOC recently issued a new Compliance Manual Section with guidance for analyzing race and color discrimination claims under Title VII of the 1964 Civil Rights Act. The guidance, which is 57 pages long, includes definitions of “race” and “color” as used under Title VII; a discussion of disparate treatment, disparate impact, and harassment based on race; information on what the Commission will look for in investigating race/color discrimination charges; and best practices recommendations for preventing race/color discrimination claims.

The EEOC also issued a Question and Answer Fact Sheet containing a shorter summary of the principles set forth in the Compliance Manual Section. Because race discrimination

charges comprised approximately 35% of the total charges processed by EEOC in 2005, employers should be aware of these new guidance tools utilized by the Commission.

Definitions of “Race” and “Color”

Title VII prohibits employers from making employment decisions based on, among other things, an individual’s race or color. The statute does not specifically define “race”; however, the new Compliance Manual states that the statutory prohibition includes discrimination based on ancestry, physical characteristics, race-linked illnesses, culture, perception, association, subgroup (or “race plus”) and reverse race discrimination. Similarly, color discrimination includes dis-

crimination based on pigmentation, complexion or skin shade or tone.

Disparate Treatment

Noting that the most evident example of race discrimination occurs when an employer makes a decision obviously motivated by racial animus (e.g., “I refuse to hire a black man for a job.”), the guidance also cautions employers against using stereotypes or less conscious bias when making decisions and to refrain from utilizing statements that could reflect racial stereotyping and bias. For example, a hiring manager who rejects an applicant because she was looking for a “clean-cut image” or “soft skills” may be perceived as stereotyping along ra-

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Tennessee Supreme Court Opens ‘Pandora’s Box’ Trial Courts Can Now Review DOL-Approved Labor Settlements, Allow New Litigation

On April 17, 2006, the full Tennessee Supreme Court issued an important ruling overturning a settlement approved by the Department of Labor (DOL). In *Henry Dennis v. Erin Truckways*, the 29-year-old claimant suffered paralysis when he was thrown from his truck in the course and scope of his employment.

After firing his attorney, the claim-

ant agreed to settle his case during a benefit review conference at the Chattanooga office of the Tennessee DOL. He was led to believe at the BRC that the most he could receive for his injuries was 400 weeks of benefits. The trial court found that neither the DOL specialist, nor the adjuster at the BRC explained to him that he could receive permanent and total disability benefits up to age 65.

The claimant settled his case at the DOL for 400 weeks of benefits. No attorneys attended the BRC.

Two years later, the claimant filed suit in Rutherford County, and asked the court to set aside the DOL settlement. The Tennessee Supreme Court upheld the trial court’s decision to overturn the settlement because

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President's Report

Today's Work Can Be Tomorrow's Wins

Deborah K. Woolley ★ President

Having patted each other and ourselves on the back for a most successful legislative session, it is time to roll up our sleeves and get back to work.

Both legislators and labor union leaders have already committed to bringing back the "Jobs Killer" bills that came so close to becoming law. One or two votes changing sides – or one or two people being present – would have resulted in some extremely anti-business bills becoming law. The best way to prevent it from happening is during this election season.

Here are some simple, but critical, action steps to undertake now.

1. Take time to thank the legislators who supported pro-business, pro-jobs legislation and let them know that their support and their vote were noted and appreciated. The Tennessee Chamber is collecting final information on the votes cast and who cast them, and we will have voting charts posted at www.tnchamber.org within a couple weeks.
2. Take time to tell those legislators who did NOT support the pro-business, pro-jobs positions that you are concerned that they will negatively impact economic growth. It is not always easy to deliver a message that says "I was disappointed in what you did" but, if you don't, then they don't know.
3. Talk to your employees. Let them know that their company and their jobs are impacted by legislative decisions and give them information on voting. With early voting starting in mid-July, encourage your employees to exercise their right to vote.
4. Communicate to candidates. The absolute best time to "educate" an elected official is when he or she is a candidate. Take time to meet with candidates, to discuss issues that would promote economic and job growth in the economy. Talk to them about

your business, the challenges you face and the opportunities that exist. Make sure they understand that the decisions they make and the votes they cast in Nashville have a direct impact on jobs in their community.

