

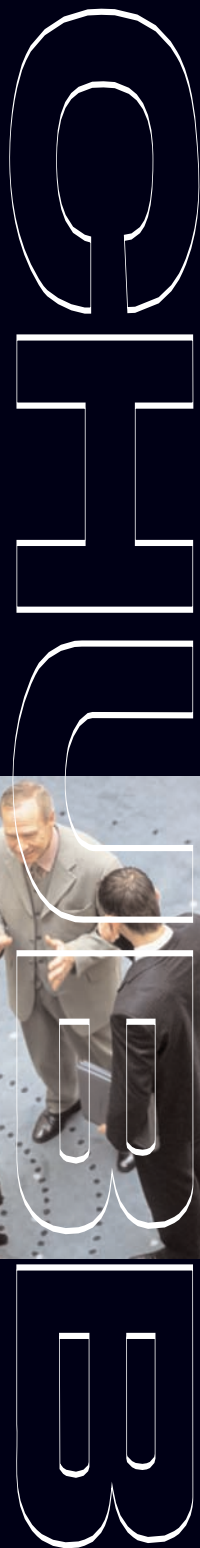


Employment Practices Loss Prevention Guidelines

A Practical Guide from Chubb



It's Chubb. Or it's Chance.



**EMPLOYMENT PRACTICES
LOSS PREVENTION GUIDELINES
A PRACTICAL GUIDE FROM CHUBB**

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for the Chubb Group of Insurance Companies

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Note: The views expressed in this handbook are those of Seyfarth Shaw LLP and may or may not reflect the views of any members of the Chubb Group of Insurance Companies.

INTRODUCTION

Employers face increasing legal obligations in managing their workforces. The federal government and the states continually impose new employment regulations on employers, designed to protect employees from a lengthening list of discriminatory practices. In addition, large, high-visibility verdicts and settlements encourage some employees who think they have been treated unfairly to sue over employment actions. Not only do companies face legal fees and litigation expenses, but employment practices liability (EPL) suits consume managers' time. In this difficult environment, employers must keep pace with changes in the law and continually adapt by ensuring that existing policies are up-to-date, drafting new policies when necessary, and adopting new employment practices when appropriate.

In such a fluid environment, it might seem impossible to avoid employee claims. It isn't. The keys are staying up-to-date on employment law, understanding which laws apply to an organization, and instituting policies and taking other steps that can limit potential claims and make actual claims easier and less costly to defend.

This guide is intended to help. It offers an overview of the federal laws governing the employment relationship, highlighting the rules and regulations governing various events in the employee-employer relationship. It includes practical suggestions for limiting employment liability, from initial interview to termination of employment, and it discusses common types of employment claims and what to expect from employment litigation.

Chubb is pleased to share this information with you. If you already have a program in place to help your organization manage its employment practices, we hope this guide will serve as a practical resource and supplement your organization's effort to build a strong and appropriate loss prevention program.

OVERVIEW: FEDERAL LAWS THAT GOVERN THE EMPLOYMENT RELATIONSHIP

Many laws have an impact on employment, either directly or indirectly, and some are extremely significant in the employment context. To acquire knowledge of all such laws is not practical, but employers should be aware of the major statutes that govern the employment relationship and the legal obligations they impose. The following summary provides an overview of these laws.

Title VII of the Civil Rights Act of 1964

Title VII is one of the most common bases of employment litigation. The statute makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment” because of race, color, religion, sex, including sexual harassment, national origin, and pregnancy, childbirth, or related medical conditions. The U.S. Supreme Court has found that Title VII protects against both sexual harassment by the opposite sex and sexual harassment by the same sex (e.g., male-on-male sexual harassment). Title VII’s prohibitions against workplace harassment are dealt with in greater detail on page 56.

Title VII applies to employers with 15 or more employees. All employees, including part-time and temporary workers, are counted for purposes of determining whether an employer is covered. Title VII cases are initially processed by the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency. Following the initial processing of the case, the complaining party is typically issued a notice of his or her right to sue. Individual employees or the EEOC may then file suit in federal court. A charge alleging a violation of Title VII must be filed with the EEOC within 300 days of the alleged unlawful act (180 days in some states). A federal court lawsuit must be filed within 90 days after receipt of the right-to-sue notice.

Claims under Title VII are established through either direct evidence of an intent to discriminate or indirect (circumstantial) evidence. A Title VII claim may arise from an alleged unlawful difference in treatment afforded similarly situated employees based on one of the above classifications (known as disparate treatment) or from an employment practice that appears nondiscriminatory but that has an adverse impact on employees in a protected class (known as disparate impact).

Most commonly, claims under Title VII allege that an individual was treated unfavorably regarding a term or condition of employment because the individual belonged to a protected class. In other words, these claims assert that the decision maker made an employment decision based on an individual's race, gender, or other protected classification. To succeed on such a claim, the individual typically produces circumstantial evidence of discrimination, e.g., that he or she belongs to a protected class, that the individual was qualified for a position, that the individual was denied the position, and that the job remained open or was filled by an individual who was not in the protected class. After the claimant produces this evidence, the employer can avoid liability by articulating a legitimate nondiscriminatory reason for its actions. If the employer can do this, the employee must then prove that the employer's reason is pretextual, i.e., that the employer's motive was intended to mask its true intention.

In some cases, an employee may have direct evidence of discrimination (i.e., an admission that the employer is prejudiced), which may relieve the employee of the need to present circumstantial evidence. In others, employees will claim that discrimination and legitimate reasons combined to motivate the employer's action (called a "mixed-motive" case).

Generally, remedies for unlawful employment discrimination include reinstatement or hiring, court orders to eliminate discriminatory practices, lost wages (including benefits), damages, and attorneys' fees. Based on amendments enacted as part of the Civil Rights Act of 1991, compensatory and punitive damages are also available from private employers. The size of

the employer determines the maximum compensatory and punitive damages available: \$50,000 for employers with 15 to 100 employees; \$100,000 for employers with 101 to 200 employees; \$200,000 for employers with 201 to 500 employees; and \$300,000 for employers with more than 500 employees.

Section 1981 of the Civil Rights Act of 1866

Section 1981 is also frequently the basis for race discrimination claims—typically brought in conjunction with a claim under Title VII. Section 1981, enacted following the Civil War, makes it unlawful for any person to be denied “the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” Section 1981 has been interpreted to protect against discriminatory employment practices. Most courts have found that even an at-will employee has an employment “contract” that is sufficient to support a claim under Section 1981.

Section 1981 defines “race” to include ethnic background. Section 1981 thus protects all “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics,” which, according to the U.S. Supreme Court, includes Arabs and Jews.

Section 1981 applies to all employers, both private and public. Therefore, employers that are not covered by Title VII are covered by Section 1981, and employers that are covered by Title VII are covered by both laws. However, cases alleging discrimination based on a disparate impact can only be brought under Title VII, because Section 1981 requires proof of intentional discrimination. Section 1981 does not require the same administrative prerequisites as are required under Title VII; employees can file directly in federal or state court.

Generally, remedies for violations of Section 1981 include lost wages (including benefits), reinstatement, injunctive relief, and attorneys’ fees and costs. Compensatory and punitive damages can also be awarded but, unlike Title VII, there are no statutory caps for such damages. Under a recent

Supreme Court decision, *Jones v. R.R. Donnelley & Sons Co.*, two statutes of limitation are possible for Section 1981 claims. For claims alleging failure to hire, the applicable state statute of limitations for tort claims, usually two years, will apply to Section 1981 claims. For other claims, including harassment and certain types of failure-to-promote claims, a uniform four-year federal statute of limitations will apply.

Age Discrimination in Employment Act (ADEA)

The ADEA makes it unlawful—as to any employee over 40 years of age—for an employer to “fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”

The ADEA covers employers with 20 or more employees. Like cases under Title VII, ADEA cases are initially processed by the EEOC or an equivalent state agency. In addition to allowing reinstatement and recovery of lost wages, lost benefits, and attorneys’ fees, the ADEA provides for the award of liquidated (double) damages in cases of willful violations. Front pay may also be awarded. Compensatory and punitive damages are not available under the ADEA.

Significantly, the ADEA does not require an employer to provide equal health insurance, life insurance, or disability benefits to older workers if it costs more to do so, provided that the employer spends the same amount on both older and younger workers. The ADEA poses particularly difficult problems in the context of hiring practices and reductions in force, as these events typically impact older workers more than other workers.

The Supreme Court recently held that the ADEA does not provide a cause of action to a relatively younger employee who allegedly has been discriminated against in favor of older employees. In *General Dynamics Land Systems, Inc. v. Cline*, the U.S. Supreme Court held that the ADEA does not prohibit discrimination against relatively younger workers over the age of 40

in favor of relatively older workers over the age of 40. The Court reached this conclusion largely based upon the history of the ADEA, which demonstrated that the statute was designed to protect older employees against discrimination in favor of younger ones, not the other way around. Although federal law will not support such “reverse discrimination” claims, management should be aware that the antidiscrimination laws of several states cover claims of age discrimination brought by younger employees who feel that older employees have received preferential treatment. For example, the New Jersey Law Against Discrimination protects all employees over the age of 18 from age-based discrimination.

Equal Pay Act (EPA)

The EPA makes it unlawful to pay employees at a rate less than the rate applicable to “employees of the opposite sex” for “equal work” on jobs requiring equal skill, equal effort, equal responsibility, and where the work is “performed under similar working conditions.” There are a number of exceptions where a differential can be justified, the most significant exception being a wage differential based on some “factor other than sex,” such as seniority. The EPA applies to most employers. Aggrieved individuals may file suit or may file a charge with the EEOC. The statute of limitations and available remedies are similar to those under the Fair Labor Standards Act, discussed on pages 17-18.

Executive Order 11246 (Affirmative Action Plans and the Office of Federal Contract Compliance Programs (OFCCP))

Executive Order 11246 establishes nondiscrimination and affirmative action requirements for federal contractors. It prohibits discrimination and requires affirmative action with regard to race, sex, ethnicity, and religion.

Except for contractors exempted by regulation, Executive Order 11246 covers contractors with a federal construction contract or with a federally assisted construction or nonconstruction contract in excess of \$10,000. Such contractors must include in their contracts and comply with an “Equal

Opportunity Clause” wherein the contractor agrees to make certain disclosures and statements of nondiscrimination to employees, applicants, collective bargaining representatives, subcontractors, and vendors.

All federal contractors with 50 or more employees must develop, and all government contracts of \$50,000 or more must have, written affirmative action plans (AAPs). The OFCCP’s regulations set forth the required contents of an AAP, including both written and statistical portions.

Additionally, numerous statistical analyses are required, such as an organizational analysis, job group analysis, availability analysis, comparing incumbency to availability, and annual goals. A compensation analysis to detect disparities by race and gender must also be conducted but is not included in the AAP.

The OFCCP conducts periodic compliance reviews of federal contractors to examine their affirmative action and employment practices. Impact ratio analyses and compensation analyses are significant focuses of these audits. The OFCCP also investigates complaints filed by individuals alleging discrimination. However, individuals do not have the authority to sue on their own behalf. Failure to comply with an administrative determination finding a violation of Executive Order 11246 “shall result in the immediate cancellation, termination and suspension of the respondent’s contracts and/or debarment of the respondent from further contracts.”

The Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973

The ADA provides significant protections for disabled workers. Congress intended the ADA to eliminate barriers to employment for disabled individuals. In general, the ADA prohibits covered employers from discriminating against qualified disabled individuals on account of their disability. The ADA also prohibits disability-related inquiries and medical testing during the hiring process prior to making a provisional offer of employment.

The ADA applies to employers that have employed 15 or more full-time and/or part-time employees in each of 20 or more calendar weeks during the current or preceding calendar year. Unlike other laws (e.g., the Family Medical Leave Act), the ADA has no minimum service requirement before an employee is protected. In fact, the ADA applies to applicants for employment. To be covered, a person must be a “qualified individual with a disability.” An applicant or employee is “qualified” within the meaning of this phrase if he or she is able to perform the essential functions of the job that they hold or seek, with or without reasonable accommodation. An applicant or employee is “disabled” if he or she 1) has a physical or mental impairment that substantially limits one or more of the major life activities of the individual, 2) has a record of such an impairment, or 3) is regarded as having such an impairment.

The ADA requires employers to make reasonable accommodations for disabled individuals so that they can perform the essential functions of their jobs. Examples of reasonable accommodations include making existing facilities readily accessible to, and usable by, individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to vacant positions; acquiring or modifying equipment or devices; changing job tests, training materials, or policies; and providing qualified readers or interpreters. The ADA’s reasonable accommodation requirement underscores the importance of job descriptions, appropriate pre-employment inquiries and physical examinations, and other employment practices.

Employers are required to participate in a good-faith, interactive dialogue with the disabled individual in order to determine the appropriate accommodation in a given situation. Employers may be excused from providing reasonable accommodations to a disabled applicant or employee if the employer can show that to do so would impose an “undue hardship,” defined as an action requiring significant difficulty or expense, taking into account the employer’s size and resources.

ADA cases are initially processed by the EEOC and, once processed, can lead to a federal court suit. Generally, back pay and benefits can be awarded along with reinstatement, injunctive relief, and the plaintiff's attorneys' fees and costs. Compensatory and punitive damages are also available, depending on the employer's number of employees, up to a maximum of \$300,000. A complaining person must file a charge within 300 days after the alleged discrimination (180 days in some states). A lawsuit must be filed within 90 days after receipt of the right-to-sue notice terminating the EEOC's review. State laws may impose greater protections for disabled individuals than those afforded by the ADA.

The Rehabilitation Act of 1973 prohibits disability discrimination in employment by federal employers, employers with federal contracts of more than \$10,000, and programs receiving federal financial assistance. Specifically, the Rehabilitation Act states that no "otherwise qualified individual with a disability" may "solely by reason of her or his disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination" under any federally funded program or activity.

The Rehabilitation Act requires covered entities to reasonably accommodate an otherwise qualified individual with a disability unless doing so would impose undue hardship. Generally, employers that comply with the requirements of the ADA will meet the requirements of the Rehabilitation Act. Applicants or employees may file an administrative complaint alleging a violation of the Act with the OFCCP. Violations of the Rehabilitation Act can result in the termination of federal funding.

The Family and Medical Leave Act (FMLA)

The FMLA provides eligible employees with up to 12 weeks of unpaid leave in a 12-month period. The FMLA, which creates protections for employees before, during, and after FMLA leave, is significant in three respects. First, in those circumstances covered by the Act, the FMLA creates an absolute entitlement to leave for eligible employees. Second, an employee is entitled

to health benefits while on FMLA leave on the same terms and conditions as if the employee was still working. Third, upon returning from FMLA leave, an employee is entitled to be reinstated to the same, or an equivalent, position with equivalent pay and benefits.

The FMLA applies to employers that have employed 50 or more full-time and/or part-time employees for 20 or more calendar weeks during the current or preceding calendar year. Public employers (such as municipalities) are covered by the FMLA regardless of size.

An employee is eligible for FMLA leave if the employee 1) works at a work site at which 50 or more employees are employed or within 75 miles of such a site, 2) has worked for the employer for 12 months, and 3) has worked at least 1,250 hours in the year before the leave commences.

An eligible employee may take FMLA leave for 1) child care following the birth of a child or placement of a child for adoption or foster care; 2) care for a spouse, child, or parent of the employee who has a serious health condition; or 3) a serious health condition that makes the employee unable to perform an essential function of his or her position.

The 12-month period during which leave is available to an eligible employee may be measured 1) on a calendar-year basis, 2) a fiscal year or any other fixed 12-month period (e.g., measured from the eligible employee's hire date), 3) a 12-month period that begins on the date of an employee's first request for leave, or 4) a rolling 12-month period looking back over the preceding 12 months from the date of the leave request. Employers must uniformly apply one of these methods of calculation to all employees.

Employers may impose certain obligations on employees who seek to take FMLA leave, such as requiring medical certification of a serious health condition when leave is taken for this reason. However, employers must generally take affirmative steps to implement these obligations. Failing to properly notify an employee of his or her obligations may preclude the

employer from enforcing the requirement. Employers are also explicitly prohibited from interfering with an employee's exercise of rights under the FMLA; from discriminating against an employee for opposing practices made unlawful by the FMLA; and from retaliating against an employee for participating in any proceedings related to enforcement of the FMLA.

The FMLA is administered by the U.S. Department of Labor (DOL). An employee can file a complaint with the DOL or pursue a private action in either state or federal court. Successful plaintiffs can recover back pay and benefits, actual monetary losses, an equal amount of back pay in "liquidated" damages, attorneys' fees, and equitable relief. The statute of limitations for FMLA claims is two years, or three years for willful violations. Finally, employers should be aware that state laws may provide employees with greater leave rights than are provided by the FMLA.

Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974

The USERRA provides a broad array of protections to employees who are required to leave their employment for military service. The general purpose of the USERRA is to ensure that veterans suffer no detriment for having left their civilian employment to serve in the uniformed services. The USERRA contains 1) antidiscrimination provisions, 2) job-restoration requirements, and 3) employee rights and benefit rules for employees on military leave. Reservists generally are afforded the same protections as inductees. The USERRA applies to all employers regardless of size and covers any person who performs service in the uniformed services.

The USERRA's antidiscrimination provisions prohibit 1) discrimination in hiring, or any terms and conditions of employment, as a result of membership in, or performance of duties for, a branch of the uniformed services; 2) adverse action against any employee who seeks leave or other benefits provided by law; and 3) retaliation against any person who assists another in securing rights provided by law.

Employees alleging violations of the USERRA can file complaints with the Veterans' Employment and Training Service of the DOL. Employees also have the option of filing private lawsuits at any time. USERRA permits recovery of back pay, benefits, and attorneys' fees. Damage awards may be doubled for willful violations.

Labor Laws and Union Representation

The National Labor Relations Act (NLRA) is the basic statute governing private sector collective bargaining and union relations in the United States. Among its provisions, the NLRA establishes the framework for union representation of employees, and it defines certain employer or union conduct as constituting an unfair labor practice. Most private sector employers are subject to the NLRA, regardless of whether they are unionized.

The NLRA, as interpreted by the National Labor Relations Board (NLRB), is constantly evolving to address new workplace situations, including those at nonunionized employers. For example, Section 7 of the NLRA states that employees have the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." The NLRB has taken the position that employees at nonunionized facilities have a right to have a co-employee present for assistance when there is a reasonable expectation that discipline will result from an investigatory interview with the management. In addition, the NLRB has interpreted "concerted activity" broadly to cover one employee if he/she acts on behalf of other workers, has discussed the matter with coworkers, or acts alone to initiate group action. Employees do not need to be in a union environment to engage in protected concerted activity. Examples of typical violations include 1) promising or implementing wage increases or other benefits to discourage concerted activity, including unionization; 2) reducing or eliminating compensation, or

engaging in economic threats to discourage concerted activity, including unionization; and 3) surveillance of employee union-related activity, or interrogating employees about their union views. The NLRA also generally prohibits disparate treatment of union advocates because of their union-related activities, even in a nonunion environment.

Alleged violations of the NLRA are investigated by the NLRB. Depending on the specific matters that are at issue, the NLRB's determination that an employer or (union) has committed an unfair labor practice can result in a "cease and desist" order, reinstatement and/or back pay, and other remedies. For example, in cases involving NLRB findings of egregious unfair labor practices during union organizing campaigns, remedies may include a bargaining order without a rerun election.

Additionally, there are complicated rules regarding nonsolicitation/nondistribution policies; the ability of employers to exclude nonemployee union organizers from their property; what employers may and may not do in connection with union activity or organizing efforts; and picketing, strikes, and other forms of economic pressure upon employers. The NLRA even affects such things as the degree to which an employer can restrict employees from sharing work-related information with one another, such as wage, salary, or benefits information. Therefore, questions in these myriad areas should be addressed to experienced labor counsel.

Wage and Hour Laws

Hours of work and minimum levels of employee compensation in the United States and some U.S. possessions are largely governed by federal statutes and regulations referred to as the wage and hour laws. Foremost among these is the Fair Labor Standards Act (FLSA), enacted in 1938 as a depression-relief measure. Through numerous amendments, the FLSA now covers nearly all nonagricultural employees and enterprises in America. The primary purposes of the FLSA remain to regulate hours of work, to eliminate substandard pay through minimum wage requirements, and to

encourage employers to hire more workers by substantially increasing the cost of overtime work. Additionally, this statute sets rules regarding the employment of minors in most businesses.