5. Participate in the elections financially. Yes – it is the dreaded "money" word. Campaigns are expensive and are getting more so. Candidates can't avoid many of the costs, and the one way we can ensure that pro-business candidates are elected or returned to office is to support them financially. It is tempting and easy to support a legislator who has not supported business because he or she is a friend or someone you see regularly at church or in town. Don't be afraid to support those who support you and reject those who don't...that is what accountability and representative government is all about.
6. Last, and most important, VOTE. In the end, when the results are tallied, your vote is what counts. Encourage your employees and associates to vote. Voting is a precious right and privilege that should not be wasted. I will never forget the Iraqi citizen who was interviewed on Nashville television last year. He and his wife had driven non-stop from outside Dallas, Texas, to the polls in Nashville with their three young children packed in the back seat. He proudly held up a blue finger tip and said, "I will not wash it. This is the first vote I have ever been allowed to cast in my life, and I wanted my children to see it and know what it means." Then he, his wife and kids, after a 2-hour stay in Nashville to vote, drove non-stop back to Dallas so he could work the next day. He understood freedom and responsibility, and I hope we all will, too.



Tennessee Supreme Court Opens Pandora's Box

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the DOL had failed to ensure that the claimant was substantially receiving the benefits to which he was entitled under the law. The claimant's benefits were enlarged from 400 weeks to permanent and total benefits to age 65.

This decision opens a "Pandora's Box" for the judicial review of DOL-approved settlements. Trial courts can now begin to review DOL-approved settlements, decide the previously unrepresented claimant did not receive "substantially"

the benefits the law allows, allow the claim to be litigated, and enlarge the award. In the Dennis case, the Supreme Court enlarged the award from 400 weeks to 1,872 weeks.

Insurers and employers should take note that DOL-approved settlements are now under attack, and that such claims, once thought to be closed, can now be reopened, litigated, and enlarged years later.

Settlements approved by a Court, rather than by the DOL, can not be

reviewed more than 30 days after their entry. In those court-approved cases, a judge is unlikely to reverse himself. Disturbingly, the Dennis ruling does not appear to set any time constraints on such a review — the Henry Dennis v. Erin Truckways case was filed two years after the DOL approval.

For further information, contact an attorney in the Workers' Compensation practice of Manier & Herod at 615-244-0030.

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cial lines. In addition, the guidance reiterates that Title VII prohibits employers from making racially motivated decisions prompted by business concerns or negative reactions from clients, customers, or other employees. Finally, under no circumstances may race or color be justified as a bona fide occupational qualification under Title VII.

The guidance notes that the EEOC will consider the "overall workplace environment" when investigating race discrimination claims and lists the factors the Commission may consider in evaluating the environment.

Disparate Impact

The guidance reminds employers that they may be liable for discrimination even in the absence of unlawful motive. Policies, practices or actions that have a disparate impact on members of a protected class also constitute discrimination. To determine the existence of disparate impact, the Commission examines criteria related to recruitment, hiring/promotions, and layoff/termination. In addition, appearance or grooming policies, along with education and experience requirements, can result in a disparate impact on employees.

To establish disparate impact claim under Title VII, the alleged disparate impact must be shown by statistical evidence. If a disparate impact is proven, the employer bears the burden of demonstrating that the policy or practice in question is job related for the position and consistent with business necessity. For example, an employer's no beard policy, while not facially discriminatory, may have a disproportionate adverse impact on black male employees, who are statistically more likely than their white counterparts to suffer from a skin condition caused by shaving.

Equal Access to Jobs

Title VII prohibits discrimination in the areas of recruiting, hiring and promotion. While most employers know they cannot use race or color as a job requirement in an advertisement for a job opening, the new guidance identifies more subtle actions that may also violate Title VII's race discrimination prohibition, such as:

- Recruiting based solely on word-of-mouth referrals, if that method creates a limited applicant pool that does not include qualified diverse individuals.

- Screening criteria that implicate race, such as a recruiter disqualifying candidates from specific neighborhoods in order to filter the applicant pool.
- Recruiting exclusively from homogeneous sources, i.e. predominately white or black schools or areas.