The wage-and-hour laws are complex and some violations may result in significant financial liability or even criminal penalties. (Examples of this complexity: certain small employers may not be covered by the FLSA, the FLSA's mandatory recordkeeping requirements, the difficulty of determining which employees qualify for the FLSA's exemptions from overtime (new regulations were recently issued on this subject), overtime computation itself is a subject of various tests and standards, and special restrictions on the employment of workers 14 to 17 years old.)

In addition, most states and some municipalities have wage-hour laws that are more stringent than the federal laws and must be considered when formulating policy. For example, the FLSA requires employers to pay nonexempt employees one and one-half times their regular rates of pay for all hours worked in excess of 40 hours in a workweek. However, a few states impose a daily overtime requirement for work in excess of eight hours per day. By contract, an employer may also agree to overtime or other pay practices that are more stringent than the federal laws. As a result, when dealing with anything other than routine wage-and-hour matters, management should seek the advice of a competent attorney who practices in this area.

Employee Benefit Laws

Compensation packages typically include employer-sponsored retirement and health and welfare benefits. The laws and regulations affecting employee benefits arrangements are complex and far-reaching. The principal body of law governing employee benefits is in the Employee Retirement Income Security Act of 1974 (ERISA) and its parallel provisions in the Internal Revenue Code (IRC). However, qualified retirement plans—such as defined benefit plans, money-purchase plans, target-benefit plans, cash-balance

plans, 401(k) plans, profit-sharing plans, and stock-bonus plans (including employee stock ownership plans)—are also affected by DOL regulations, Pension Benefit Guaranty Corporation (PBGC) rules, and USERRA. If company stock is held by a plan, Securities Exchange Commission (SEC) rules may also come into play.

Nonqualified retirement plans, such as supplemental executive retirement plans and other forms of deferred compensation plans, will also be affected by ERISA and IRC rules. Health and welfare plans offered by employers will also be governed by ERISA, provisions of the IRC, the Consolidated Omnibus Budget Reconciliation Act (COBRA), FMLA, and the ADA, as well as the Health Insurance Portability and Accountability Act (HIPAA). These laws impose an exceedingly complex set of requirements on employers. Employers should have all employee benefit plans reviewed by an experienced employee benefits attorney. Failure to comply with applicable laws can result in adverse tax consequences, personal liability for individuals who are deemed fiduciaries of benefit plans, and penalties imposed by the Internal Revenue Service (IRS) or the DOL.

Other Federal Laws

Various other federal laws apply to the employment relationship and these are discussed in the following sections, which address specific stages of employment and special considerations applicable to each.

STATE STATUTES AND LOCAL ORDINANCES REGULATING EMPLOYMENT

State legislatures have imposed a variety of regulations on employers. Generally, these laws apply to employees located within that state, although some courts have applied state employment laws to out-of-state employees when the employer is based within the state. Federal antidiscrimination laws do not preempt more restrictive state laws, although state law regarding labor relations and employee benefits may be preempted by federal law. Although these laws are similar to the federal laws already discussed, key differences include: 1) state laws generally apply to smaller employers that may be exempt from compliance with the comparable federal law; 2) state laws may create additional protected statuses (e.g., sexual orientation, marital status, residency); 3) state laws may provide for damages (such as unlimited punitive damages) that are not available under federal law; and 4) state laws may not require exhaustion of administrative procedures and may allow plaintiffs to proceed directly to court. It is imperative that employers discern what obligations their local jurisdictions impose.

In addition to antidiscrimination laws, various state statutes provide additional benefits for employees and limitations for employers. For example, California employment law is peculiar in many important respects. That state has adopted a host of laws covering various aspects of employment, ranging from expansive employee leave rights, to employee privacy protections, to unique wage and hour rules, to providing a cause of action for wrongful discharge. A discussion of these unique California laws is beyond our scope, but suffice it to say that employers with employees in California should regularly consult with experienced California labor and employment counsel to keep current on that state's unique requirements.

In addition to state laws, many local governments have imposed employment regulations. For example, the New York City Administrative Code prohibits employment discrimination, harassment, or retaliation within the five boroughs of New York City. There is at least one notable

difference between the New York Human Rights Law (NYHRL), which applies statewide, and the New York City code: pregnancy is considered a *per se* disability under the Administrative Code, while a routine pregnancy itself is not regarded as a disability under the NYHRL. In addition, the Administrative Code provides for recovery of a prevailing plaintiff's attorneys' fees, as well as uncapped punitive damages.

STATE COMMON LAW EMPLOYMENT CLAIMS

In addition to claims under federal and state statutes, employees may be able to assert claims under state common law. Generally, an employment relationship for no specific duration may be terminated any time, for any reason or for no reason at all, at the will of either the employer or the employee. This is referred to as the employment-at-will doctrine. Under this doctrine, the reason for terminating an employee does not matter, even if the reason was unfair. Over the past several decades, however, an employer's ability to discipline or discharge its at-will employees has become more and more restricted in many states.

There are a number of recognized exceptions to the general employment-at-will rule. For example, employees working under a union contract generally can be discharged only for "just cause." As noted above, various antidiscrimination statutes protect employees from being discharged based on a protected classification. Many laws also prohibit retaliation against employees for exercising rights protected by statute, such as filing workers' compensation claims or discrimination charges. Additionally, written employment contracts sometimes limit the circumstances under which an employee may be terminated.

Wrongful Discharge or Discharge in Violation of Public Policy

A number of courts recognize a wrongful discharge claim for termination in violation of a well-established public policy. Classic examples of public policy retaliatory discharge lawsuits involve employees who claim they were terminated for "whistle-blowing" (that is, reporting unlawful activities to law enforcement officials, or sometimes even complaining to the media or another company employee); filing workers' compensation claims; refusing to perform illegal, unethical, or unsafe activities on behalf of an employer; fulfilling a legal duty, such as serving on a jury or attending court when subpoenaed as a witness; and cooperating in a governmental investigation involving the employer. A major concern with public policy discharge cases

is that they often are treated like personal injury cases, which means that employees who win these lawsuits may be able to collect compensation for mental anguish and punitive damages that can greatly exceed their actual economic damage.

Breach of Contract

The most common wrongful termination claim alleges that an employer breached a contract, whether formal or informal, not to terminate employment except for “good cause.” If an employer expressly or implicitly agrees, orally or in writing, to hire an employee for a specific period, to discharge only for just cause, or to abide by progressive disciplinary procedures, a court may find that agreement to be an enforceable employment contract.

Express contracts—Lawsuits challenging breach-of-express contracts are not limited to high-level executives with formal, written employment agreements or to employees who are covered by union contracts. Courts have permitted individual employees to sue for breach of contract based on informal promises, made orally by managers or others in positions of authority, or the provisions of employee handbooks.

Implied contracts—In cases where no specific promises were made, courts nonetheless sometimes find an implied contract that an employee would not be discharged except for good cause. The wide variety of facts and evidence courts have found relevant in determining if an implied contract exists includes: language in employee handbooks giving employees an initial probationary period; language in disciplinary policies that states employees will be discharged only for particular offenses; language in progressive disciplinary policies that states employees will receive chances to improve their performance; language in handbooks or records that states fairness or special consideration will be given to employees because of seniority; an employee’s work history that reflects regular merit raises, good performance evaluations, praise, and promotions; the employer’s practice of discharging

employees only for good cause; and an industrywide practice that employees are treated fairly or terminated only for good cause. Many of these factors are present at most companies. Therefore, unless employers take affirmative steps to declare their employer-at-will status, employment may not truly be at will.

Covenant of good faith and fair dealing—Courts in several states have held that all employment relationships are contractual in nature and contain an implied promise of good faith and fair dealing. This doctrine holds parties to a contract liable for acting in bad faith to deprive the other party of the benefits of the agreement. Good-faith and fair-dealing cases often involve abusive and highly offensive discharges, such as terminating an employee to avoid paying a sales commission, retaliation for refusing to become romantically involved with a supervisor, or retaliation for publicizing wrongdoing by the employer.

Damages for breach of contract typically attempt to put the employee in the same position, and no better, than he or she would have been if the contract had not been breached.

Tort Claims

Promissory Estoppel

Promissory estoppel claims enforce promises in the absence of a contract. To recover, an employee must prove that the employer made an unambiguous promise, that the employer reasonably expected the employee to rely on the promise, and that he or she in fact reasonably and detrimentally relied on the promise. The employee must also prove that the reliance was detrimental and that injustice can only be avoided by enforcing the promise. Accepting or continuing employment alone usually is not sufficient reliance to support a claim. Promissory estoppel can, however, arise when an employer offers an applicant a position, the applicant incurs significant expense (such as moving expenses) in reliance of the offer, and the employer then withdraws the offer.

Tortious Interference with Contract

This type of claim alleges that an individual, without privilege to do so, caused a third party not to enter into or continue a business relationship. It typically involves allegations that supervisors or managers interfered with the contractual relationship between employees and their employers. For example, if a supervisor knowingly communicates false information about an employee to higher management that results in the employee's termination, this could, in some jurisdictions, give rise to a tortious interference claim. These claims are often brought against individual co-workers or supervisors.

Invasion of Privacy

Many common-law torts potentially protect employee privacy and may give rise to claims. The three most prevalent theories are intrusion upon seclusion, public disclosure of private facts, and false light.

Intrusion upon seclusion protects employees from intentional intrusions into their private affairs. To establish liability, the employee generally must prove 1) intentional intrusion by the employer on the seclusion or solitude of the employee or the employee's private affairs or concerns and 2) that the intrusion was in a manner that would be highly offensive to a reasonable person. For example, a former employee might bring a discrimination and invasion-of-privacy action against her former employer based on invasive questioning by the employer of whether the employee was married and ever planned to have children. Such claims can also arise when an employer searches an employee's person or property.

Public disclosure of private facts protects employees from public disclosures regarding their private lives. To create liability, the publicity must be highly offensive to a reasonable person, and the subject matter must not be of a legitimate concern to the public. The facts made public do not have to be false to establish this tort. Unauthorized disclosure of medical records is an example of a disclosure that may be the basis for such a claim.

The risk of invasion-of-privacy liability can be reduced by removing any expectation of privacy. For example, an employer can establish, distribute, and post policies that publicize the fact that personal items, lockers, purses, and automobiles are subject to search. Employers should consider having a login screen for their computer network that reminds the user that email is not private and may be read by anyone. Protecting the confidentiality of employee evaluations, medical records, and disciplinary records will also reduce exposure to such claims.

Assault and Battery

Assault and battery claims frequently accompany claims of sexual harassment, or they are brought in connection with drug testing or with employees being forcibly detained or removed from an employer's premises. Assault is an unlawful attempt to inflict physical injury. The attacker must have intended to threaten or injure the victim, and there must have existed a substantial certainty that the attacker's conduct would threaten or harm the victim. Battery is a completed assault after physical contact is made. Battery also includes any intentional, unauthorized physical contact. Individual employees and corporations are typically sued together as co-defendants for assault and battery.

False Imprisonment

False imprisonment claims typically arise from the detention of employees suspected of theft or other unlawful behavior. To prevail, an employee must show that he or she was unlawfully detained and was restrained by force from leaving.

Negligence Claims

Negligent hiring—The tort of negligent hiring is an expansion of the so-called “fellow servant rule,” under which an employer is required to select employees who will not endanger fellow employees. The modern view stresses the duty to hire and retain competent employees for the benefit of

third parties as well as coworkers. The tort is now recognized in almost every state. Generally, an employer may be liable for negligent hiring if 1) the employer knew or should have known that the employee in question was unfit for the position so as to create a danger of harm to third persons, 2) the unfitness was known or should have been known at the time of hiring, and 3) the particular unfitness proximately caused the claimed injury.

To minimize the risk of negligent hiring claims, an employer should assess the nature of various jobs and their relationships to the public and other employees. Depending on the risks involved in the position, the employer should determine what information is necessary to assess whether an applicant is appropriate for the position. For example, information that includes reference or criminal background checks is appropriate to gather for positions (e.g., security guards) involving security access or the use of potentially dangerous weapons.

Negligent evaluation—This claim takes two forms. One is where an employee who is not evaluated claims that the employer was negligent in not performing a job evaluation, despite a duty to do so. The second is where an evaluation is performed, but the employee alleges that it was done negligently or improperly, and that if the employer had not been negligent, it would have realized that the basis for discipline or discharge was improper. Negligent evaluation claims are not recognized in most states. Nonetheless, poorly completed or forgotten evaluations can give rise to, or be problematic for, defamation, discrimination, or breach-of-contract claims.

Negligent training, retention, and supervision—Negligent training and supervision claims assert that, had the employer exercised due care in training and supervising an employee, an injury to an employee or third party could have been prevented. Negligent retention claims assert that an employer knew or should have known of problems with an employee that indicated unfitness yet the employer failed to take corrective action. Negligent retention claims frequently involve allegations of sexual harassment, especially when there have been previous complaints against the alleged harasser.

Intentional Infliction of Emotional Distress

This type of claim typically arises if the discharge of an employee was carried out in an extremely abusive, degrading, or humiliating manner. Many states do not recognize these claims in the employment context or may provide relief solely through their workers' compensation statutes. In those states where these claims are recognized, the employer's actions generally must exceed all bounds of decency. Intentional infliction of emotional distress claims frequently accompany claims of overt sexual or racial harassment that results in severe emotional distress to the employee. Emotional distress liability can be reduced by avoiding anger in administering discipline; requiring review of a contemplated disciplinary decision by another supervisor or manager who has no personal bias against the employee; using common sense; and documenting, signing, and dating reports of every critical workplace incident.

Defamation

Defamation claims often arise in connection with claims of wrongful termination or in the context of reference checks for former employees. The claims allege that supervisors or coworkers made unprivileged, injurious, and false statements against an employee. A potential defamation claim could exist, for example, if an employer falsely accused an employee of gross misconduct, theft, embezzlement, or falsification of records; using or abusing drugs; professional incompetence; or having a communicable disease.

Defamatory statements may be oral (slander) or written (libel) and may be communicated to individuals inside or outside the company. Any false, derogatory statement can be the basis of a defamation action. In some states, even a statement made only to the terminated employee may be considered defamation. This could occur if a false reason for termination is placed in the employee's personnel file and if the employee is compelled to repeat the reason for his or her discharge to prospective employers in searching for a job. This is known as self-compelled publication.

Most states recognize a company's right to make negative statements about employees to certain persons within the company who have a need to know, and to prospective employers that specifically request information about the employee. A company may lose this right, however, if the affected employee can prove statements were made with a reckless disregard for the truth.

Defamation liability can be minimized by investigating and documenting incidents of employee misconduct thoroughly before imposing discipline, thereby avoiding claims that the employer acted in "reckless disregard of the truth." Employers should also limit disclosure of the reasons for discipline to those with a legitimate need to know. Medical data should always be kept strictly confidential. In most cases, responses to reference checks should be limited to confirming dates of employment and positions held and should be handled by one designated person within the company. There is one exception to this general rule of nondisclosure: If a company knows that a former employee has exhibited violent or dangerous behavior, it may have a duty to disclose this information on request to avoid being sued by employees or customers of the inquiring company.

Fraud and Misrepresentation

To establish a claim for fraud, an employee must prove that the employer made an actual or implied misrepresentation of material fact. General promises of future benefits or statements of pure opinion are not actionable. Common employment-related fraud claims include employer representations that the employee will be employed for a specific period or that he or she will receive certain benefits. Statements about the future can be a basis for a fraud claim only if the employee proves that, when the statements were made, the employer did not intend to take the promised action. A later breach of promise does not establish the requisite intent. The employer must also intend for the employee to rely on the disputed representation. Moreover, the employee must be ignorant of the truth and justifiably rely, to his injury, on the misrepresentation.

RECRUITING AND HIRING EMPLOYEES

Before You Begin the Hiring Process

Finding and retaining high-quality, skilled workers is of tremendous importance to employers because of the high costs associated with employee turnover and the increasing legal liability for negligent hiring practices and wrongful termination. These factors mandate that employers effectively identify qualified, honest, dependable, skilled, and motivated applicants who are likely to be highly productive.

Federal and state employment discrimination laws impose responsibilities and liabilities on employers in the recruiting and hiring process. As a result, employers should consider preparing thorough and thoughtful written job descriptions that establish the essential job functions. This way, employers and courts can determine, for example, whether a disabled individual is “otherwise qualified” under the ADA, and the scope of the employer’s duty to reasonably accommodate.

All aspects of interviewing and recruiting are regulated by employment laws. Many statutes aim to prevent job-offer decisions based on illegal criteria. These laws also prevent management personnel conducting interviews from applying arbitrary or irrelevant hiring criteria that intentionally or unintentionally screen out members of any protected group. Importantly, the law presumes that all questions asked on an application or during a personal interview will be used in the hiring decision. Questions that are not job-related may create evidence of discrimination. Accordingly, employers should design the application and interview process so that applicants are asked only legitimately job-related questions. Employers must avoid even the appearance of unlawful discrimination by avoiding inquiries that may identify an applicant’s age, sex, disability, membership in a minority group, or other protected status under applicable laws. The best way to avoid liability is to consider the purpose of each inquiry and then narrowly tailor the inquiry to meet that purpose.

Establish or update job descriptions. Job descriptions give applicants a clear understanding of the nature of the position and its requirements. They establish requirements for the job that can be used to objectively screen applicants and avoid charges of discrimination. Job descriptions should emphasize objective requirements such as job-related education/licensure, job-related work experience, and demonstrated ability to perform particular aspects of the job.

Job descriptions are also evidence of “essential job functions,” which are used in analyzing whether a disabled individual is “otherwise qualified” for the position under the ADA. “Essential job functions” are tasks that are fundamental, basic, or integral to the job, as opposed to aspects of the job that are incidental, minimal, or marginal. An individual is generally “otherwise qualified” for a position under the ADA only if the individual can perform the “essential job functions” with or without a reasonable accommodation. If an individual is not “otherwise qualified” for the position, then the employer does not have any duty to accommodate the individual.

Caution: Absolute requirements (such as test scores and diploma requirements) are suspect if they screen out minorities and women on a disproportionate basis or if they screen out otherwise qualified individuals with disabilities.

Develop a policy regarding acceptance and retention of applications. Such a policy can minimize an employer’s exposure to failure-to-hire claims. A good policy, communicated to management personnel, can also eliminate wasted managerial time. At minimum, the policy should require applications to be retained for one year from the date of receipt or date of the employment decision, whichever is later, to comply with record-keeping requirements imposed by the EEOC.

Require all applicants to complete an application form. This allows managers to collect necessary, comparable information on all candidates and

allows human resources to accurately track applicant flow. By reviewing an organization's applicant flow, management can verify its fulfillment of equal employment opportunity (EEO) obligations and conduct internal analysis of recruiting strategies. Lastly, written applications give employers written representations of an applicant's experience and qualifications. An applicant's false information, later discovered, may be a basis for dismissal and may limit damages in the event of litigation.

Employment Applications

Legal items—Every application should state that the employer is an EEO employer and will not discriminate in any phase of employment. The application should also state that the application is not an offer of employment and that any employment with the company is on an at-will basis (meaning the employee or employer can terminate the employment relationship at any time for any lawful reason). The applicant should be required to acknowledge these statements. The latter is known as an at-will employment acknowledgement, and it helps prevent later claims by employees for breach of an employment contract. To prevent the inadvertent creation of a contract by statements made during the hiring process, the application form also should notify applicants that managerial personnel do not have the right or authority to enter into an employment agreement for anything other than an at-will type arrangement. This will help to create a defense mechanism against claims of breach of oral employment contracts.

Applications should also contain a section allowing the employer to contact former employers and references and providing for the applicant to provide written consent and release of liability. This section should state that the applicant releases the employer and its managerial personnel from any liability resulting from obtaining, using, or disclosing the background information at a later date. Lastly, the application should include a "truth clause"—a certification by the applicant that all information and answers provided are true, along with an acknowledgment by the applicant that denial of employment or, if hired, termination of employment may occur if

false information was given. The truth clause is used to combat the all-too-common problem of resumé and application fraud and is an effective weapon for management in employment discrimination cases.

General information—Applications should also elicit information necessary for the employer to determine the applicant’s qualifications, including name, address, telephone number; whether the applicant is authorized to work in the United States; the position(s) applied for (or desired) and availability to work; job-related ability and skills; educational background; employment history; licenses (if applicable); and prior discipline or discharges for making threats, fighting, or participating in any incidents involving violence.