Although courts usually defer to an employer's business judgment in the context of hiring or promotion, the selection criteria utilized by the employer must be objective and consistently applied. This mandate applies to the employer's education requirements that are not directly related to the position at issue; employment testing (subjective personality tests or differences in scoring based on race); and conviction and arrest records (disqualifying a person of one race because of a felony conviction while retaining a person of another race with a similar record).

The guidance notes that employers who implement diversity strategies in an effort to achieve a more multicultural workplace, and those who wish to redress the historical wrongs of past discrimination by establishing affirmative action programs, must ensure that the programs adhere to the requirements of

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Title VII. The plans should not impose racial quotas or unnecessarily infringe on third party interests. Additionally, employers in the public sector should be aware that their affirmative action programs must comply with both Title VII and the Equal Protection Clause in the U.S. Constitution.

Equal Opportunity for Job Success

The new guidance reiterates that employers may face liability if they neglect to ensure a harassment-free workplace for their employees. In this respect, the guidance mirrors the analytical framework previously developed for sexual harassment claims. Such liability may be incurred based on the conduct of a supervisor, co-workers, and even customers or business partners under the employer's control.

Race-based harassment occurs if: (1) the conduct is unwelcome, and (2) the conduct is sufficiently severe or pervasive to alter the terms and conditions of employment both in the mind of the victim and from the perspective of a reasonable person in the victim's position. Conduct will be deemed unwelcome if the victim did not solicit the behavior and viewed it as offensive. This is an individualized, fact-based inquiry, since there may be a close question as to whether the conduct was unwelcome or merely "playful banter." Most importantly, EEOC investigators will consider the context in which the alleged harassment occurred. For example, a Japanese clerk whose co-workers subject her to Karate chops when they see her or intentionally mispronounce her name has experienced

race-based harassment.

As noted above, policies imposing appearance and grooming standards must be neutral. Employers should note, however, that seemingly innocuous policies may violate the statute if not absolutely necessary for business purposes. For example, strict height and weight restrictions may adversely impact certain racial groups. Additionally, while employers may establish policies regulating hairstyles, such policies must be equitably enforced and should acknowledge differences in hair textures. As such, a rule prohibiting an "afro" style predominately worn by African-Americans would violate Title VII. Likewise, employers may establish dress codes for the workplace, as long as the code was not adopted for discriminatory reasons and treats all attire equally (i.e., an employer may not enforce a code banning only traditional Hawaiian dress).

The new Compliance Manual and Question and Answer Fact Sheet can be found at www.eeoc.gov

Proactive Prevention

The EEOC also issued recommendations for proactive efforts to prevent Title VII violations and commit to diversity strategies in the workplace. The EEOC's list of the best practices is outlined below. Employers are advised to:

- ❑ Implement a strong equal employment opportunity policy, emphasizing enforcement and accountability from all employees.
- ❑ Document personnel decisions and retain employee records in accordance with applicable time periods.
- ❑ Consider diverse candidates in the areas of recruitment, hiring and promotion.
- ❑ Conduct internal reviews to ensure current practices minimize or eliminate disparate impact among employees.
- ❑ Ensure job standards are applied objectively and consistently, and job openings are adequately communicated to all employees.
- ❑ Incorporate a harassment policy that gives a specific explanation of prohibited conduct and grievance procedures available to employees, and ensures a swift, thorough investigation.

While the principles contained in the this race/color discrimination guidance are not news to most employers, the guidance provides insight into how the Commission will be assessing these claims, as well as some helpful examples of factual scenarios.

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Department of Revenue Now Responsible for Vehicle Title and Registration Functions

On July 1, all functions relating to the Division of Title and Registration in the Tennessee Department of Safety were transferred to the Department of Revenue. The transition results from Governor Phil Bredesen's Executive Order No. 36, which called for all functions relating to the Division of Title and Registration to be administered by the Commissioner of Revenue.

Executive Order No. 36 implemented recommendations outlined

by the Governor following a report he commissioned by Kroll Inc. to suggest changes at the Department of Safety to improve and streamline processes within the department's management.

To enable implementation and to streamline activity for customers, the Department of Revenue has redesigned its Web site at www.Tennessee.gov/revenue.