Areas for caution—The ADA prohibits certain questions on job applications. Any inquiries on job applications regarding an applicant’s health, disabilities, and past history of workers’ compensation claims are absolutely prohibited under the ADA.

It is risky to ask applicants if they have been arrested or convicted. Use of arrest records to disqualify applicants, without proof of a business necessity, may constitute unlawful discrimination because members of some protected groups are arrested proportionately more often than members of nonprotected groups. The EEOC has issued a policy statement against requesting information on arrests because asking about arrests may discourage minority applicants. Certain states, including Arkansas, California, Colorado, Hawaii, Illinois, Massachusetts, Michigan, Rhode Island, Virginia, West Virginia, and Wisconsin, explicitly prohibit and/or severely restrict employers from asking applicants about their arrest records. Other states, such as Connecticut, Georgia, Iowa, Missouri, Texas, and Washington, limit an employer’s ability to obtain arrest records by requiring the employer to secure the applicant’s consent and then limiting access to such records to human resources personnel. An applicant’s conviction(s) may determine the applicant’s fitness for a position. Employers, however, should not use convictions as an absolute bar to employment. Some states, however, including Hawaii, New York, Ohio, Pennsylvania, and Wisconsin, prohibit

employers from taking adverse employment action (such as refusing to hire) against an individual based on a conviction unless the conviction is for a felony or is job-related.

Questions about military discharges can also be risky. Insisting on honorable discharges may violate antidiscrimination laws. Because members of some protected groups have had a higher proportion of general and undesirable military discharges than nonprotected members of similar aptitude and education, requiring applicants who are former members of the armed services to have been honorably discharged may have a disparate effect on some protected groups and thus violate Title VII. Rather than an absolute requirement of an honorable discharge, employers should consider all the pertinent circumstances surrounding a military discharge and explain this policy to applicants.

Height and weight requirements that disproportionately screen out women (or members of other protected groups) are also illegal, unless the employer can demonstrate that these standards are essential to the safe performance of the job in question.

Although Title VII does not specifically prohibit pre-employment inquiries regarding marital status, pregnancy, future childbearing plans, and the number and age of children, such questions may constitute evidence of sex discrimination. This is particularly true when such questions are asked only to women. Some jurisdictions, such as California, the District of Columbia, Illinois, Kentucky, Maryland, Michigan, Nebraska, New Jersey, New York, and Pennsylvania, specifically prohibit discrimination on the basis of marital status. An inquiry about an applicant's maiden name may also be used as evidence of discrimination on the basis of marital status.

Management should accept job applications only from individuals who complete the company's designated job application form. The written safeguards and protections in the application form are useless if management personnel fail to consistently and uniformly require all applicants to fill it out before being considered for possible hiring.

Job Interviews

An interview provides the employer with an opportunity to observe and evaluate the applicant face-to-face and to review information relating to both the job itself as well as to the individual's application and/or resumé. Because federal and state statutes directly and indirectly limit the types of questions that can be asked of applicants during job interviews, personnel who are involved in the interviewing process must be trained so that they know the various legal pitfalls that could result from an inappropriate interview. These legal prohibitions are primarily designed to protect applicants from discrimination. To minimize legal exposure during the interviewing process, interviewers should develop specific questions for the applicant prior to interviews. These questions should be carefully designed to elicit information regarding the skills, experiences, and other qualifications required for the position (and presumably listed in the job description). The interviewer should review the essential functions and basic requirements of the job with the applicant and then discuss the applicant's experience, qualifications, and interests. There are many ways to ask appropriate questions and elicit a candidate's qualifications and ability to perform job-related functions.

Examples of acceptable interview questions include:

- Why did you leave your last job?
- Why do you want to work for this organization?
- Have you ever been asked to leave a position?
- What irritates you about coworkers? Supervisors?
- Why do you think you would do well at this job?
- Are you willing to work overtime? Nights? Weekends?

- Tell me about a time when you helped resolve a dispute between others.
- What has been your biggest professional disappointment?

If possible, more than one interviewer should speak with the applicant, either in multiple interviews or in a single interview. This will not only promote objectivity in the selection process, but also elicit more complete information about the applicant, as one interviewer may pick up an area that another misses, and vice versa.

Issues under Title VII and the ADEA—All interviewers should ask only job-related questions and avoid too much personal small talk that can cause digression into potentially risky areas. The following table identifies some examples of proper and improper questions about the same subject matter under both Title VII and the ADEA:

Proper Question	Improper Question
If employed, can you submit verification of your right to work in the United States?	Were you born in the United States?
Our business often involves tight deadlines and last-minute emergencies, requiring unexpected overtime work. Will you be able to work evenings and weekends if your assistance is needed on an emergency project?	Will you have any problem working evenings and weekends on account of any family or child-rearing responsibilities?
How did you become interested in retail sales?	What do your parents do for a living?
What type of training did you receive in the Marine Corps?	Did you receive an honorable discharge from military service?
How long have you resided in this area?	Do you own or lease your residence?

Pre-employment obligations and inquiries addressed by the ADA—Under the ADA, an applicant may be entitled to a reasonable accommodation during the hiring process. If the employer has reason to believe that an applicant requires such an accommodation, or if the applicant asks for a reasonable accommodation for the hiring process, the employer may have to accommodate the individual. For instance, if an applicant is blind, the employer may have to alter the format of a written pre-employment test. However, if the employer is testing eyesight because it is necessary for the essential functions of a job, the employer need not alter the format of its test. Additionally, employers should make sure interview sites are easily accessible and contain no barriers that would hinder a person with a disability. This includes restrooms, parking areas, routes of ingress and egress, interior routes in the employer's premises, and interviewing rooms. Employers must provide wheelchair-accessible interview sites.

Under the ADA, employers may ask for certain information, such as whether an applicant can perform a specific job function, with or without a reasonable accommodation; whether an applicant can meet an employer's attendance/work-hour requirements; or whether the applicant had an attendance/tardiness problem at a prior employer. If an employer reasonably believes that an applicant will need an accommodation to perform the essential functions of the job, the employer may then ask whether the applicant needs a reasonable accommodation to perform the essential functions of the job and what type of reasonable accommodation would be needed. The employer's reasonable belief may be triggered by observation of a visible disability or, in the case of a nonvisible disability (such as a psychiatric impairment), by an applicant volunteering information about a disability or the need for an accommodation.

The ADA, however, prohibits any type of oral interview question or written inquiry that might prompt an applicant to disclose the existence, nature, or severity of a disability. The ADA applies to interviews of all applicants, and not just to applicants with disabilities. Some courts have even held that an applicant who does not have a disability may still challenge an employer's

unlawful disability-related inquires, such as questions about an applicant's health, disabilities, and past history of workers' compensation claims. The EEOC, which enforces the ADA, regards the following questions as likely to elicit information about a disability, and therefore illegal to ask in a job interview:

- Do you have a disability?
- Have you ever been injured on the job?
- How many days were you sick last year?
- Have you ever been treated for mental health problems?
- Have you ever been treated for epilepsy, AIDS, HIV-infection, cancer, or heart disease?
- What medications are you currently taking?
- What is your history of filing workers' compensation claims against previous employers?
- Do you have any health-related problems that may impair your ability to perform the job?
- Do you need a reasonable accommodation?

Although some subjects are obviously taboo under the ADA, a manager can ask about particular subject matters in an appropriate manner. These are examples of proper and improper questions about the same subject matter under the ADA:

Proper Question	Improper Question
The position you have applied for requires driving a vehicle in the evening. Can you drive at night?	Do you suffer from night blindness or some other visual impairment that prevents you from driving at night?
The position you have applied for requires frequent lifting of 25-pound barrels on a loading dock. Can you carry 25 pounds for 10 yards on approximately an hourly basis every workday?	Do you have a physical problem that would prevent you from carrying 25 pounds for 10 yards on approximately an hourly basis every workday?
The position you have applied for requires considerable travel. Can you travel on a regular basis?	Do you have a physical or mental impairment that might prevent you from traveling on a regular basis?
This is a demanding job you have applied for at the company. How well can you handle stress?	Have you ever sought treatment for an inability to handle stress?

A final consideration for hiring is language proficiency. Managers are often surprised to learn that English language proficiency can be an unlawful hiring criterion. A ban on hiring applicants who cannot speak or write fluent English may constitute national origin discrimination unless the rule is justified by business necessity. Management personnel must be aware of the job requirements of any position for which an applicant is applying. If the job requires English language proficiency, then and only then should this be a hiring criterion.

Interviewer notes—Any documentation or notes compiled during an interview should be separate from the application/resume and should focus on job-related information learned during the interview. Interviewers should never note an applicant’s race, age, national origin, etc., or use a code/symbol for any of these categories. Racial identification and tracking of job applicants for affirmative action and EEO reporting and record-keeping purposes should be done by visual identification or voluntary self-identification on a separate form. Hiring decision makers should be screened from this information. Notations concerning an applicant’s race or color should never be made on a resumé or application form.

Investigating Candidates for Employment: Background Checks and References

Employers have an obvious need to investigate the qualifications, job abilities, and trustworthiness of potential employees. Competing with the employer's need for information, however, is the applicant's right to privacy. An employer's failure to adequately investigate a prospective employee may lead to liability for negligent hiring. However, an overreaching background investigation may lead to employer liability for invasion of privacy or other federal or state violations. Privacy issues are implicated in response to the following types of employer investigations: reference checks, credit checks, and background checks.

Reference checks—Employers typically verify references to determine whether an applicant engaged in misconduct or dishonest behavior at previous jobs and to determine whether the applicant exhibits positive traits such as dependability and responsibility. The failure to check references can also be a significant factor in a negligent hiring case. Nevertheless, employers should exercise caution in reference checking. The risks for verifying references include discrimination claims, invasion-of-privacy and defamation claims, and interference with contract claims.

To avoid liability, the employer should obtain the applicant's written consent before checking references. The written consent should authorize the prospective employer to check the applicant's references and should require the applicant to affirm that he or she releases the prospective employer from any liability in connection with the reference check. An employer should also consider having the applicant release the persons providing the references (the referrers) from liability. The employer may then inform the referrers of this release when it checks references, which may encourage them to be more candid.