Annual Environmental Conference and Awards An Opportunity for Tennessee Businesses

The Tennessee Chamber's environmental awards are presented annually to recognize those companies that care for our environment and heritage through environmental management and sustainable initiatives. The environmental awards acknowledge those who conserve and enhance the natural environment and publicly recognize a company's concern for its community

through environmental improvement.

The awards are presented in the areas of Air Quality, Water Quality, Solid Waste Management, Hazardous Waste Management and Environmental Excellence and are based on a company's size. The deadline for applying for the 2006 awards is August 31. The nomination form is available at the Chamber's website (www.tnchamber.org)

or by calling the Chamber at 615-256-5141.

The awards will be presented at the 23rd Annual Environmental Awards Conference at Montgomery Bell State Park in Dickson October 26-27, 2006. Make sure you mark your calendar and make reservations now to attend and participate.

"Adverse Employment Action" in Retaliation Cases Clarified by High Court

The U.S. Supreme Court issued in late June its highly anticipated decision in *Burlington Northern & Santa Fe Railway Company v. White* (No. 05-259). The case was brought by a female railroad worker who claimed that she was suspended without pay and reassigned to another position in retaliation for complaining about unlawful harassment. The key question before the high court was what constitutes an "adverse employment action" under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964.

In upholding the jury's verdict in favor of the employee, the Court first held that the anti-retaliation provision "does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." In reaching this conclusion, the Justices referred to the D.C. Circuit opinion involving an FBI agent who claimed that he was not warned when the FBI learned about threats to his life from an inmate. According to the Court, "[a] provision limited to employment-related actions would not deter the many forms that effective retaliation can take." Thus, the Court rejected

the standard applied by the Courts of Appeals that limited actionable retaliation to so-called "ultimate employment decisions."

The high court then turned to what it deemed to be the proper standard for evaluating retaliation claims under Title VII. Agreeing with the Seventh and District of Columbia Circuits, the Justices wrote: "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

The Court made three important explanatory points:

- It is important to distinguish "significant from trivial" harms;
- It used the phrase "reasonable employee" to make clear that the standard is an objective, rather than subjective one; and
- It defined the standard in general terms because the decision as to whether it is an adverse action must be decided in context.

Applying its new standard, the Court unanimously held that both a 37-day unpaid suspension, even though it was later converted to paid, and an assignment to a more physically arduous position were adverse actions and thus form the basis for a retaliation action. As a result, the judgment of the Court of Appeals was affirmed.

The decision is not a terribly unexpected result. It will undoubtedly be referred to as a pro-employee decision – which it is – but employers can take heart in the explanatory comments, particularly that the test is objective. Similar to determining whether conduct meets the severe and pervasive standard for sexual harassment, whether an action is sufficiently adverse for retaliation may often be decided by the court. What it certainly means, however, is there will exist a period of time until the courts, at least in 10 circuits, sort through their new standard."

**For further information, contact
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New Legislation Impacts Taxation of REITs

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The Tennessee Department of Revenue recently advanced “technical corrections” legislation that results in a sea change in how real estate investment trusts (“REITs”), their subsidiary partnerships and REIT owners are taxed.

The legislation was introduced to respond to the formulation of “captive REITs” (i.e., ones that are not publicly traded, but rather that are majority owned by a C-Corporation). The Department believed captive REITs were set up to avoid or minimize Tennessee franchise and excise tax. The Department of Revenue’s legislation, however, affects more than just captive REITs.

Senate Bill 3930 and House Bill 4048 amended Tennessee Code Annotated, Title 67, Chapter 4, Parts 20 and 21 to remove the franchise and excise tax exemption for any entity that is treated as a partnership for federal income tax purposes and that is wholly owned by a REIT. Under prior law, property of REIT-owned partnerships was exempt from Tennessee franchise tax. To the extent not REIT-owned, the partnership was subject to the “net worth” method for calculating the franchise tax. For excise tax purposes, the REIT-owned subsidiary

filed a Tennessee franchise and excise tax return at the subsidiary level. Income and losses were exempt from Tennessee excise tax to the extent that income and losses were distributed by the partnership to the REIT and later to the owners of the REIT. Distributions to REIT owners who resided in Tennessee were subject to the Hall Income Tax Act.