Employers should also use caution when they give references. Providing information other than name, position, and dates of employment may

subject an employer to lawsuits for defamation, invasion of privacy, etc. Many state laws, however, now provide limited protection to employers supplying references by providing employers with a rebuttable good-faith presumption. In such states, in order to prevail on a claim against an employer, an employee must prove that the employer abused its privilege by supplying the reference with malice, i.e., with spite or ill will or, depending on the state, with knowledge of its falsity or reckless disregard for the truth of the statement.

Credit and background checks—Both credit checks and general investigative background checks are governed primarily by the Fair Credit Reporting Act (FCRA), a federal statute. In addition, employers should be especially wary about privacy issues when conducting investigative checks, particularly when seeking information about the applicant’s or employee’s personal life, general reputation, etc. Although FCRA requirements have been met, an employer may still be exposed to liability for nonstatutory claims, such as invasion of privacy, defamation, or intentional infliction of emotional distress if it seeks non-job-related information through a background check. As a result, an employer should only seek such information when needed for security or other business reasons. Background checks must also be conducted equally for all applicants and employees. Conducting more rigorous background checks for certain employees may expose an employer to discrimination claims.

The Consumer Credit Reporting Act of 1996 amended the FCRA to significantly expand employer obligations with respect to disclosing and obtaining applicant consent to investigations. The FCRA governs two types of reports:

- Consumer reports: Any written, oral, or other form of information provided by a “consumer reporting agency” (CRA), which addresses creditworthiness, credit standing, or credit capacity, character, general reputation, personal characteristics, or mode of living, and

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- Investigative consumer reports: Consumer reports or portions thereof in which information on an individual's character, general reputation, or mode of living is obtained through personal interviews with neighbors, friends, associates, or others with whom the individual is acquainted or who may have knowledge regarding the information sought.

An employer that wishes to order either type of report on an applicant or employee must give the individual a written statement disclosing that a report may be obtained and obtain the individual's written authorization and release. Investigative consumer reports require an additional disclosure describing the information that may be obtained. The statute imposes other specific requirements for a valid disclosure.

Before taking any adverse employment action based on a consumer report (i.e., refusing to hire a person or denying a promotion to a current employee), the employer must give the individual a copy of the consumer report and a written description of the applicant's or employee's rights under the FCRA.

In addition, after taking an adverse employment action based on a consumer report, the employer must provide the applicant or employee with notice of the adverse action; the name, address, and telephone number of the CRA (including a toll-free number for nationwide CRAs); a statement that the CRA did not make the adverse action decision and is unable to provide the applicant or employee with specific reasons as to why the adverse action was taken; and notice of the applicant's or employee's right to obtain a free copy of the consumer report from the CRA within 60 days and dispute the accuracy of any information in the report.

State or federal actions and private lawsuits are available to enforce compliance with the FCRA. Further, any person who knowingly and willfully obtains a consumer report under false pretenses may face criminal prosecution.

Congress recently amended the FCRA to largely exclude third-party investigators from the statutory reporting obligations. Effective January 1, 2004, the FCRA was amended to exclude from its requirements communications from outside consultants, including attorneys, made to employers in connection with an investigation of 1) suspected misconduct relating to employment or 2) compliance with federal, state, or local laws and regulations; the rules of a self-regulatory organization; or any preexisting written policies of the employer. An investigation involving information relating to an individual's credit worthiness, credit standing, or credit capacity is, however, still subject to the FCRA's notice and consent provisions.

In exchange for not having to give prior notice of, and get consent for, workplace misconduct investigations, the FCRA as amended does impose certain requirements. First, any workplace investigation report can be disclosed only to the employer; federal, state, or local agencies; officers of departments; any organization with regulatory authority over the employer; or as otherwise required by law. Of course, most employers would so limit any disclosure of such a report due to fear of liability for libel and slander. Additionally, if an employer takes adverse action based in whole or part on the report, the employer must disclose to the target employee of the investigation a summary of the communications on which the adverse action is based. The summary must include the nature and substance of the communications, but need not include sources of information, such as the identity of individuals who have been interviewed.

In addition to federal law, some states restrict background checks. California and New York, for example, prohibit employers from obtaining information about an applicant's arrests if the arrest did not result in a conviction. Other states prohibit credit-reporting agencies from reporting arrests or convictions that are more than seven years old. Thus, an employer must be careful in such states to specify that it does not want information on such arrests included in any investigative reports.

Hiring an Applicant

The actual hiring decision should be made by, or subject to, the approval of more than one specified person. Higher levels of management and/or human resource managers should scrutinize hiring recommendations and require explanations and justifications for the decision. Any discrepancies between the recommendation and qualifications required for the position should be questioned, as well as vague or inconsistent justifications. The recommending supervisor should also be required to justify the preferred candidate's selection over other finalists or candidates who were interviewed. If the manager's decision cannot withstand the employer's internal scrutiny, the decision most likely will not be able to withstand challenge by a plaintiff's attorney or a court.

Offer letters—An employer should provide a written offer of employment that specifies the terms of employment agreed to by the employer and the prospective employee. The offer letter should outline the particular position and start date and should also set forth a salary and describe any benefits (at least in general terms). When writing an offer letter, take care to ensure that no promises of continued employment are made that might inhibit the employer's ability to dismiss the individual. For example, the offer letter should never offer "permanent" employment or indicate that the individual will "always have a job with ABC Company." Offer letters should be reviewed by an experienced human resources professional or an attorney.

Employment agreements—In addition to a clear offer letter, an employer may wish to use written employment agreements. Common employment agreement provisions range from general restrictions to clauses providing for mandatory arbitration of employment-related disputes. Many employers also use employment agreements for professionals or executives to define the terms and conditions of employment, including job duties, termination rights, length of employment, compensation, and benefits. Depending on how they are written, these agreements may or may not modify the presumption of an employment at-will relationship.

Any employment agreement must be carefully drafted to ensure it is enforceable and does not create contractual rights and obligations that the employer is not willing to meet. A poorly drafted employment agreement may create more problems for the employer than having no agreement at all. Accordingly, any written employment agreement should be reviewed by an experienced attorney.

Immigration Considerations

Form I-9—New employees and the employer must complete a Form I-9, which is sworn under penalty of perjury. The employee must attest that he or she is authorized to work in the United States and the employer must attest that it has reviewed the documentation supplied by the employee and that it appears genuine. An employer does not guarantee that the documents provided by the employee are genuine but merely attests that it has examined the employee's documents and they appear to be in order. Form I-9 must be completely filled out; merely attaching photocopies of the documents is not acceptable. Do not employ someone who refuses to sign the form.

Immigration Reform and Control Act of 1986 (IRCA)—IRCA has placed private employers in the role of policing the federal government's immigration policies. IRCA prohibits any employment of illegal or unauthorized aliens and, accordingly, requires all employers to verify the identity and employment authorization of every new employee. The statutory provisions and regulations governing the "employment verification" process are quite complex, and the Act imposes extensive record-keeping requirements on employers.

In addition to prohibiting employment of unauthorized aliens, IRCA prohibits all employers with four or more employees from discriminating against an individual based on his or her citizenship or national origin in hiring, discharge, recruitment, or referral for a fee. An employer should only ask what is necessary to determine whether an individual is authorized to

work in the United States and should avoid questions concerning an applicant's national origin, birthplace, or citizenship.

IRCA is administered by the Immigration and Naturalization Service, but the Act's nondiscrimination provisions are enforced by a "Special Counsel" within the Justice Department. The nondiscrimination provisions remain largely untested. A charge must be filed within 180 days, and plaintiffs can recover back wages and benefits, reinstatement, civil penalties, attorneys' fees, and equitable relief.

EMPLOYEE AND APPLICANT TESTING

A well-defined and thoughtful recruitment and hiring program goes a long way toward identifying the best candidates for an employer's workforce. Some employers, seeking added assurance that their employees will be honest, responsible, and able to do the work, seek to test applicants and employees. While some tests provide useful data, employee and applicant testing is a highly regulated and often problematic area. A sampling of applicable regulations follows.

Medical Testing (ADA Limitations)

Under the ADA, a medical examination may be given only after an offer of employment has been made. The offer may be conditioned upon successfully passing the exam. The EEOC's Enforcement Guidance on Preemployment Inquiries defines "medical examination" to be "a procedure or test that seeks information about an individual's physical or mental impairments or health." Neither physical agility tests, physical fitness tests, nor tests for the illegal use of drugs are considered medical examinations and may be given at the pre-offer stage.

If a test screens out an applicant on the basis of a disability, however, the test may violate the ADA unless it is job-related and consistent with business necessity. In the ADA context, this standard requires that tests or medical inquiries be directly related to the performance of essential job functions. Furthermore, if an employer measures an applicant's physiological or biological response during a physical fitness test, the test will be considered a medical examination under the ADA and will be prohibited at the pre-offer stage. For example, if required by business necessity, a messenger service may test its applicants to ensure that they can travel a mile in under 15 minutes, but cannot measure the applicants' heart rates at the completion of the test without the test being an ADA-regulated medical examination.

An employer may test for illegal drug use at the pre-offer stage but may not give applicants an alcohol test or other test for legal drug use at the pre-offer

stage. However, the EEOC has indicated some flexibility in allowing drug and alcohol screening (combined) at the pre-offer stage.

At the post-offer, pre-hire stage, an employer may give applicants a wide-ranging medical examination. If such exams are given, they must be given to all offerees in the same job category. Importantly, if an offer of employment is withdrawn because of the results of a post-offer medical examination, the reason the individual is rejected must not be one that screens out individuals with disabilities, unless the reason is job-related and consistent with business necessity. The employer must also demonstrate that there is no reasonable accommodation that would permit the individual to perform the essential functions of the job.

The ADA regulates medical testing of current employees under a different standard. Once an employee has begun working, an employer cannot require a medical examination “unless such examination . . . is shown to be job-related and consistent with business necessity.” Courts generally hold that return-to-work and post-accident exams satisfy this standard, provided they are narrowly tailored to assess the employee’s ability to perform essential job functions.

Information obtained as part of a medical examination must be kept in a secure separate file and treated as a confidential medical record for purposes of the ADA. An employee’s medical records may not be kept in that employee’s general personnel file.

Most states have disability discrimination laws that largely parallel the ADA with regard to medical inquiries and testing. The remedies available under some state’s laws are less favorable for the individual than under the ADA. Conversely, in a few states, such as Massachusetts, the state law affords disabled complainants unlimited punitive damages. Thus, companies assessing risk in connection with medical exams or inquiries must be aware of the legal particulars of the state(s) in which they have employees.

Drug and Alcohol Testing

Because drug testing is full of potential legal pitfalls, it is highly recommended that all employers consult with counsel before implementing any drug-testing program. Among the potential restrictions on drug and alcohol testing are the following:

- ***U.S. constitutional protections***—The Fourth Amendment protections against unreasonable searches and seizures protect *government* employees against drug testing. The Fourth Amendment does *not* apply to private sector employees.
- ***State constitutional issues***—In addition to mirroring federal constitutional protections, the California constitution has been interpreted by California courts to apply to both government and private-sector employees.
- ***Collective bargaining issues***—An employer is required to bargain over the implementation of drug testing for existing employees. However, a unionized employer need not bargain over drug testing for applicants.
- ***State statutes***—State statutes may limit circumstances or impose requirements on pre-employment drug testing. Employers should have their counsel review any proposed policy for compliance with these laws.
- ***ADA***—Under the ADA, employers may test pre-employment for the *illegal* use of drugs. Individuals who are currently engaged in the illegal use of drugs are *not* protected under the ADA. Alcohol, however, is not an illegal drug, and testing for alcohol is considered a medical examination for purposes of the ADA. Similarly, drug tests that detect the *lawful* use of drugs are medical examinations regulated under the ADA. In addition, individuals who have used illegal drugs in the past, but are not currently using them, may be protected.

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- ***Other considerations***—All results of drug tests must be kept strictly confidential to minimize potential liability for defamation and invasion of privacy. Employers should obtain a release from all employees and applicants being tested to protect against any liability that could result from the testing or reporting of the test results. Employers should have their drug policies written and reviewed by counsel in advance of any testing. These policies should define under what circumstances (*i.e.*, what level of intoxication) an employee or applicant will be disciplined or rejected. A reputable laboratory should be chosen to conduct the testing. Some states require certain testing procedures and specific tests for false positives. Employers should select laboratories that can perform the required tests.

Psychological and Personality Tests

Disability discrimination—Psychological/honesty testing raises issues under the ADA. There is no clear-cut rule for whether psychological tests are considered medical examinations for purposes of the ADA. Such tests will be considered medical to the extent that they provide information that could enable an employer to identify a medical disorder or impairment. Moreover, to the extent such tests screen out people with mental disabilities, ADA liability could result unless an employer establishes a business necessity. In order for the ADA to apply, the impairment must “substantially limit” one or more major life activities of the individual. An employer may refuse to hire someone based on his or her history of violence or threats of violence if, based on an individualized assessment of the individual’s present ability to safely perform the functions of the job, the employer can show that the individual poses a “direct threat.”

Privacy issues—Psychological and honesty testing may also raise privacy issues. This is particularly true in states such as California that recognize a state constitutional right to privacy. Some of the test questions may be particularly invasive. If an employer decides to conduct such testing, it should ensure that the testing is job-related.

Discrimination issues—If the test has an adverse impact on a protected class, an employer will have to validate and defend the test by showing that it correlates to job performance in some way. Even if an employer hires an outside agency to do the testing or purchases the test from an outside agency, the employer will still be the party responsible for the validation.

State law—Some states, such as Massachusetts and Rhode Island, specifically regulate pen-and-paper honesty tests. Thus, employers should have counsel review their testing procedures for compliance with state law before adopting any such testing procedures.

“Lie Detector” or Polygraph Tests

The Employee Polygraph Protection Act of 1988 (EPPA) prohibits an employer’s use of polygraph testing in the hiring process in most situations. The EPPA further prohibits an employer from disciplining, discharging, or discriminating against any employee or applicant for refusing to take a polygraph test, based on the results of a polygraph test, or for taking any actions to preserve rights under the Act.

The EPPA contains certain exceptions to the general ban on polygraph testing: security guard firms may test prospective employees; employers that manufacture, distribute, or dispense controlled substances may use polygraph tests; and a covered employer may test current employees who are suspects of an “ongoing investigation.” For this latter exception to apply, the employer must be engaged in an ongoing investigation involving economic loss or injury to the employer’s business, establish that the suspected employee has “access” to the property at issue, have “reasonable suspicion” that the employee was involved in the incident, provide the employee a pre-test statement that thoroughly explains the incident that triggered the investigation and the basis for testing the employee, and retain a copy of all such statements for a minimum of three years.

Many states also have laws that regulate or prohibit polygraph testing. For example, California and Massachusetts prohibit employers from compelling

applicants or employees to take a polygraph test as a condition of employment or continued employment. Wisconsin does the same, except for a narrow range of exceptions, such as security and armored car personnel. Other states, such as Virginia, allow polygraphs but prohibit employers from asking questions concerning an individual's sexual activities.

HIV Testing

The ADA severely restricts HIV testing of applicants. Both HIV and AIDS have been held by the U.S. Supreme Court to be disabilities. Accordingly, HIV/AIDS testing is generally a prohibited medical examination. Any attempt to reject an applicant as a result of HIV-related information obtained from a post-offer medical examination must be justified as job-related and consistent with business necessity. This is rarely the case because HIV and AIDS are generally considered to be non-job-related disabilities unless they substantially limit an employee's ability to perform the essential functions of the job or pose a direct threat to the safety or health of individuals in the workplace. The few court decisions to recognize a direct threat in the HIV/AIDS context have involved health professionals performing invasive procedures or otherwise at risk of direct contact with bodily fluids (typically blood).

To reject an applicant or discharge an employee based on AIDS or HIV, the employer also must be able to establish that job-related limitations posed by the disability on the individual's essential job functions could not be addressed through a reasonable accommodation.

Some states, including Florida, Hawaii, Maine, Massachusetts, New Mexico, Ohio, Rhode Island, Vermont, Washington, and Wisconsin, generally prohibit employers from requiring HIV tests as a condition of employment. Other states, such as California, Delaware, Illinois, Iowa, New Jersey, New York, and West Virginia, have special laws imposing confidentiality requirements on HIV tests and records. Numerous municipalities, including Austin (Tex.), Detroit, Los Angeles, and San Francisco, also have ordinances

that restrict HIV testing or otherwise prohibit considering HIV status in employment.

Performance and Aptitude Tests

These tests are designed to identify those candidates most likely to succeed on the job by determining an applicant's mastery of the skills required for the particular job. Typically, these tests measure an applicant's mental ability, job knowledge, simulated job performance, agility, strength, or motivation in an attempt to predict job performance. Such tests are generally permissible but should be used with caution and only if they are job-related. Often, the problem with these tests is that they have an adverse impact, i.e., they screen out individuals in protected groups, such as females, minorities, or the disabled, in greater proportion than other groups (e.g., white males). According to the EEOC, a selection rate for any race, sex, or ethnic group that is less than four-fifths (or 80%) of the rate for the group with the highest rate will generally be regarded as evidence of an adverse impact.

If a test is shown to have an adverse impact on a particular group, the employer must "validate" the test by establishing that it is a neutral predictor of job performance and that the criteria used in the test are related to the qualifications for the job. An employer must also show that it considered alternative selection procedures that have less or no adverse impact.

Fingerprinting

At least one state prohibits fingerprinting of employees. Even in those states that do not explicitly prohibit fingerprinting, the practice has been challenged as an invasion of privacy.

Genetic Testing

A recent but widespread state law development is the prohibition against using genetic information in employment decisions. Among the states that specifically prohibit or restrict genetic testing by employers are California, Iowa, Minnesota, Nebraska, Nevada, New Hampshire, Oregon, Rhode

Island, Vermont, Virginia, and Wisconsin. Other states, including Louisiana, Maine, Massachusetts, Missouri, Oklahoma, South Dakota, and Texas, generally prohibit employers from basing employment decisions on genetic test results. Still other states, including Florida and Illinois, have special laws imposing confidentiality requirements on the results of genetic testing.

THE PROHIBITION OF WORKPLACE HARASSMENT

Both federal (Title VII) and state law prohibit unwelcome conduct in the workplace that is based on, or motivated by, the victim's membership in a protected class. Although *sexual* harassment cases have been widely publicized, an employer can also be liable for harassment based on *race, age, disability*, and a variety of other protected characteristics.

In general, there are two types of harassment claims: *quid pro quo* claims and hostile environment claims.

An example of a *quid pro quo* claim is when a supervisor says to a subordinate "sleep with me or I will fire you" and the supervisor actually fires the subordinate for failing to comply. With respect to *quid pro quo* claims, the employer's duty is to ensure that individuals who wield authority do not misuse that authority and to take appropriate steps to protect employees from harm, once the employer knows or should know of the improper conduct.

An example of a hostile environment claim is when male employees subject a female employee to inappropriate jokes, touching, and derogatory comments that have sexual overtones. Simply put, employers have a duty to maintain a reasonably professional working environment and to ensure that employees are not subjected to inappropriate conduct based on their membership in a protected group (i.e., gender, race, disability).

A number of relatively recent decisions from the U.S. Supreme Court and other courts stress the importance of an employer's efforts to prevent and promptly correct harassing conduct. As discussed below, an appropriate and well-publicized anti-harassment policy, and an effective response to a report of harassment, are keys to minimizing an employer's liability for harassment.

Rules for Claims of Sexual Harassment

As a result of two 1998 decisions of the U.S. Supreme Court (*Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*), an employer's efforts at preventing and correcting sexual harassment are now key to defending sexual harassment claims. Under the rule of these decisions:

- An employer that does not have a disseminated sexual harassment policy with a complaint procedure will automatically be liable for sexual harassment by its supervisors.
- An employer with a disseminated sexual harassment policy and a complaint procedure, however, will have an affirmative defense against claims of sexual harassment by its supervisors if the harassment did not result in a "tangible employment action" (the employee being fired, demoted, caused to lose benefits, etc.) and if the employee unreasonably failed to use the complaint procedure.
- An employer will be vicariously liable for sexual harassment by supervisors, regardless of the existence of a sexual harassment policy, if the harassment results in a tangible employment action.
- Under the Supreme Court's 2004 decision in *Pennsylvania State Police v. Suders*, the *Ellerth/Faragher* affirmative defense is not available when a supervisor's official act precipitates the constructive discharge; that is, when the working environment becomes so intolerable that a reasonable person would feel compelled to resign.
- An employer will be liable for sexual harassment by nonsupervisors (coworkers, customers, vendors, and independent contractors) based on a negligence standard that the employer "knew or should have known" of the harassment.
- Although not explicitly stated by the Court, it appears that employers will be vicariously liable for all harassing conduct by the highest-level managers, regardless of whether the employer has a disseminated harassment policy and complaint procedure, whether the conduct resulted in tangible job detriment, or whether the employee complained of the conduct.
- The complaint procedure should provide alternative avenues of complaint so that the victim is not forced to complain first to his or her supervisor, who may be the very one committing the harassment.