The passage of Senate Bill 3930 and House Bill 4048 now make REITs and their REIT owned subsidiaries subject to Tennessee franchise and excise tax, but with a few noteworthy exceptions. Despite the categorical removal of the exemption from franchise and excise tax for REITs, the Bills exempt, from Tennessee excise tax, any person treated as a partnership for federal tax purposes who directly or indirectly distributes 100 percent of his net earnings or net losses to a publicly traded REIT (i.e., one that is publicly traded on a regulated exchange). For “public REITs”, the net effect of the Department of Revenue’s legislation is to treat them no differently for Tennessee excise tax purposes than they were treated before the legislation (i.e., to the extent they distribute subsidiary income to owners, there is no Tennessee excise tax).

In an important concession to Tennessee-domiciled owners of REITs, the legislation also exempts from the Hall Income Tax the income from the stock in any publicly traded REIT. This is an important exemption that removes what could potentially have been unfair and double taxation on the same income.

The bills as passed by the Senate and House were transmitted to the Governor for signature on June 15, 2006. The effective date of the legislation (as it relates to public REITs) is July 1, 2006. Therefore, REITs will be subject to a prorated Tennessee franchise and excise tax for tax year 2006.

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Tennessee’s Top 20 “Best Employers” Announced

Twenty companies have been named “Best Employers” by the Best Companies Group, in an annual competition sponsored by Business Tennessee magazine, the Tennessee Chamber of Commerce and the Tennessee State Council of the Society of Human Resource Management.

The companies, following an application process, are examined by the Best Companies Group and evaluated to determine which ones stand out as the best employers. The winners are picked based on factors such as salaries, personal benefits, tenure of CEOs and much more.

The 2006 “Best Employers” in Tennessee are (in alphabetical order): Beaman Automotive (Nashville), Cowan

Benefit Services (Franklin), Edward Jones (state-wide), ENA (Nashville), First Horizon National Corp. (state-wide), Kramer Rayson LLP (Knoxville/Oak Ridge), Lee Company (Franklin), LifeWay Christian Resources (state-wide), McKee Foods Corp. & Affiliates (Chattanooga), Memorial Health Care System (Chattanooga), Mid-America Apartment Communities (state-wide), Midsouth Bank (Murfreesboro/Smyrna), Passport Health Communications (Franklin), Qualifacts Systems (Nashville), Saratoga Technologies (Knoxville/Tri-Cities/Greeneville), Scripps Networks (Knoxville, Nashville), T-Mobile USA (state-wide),



UNUM PROVIDENT CORP. (Chattanooga), Valenti Mid-South Management (Memphis), and Walden Security

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Tennessee's Top 20 Best Employers

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(Chattanooga/Knoxville/Nashville).

Numerous studies show a strong correlation between profitability and creating a great place to work. The Best Employers in Tennessee initiative is similar to the famous Fortune magazine list announcing the "100 Best Employers in America." In addition to the positive effect the award has on their employee relations and recruitment, the driving force for companies to participate is the remarkable effect that workplace improvements can have on their bottom line.

The goal of Best Employers in Tennessee is to raise the bar among our state's employ-

ers and create excellence and employee satisfaction in the workplace that will attract talented people for years to come. This initiative is integral for Tennessee to compete in both national and global arenas.

The selection process is based on an assessment of the company's employee policies and procedures and the results of a 65 question employee survey. After the process is complete, all participating companies will receive Assessment Findings Reports which will not only summarize and sort employee feedback, but will also include Tennessee benchmarking data to compare to.

"These twenty companies prove that

"best employers" can come from all business and industry sectors and all parts of Tennessee," said Deb Woolley, Tennessee Chamber president. "They are recognized as leaders within their industry sectors and within their communities.

"But the common thread that runs through all these companies – and makes them stand out above the rest – is their commitment to their employees. In the end, they all recognize that their most valuable asset are the associates who work with them and they strive to maximize that asset."

Who Is Entrusted With The Chamber's Worker's Comp Trust?

At times it seems like many of our business relationships are guaranteed to be short term – just when one gets accustomed to a particular set of personnel and the feeling of being known by staff, the roster changes and the combined history and experience with your needs evaporates.

That is why we thought in this issue of the *Business Insider*, Tennessee Chamber members would appreciate knowing that the Chamber's sponsored workers' comp trust for manufacturers – TABCOMP – has the same core personnel for more than 10 years. These professionals have enjoyed good markets—and bad, and weathered storms as well as enjoying sunny times with Trust members.

Michele Radford, claims specialist, started with TABSSIT, the Chamber's original sponsored workers' comp trust, at the beginning in 1995 as the claims specialist for the organization. Likewise, Diana Beasley who began with TABSSIT in 1995 as the receptionist and now assists in working medical claims.

Underwriter Robert McDougal, also started with the Trust in 1995 as a claims assistant and was subsequently promoted in the spring of 1997 to underwriter. According to McDougal, there have been many changes and challenges over this time period, including today's "roller coast-

All current TABCOMP members are invited to attend the Trust's annual meeting on July 21st, at 1 p.m. Central Time at the Brentwood Hilton Suites, to get additional details on the Trust and its progress. Please contact Janet Bowman toll-free at 866-295-6689 for further information.

er pricing" by competitors. TABCOMP, however, has chosen to keep prices stable – to the ultimate benefit of all:

"I have seen insurers go out of business on many occasions due to under-pricing," reports McDougal.

He went on to state that "...our loss frequency and loss severity have declined radically since I first joined the Trust. For example, frequency has gone from 18-19 percent to 9 percent. In addition, average cost per claim has decreased." He attributes these changes to members' taking advantage of the loss prevention services that TABCOMP offers.

And, this type of long-term commitment is reflected in the member base, which has resulted in a level of consistency, service and attention to members' specific workers' comp needs and improvements.

TABCOMP's Chief Financial Officer Mikhel Lindsley has also been with the Trust more than 12 years. Lindsley points

out that the Trust has never had to do an assessment, which is relatively rare with self-insured funds.

"In fact, we have given dividends back to our members," Lindsley said.

With the change to CCMSI as the Trust's management company, the program has gained the best of all worlds – adding Janet Bowman, CPSR, as the Account Manager. Bowman brings just the right amount of "new blood" to the group. She has 22 years experience in the field, serving as Vice President of the Public Entity Division, Southeast Region for Driver Alliant Insurance Services, prior to taking her position with TABCOMP. Her experience is wide ranging, including working as Senior Vice President of Marketing for a large national brokerage operation. In 1997, she won the Wightman's Award for most creative and innovative insurance product. Other accomplishments include developing and growing the Tennessee Local Government Property/Casualty Fund.

For more information on TABCOMP Trust and how it can benefit your manufacturing firm, please log on to the website at tabcomptrust.org or call Janet Bowman at 615-370-5964 or toll free 866-295-6689.



2006 Seminar Schedule

DATE	SEMINAR	LOCATION
August 15, 2006	Maintenance Related TOSHA Compliance	Jackson
August 17, 2006	Maintenance Related TOSHA Compliance	Knoxville
August 29, 2006	Maintenance Related TOSHA Compliance	Dickson
August 31, 2006	Basic Safety	Clarksville
September 7, 2006	Basic Safety	Dyersburg
September 14, 2006	Basic Safety	Knoxville
September 29, 2006	Basic Safety	Cleveland
September 21-22, 2006	10-hour OSHA Vol Compliance	Clarksville
September 26-27, 2006	10-hour OSHA Vol Compliance	Morristown
October 5, 2006	2006 Business Tax Update	Nashville
October 26-27, 2006	Annual Environment and Awards Conference	Montgomery Bell State Park-Dickson, TN
November 2, 2006	Safety Programs	Clarksville
November 16, 2006	Safety Programs	Kingsport
November 9, 2006	TOSHA 101	Dyersburg
November 15, 2006	TOSHA 101	Morristown
December 4-7, 2006	30-hour OSHA	Murfreesboro
November 29, 2006	Forklift	Cleveland
November 8, 2006	Forklift	Dyersburg
December 15, 2006	Forklift	Nashville

For further information on any seminar or program, contact Suzie Lusk at suzie.lusk@tenchamber.org or at 615-256-5141.



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