Conduct Prohibited

The law generally prohibits imposing unwanted conditions on a person's employment based on a protected characteristic. With respect to sexual harassment, EEOC guidelines prohibit "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or . . . 3) [such conduct] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." Any of the following could, if part of a pervasive pattern of abuse, constitute sexual harassment:

- Explicit demands for sexual favors.
- Sexual-oriented verbal kidding, teasing, or jokes.
- Repeated sexual flirtations, advances, or propositions.
- Continued or repeated verbal abuse of a sexual nature.
- Graphic or degrading comments about an individual or his or her appearance.
- The display of sexually suggestive objects or pictures.
- Subtle pressure for sexual activity.
- Physical contact such as patting, hugging, pinching, or brushing against another's body.

On the other hand, the law does not create a general civility code for the workplace. The Supreme Court has stated that the law "does not reach

genuine but innocuous differences in the ways men and women interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior that is so objectively offensive as to alter the conditions of the victim's employment." Exchanging pleasantries, engaging in consensual discussions on obviously inoffensive and nonsexual topics, and participating in normal work relations does not constitute harassment.

Protected Groups

Harassment based on sex, race, color, religion, national origin, age, disability, or protesting discriminatory conduct is unlawful under federal law. State laws may prohibit harassment based on additional characteristics or conditions. Employers have been held liable for tolerating continuous racial and ethnic slurs and graffiti in the workplace, for a supervisor making adherence to his religious values a requirement for continued employment, and for tolerating teasing and pranks directed at a developmentally disabled employee.

Although federal law does not expressly prohibit discrimination or harassment based on sexual orientation, claims can be brought based on harassment by a member of the same sex as long as the victim shows that the conduct occurred because of the victim's gender. Laws in a number of states expressly prohibit harassment based on sexual orientation. Accordingly, employers' policies should prohibit harassment based on sexual orientation.

Employer Liability

Employer liability for harassment differs depending on whether the harasser is a supervisor or a coworker. Regardless, the keys to minimizing employer liability are the same—an appropriate, well-publicized policy against harassment and an effective response to all reports of harassment.

The Importance of an Appropriate, Well-Publicized Policy Against Harassment

Every employer should have an anti-harassment policy that is given to all employees. This ensures that the employer can raise the defense of having exercised reasonable care to prevent and correct harassment. An anti-harassment policy should be drafted by experienced counsel and should be reviewed periodically since the law in this area is continually evolving.

An anti-harassment policy should include:

- ***A statement of zero tolerance***—Harassment should be prohibited and not be tolerated by anyone. The statement should state that harassment is forbidden by coworkers, customers, vendors, agents, or any other third parties.
- ***A description of conduct that constitutes harassment***, including examples that are specific to the employment setting.
- ***A complaint procedure***—The policy should *require* employees to promptly report harassing conduct they experience, learn of, or witness. A complaint procedure must allow a complaining employee to *bypass an allegedly harassing supervisor* to make complaints. Echoing the Supreme Court, the EEOC states that a policy should “be designed to encourage victims of harassment to come forward and should not require a victim to complain first to the offending supervisor.” This means that someone with an unbiased relationship with the employees, such as a human resources professional, may be the best person to receive complaints. Also, consider designating people of both sexes to receive complaints. This may make employees more comfortable complaining about sexually offensive behavior. Immediate supervisors may still be designated to receive complaints as long as other accessible alternatives are offered and employees are not required to complain to their supervisors. Do not require employees to put their complaints in writing, which may discourage some

employees from making complaints. An employer must investigate and remediate claims of harassment no matter how it learns of them. Nevertheless, once an employee comes forward with a complaint, it may be appropriate to ask the employee to put the complaint in writing as part of the investigation.

- ***A statement that the employer will investigate all complaints thoroughly and promptly***—This encourages employees to come forward with claims without worry that they will not be believed or that the company will not respond. All claims must be investigated, even if the employer believes the complaint is made in bad faith.

- ***A statement regarding the confidential nature of the investigation***—An employer must not promise absolute confidentiality but only confidentiality to the extent possible. Absolute confidentiality would often preclude an effective investigation. “Confidentiality to the extent possible” means limiting information to those persons with a “need to know” of the complaint or of the investigation. This level of confidentiality allows an employer to reveal the allegations and the investigation information as needed to carry out the investigation, make a determination on the allegations, and take any necessary disciplinary or corrective action.

- ***A no-retaliation statement***—Any employee may complain about harassment without fear of retaliation. Retaliation against any person participating in a harassment investigation is a separate violation of federal and local law. Accordingly, an employer may be held liable for retaliation regardless of whether there was any merit to the underlying harassment complaint.

- ***A statement that offenders will be subject to corrective action, including discipline, up to and including termination***—Harassment policies should be broader than the law requires. In other words, it should be clear that an employer could find a violation of the *policy* without admitting to any violation of the *law*.

To be effective, the policy must be disseminated to all employees. Accordingly, employers should consider distributing their anti-harassment policy in the following ways:

- Include it in new-employee orientation materials.
- Make it a part of the employee handbook.
- Distribute the policy electronically.
- Post the policy in conspicuous places throughout the workplace.
- Distribute it annually using the best method for your employment circumstances.
- Distribute it with paychecks.
- Distribute it as a part of performance reviews.
- Include it in conflict-of-interest agreements.
- Have it appear periodically on your computer network.

Employers should require that employees periodically acknowledge, in writing, their receipt and understanding of the employer's anti-harassment policy. The acknowledgment should also provide that the employee promises to contact the human resources department if he or she has any questions about the policy. Ideally, employers should periodically train employees about the policy. Attendance should be mandatory for all employees, including the highest-level management employees, and attendance should be documented. Again, training should be conducted by experienced professionals who regularly conduct such training sessions.

Several states, including California, Illinois, and Massachusetts, have laws imposing additional, specific requirements on the content and dissemination of sexual harassment policies. California places a special affirmative duty on employers to give their employees information about sexual harassment. The California law requires 1) that an employer display a poster distributed by the California Department of Fair Employment and Housing that describes the illegality of sexual harassment under state law; 2) that every employer distribute a fact sheet to every employee that describes sexual harassment with examples, sets forth the employer's complaint procedure, and describes the legal remedies available on sexual harassment claims; and 3) that every employer issue a policy prohibiting sexual harassment and other forms of harassment. Despite the strict requirements, compliance with this law is not a defense to claims of sexual harassment. Connecticut law requires that employers with 50 or more employees provide at least two hours of anti-harassment training to supervisors. Employers should have counsel review state laws to ensure compliance.

Responding to Reports of Harassment

When an employer has notice of a potential violation of its anti-harassment policy, the employer must take prompt remedial action reasonably calculated to end the harassment. This requires the employer to conduct an investigation. Indeed, under EEOC guidelines an employer has a duty to investigate "[w]hen an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace." Similarly, state statutes often require employers to investigate and remedy sexual harassment. Illinois law holds employers liable for sexual harassment "if the employer becomes aware of the conduct and fails to take reasonable corrective measures." California law holds an employer liable if it "knows or should have known of the conduct and fails to take immediate and corrective action." Persons reporting harassment often request that the person receiving the complaint keep it confidential. Managers must be trained that they cannot agree to keep such complaints confidential.

It is often appropriate for an employer to take interim measures to avoid potential harassment during an investigation. Failing to use interim measures, such as a temporary transfer and nondisciplinary leave of absence with pay, to prevent continued serious misconduct before concluding an investigation can increase the risk of liability.

The employer must choose a neutral, objective, and properly trained investigator. Additionally, the person should have a high level of personal integrity, should have the backing of employees and upper-level management, and should have enough time to conduct a thorough investigation. It is important that the investigator be a credible and effective witness should litigation result.

Sometimes employers should select an outside investigator. For example, where a high-level executive is the alleged wrongdoer and there is concern that the company investigator may feel constrained to protect the executive, an outside investigator may be appropriate. An independent fact finder may allay suspicion that the employer's investigation was biased.

Although an investigation must be tailored to the complaint, the following general considerations are important for conducting an effective investigation:

- Locate and preserve the company's anti-harassment policy (and any acknowledgment signed by the complainant/accused that he/she read and understood the policy).
- Document exactly when and to whom the first complaint was made. Determine if the complaint was made in accordance with the company's complaint procedure. If the complaint was made to a person other than the persons identified in the policy, determine why the complainant did not follow the policy (this does not necessarily mean that the company will be protected from liability).

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- Pin down the complainant's version of the dates of the harassment.
 - Always refer to the investigation and the allegations in terms of potential violations of "company policy" and not as violations of the law.
 - *Do not* document the conclusion that unlawful harassment occurred except in the rarest case, and then do so only after consulting with counsel.

According to the EEOC, after an investigation, "an employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring." The EEOC further directs that "[d]isciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct." The employer's response to the report of harassment should not disadvantage the person who made the complaint.

If the investigation is inconclusive, the employer should:

- Assure the employee who brought the complaint that, although no finding could be made, the employer intends to protect him/her and all employees against unlawful harassment and retaliation.
- Advise the alleged wrongdoer that, although the truth of the claim has not been determined, all employees are expected to comply with the company's policies against harassment and retaliation.
- Consider some nondisciplinary steps, such as republication of the company's discrimination, anti-harassment, and workplace violence policies; sensitivity training; or physical relocation of either the complainant or alleged wrongdoer to eliminate interaction (provided

that relocation does *not* diminish duties of either so as to constitute a real or imagined demotion).

Additional Considerations

Claims by the Accused Harasser

Alleged harassers have sued employers for defamation, discrimination, wrongful discharge, breach of contract, and negligent investigation following claims of sexual harassment. The best way to avoid such claims is to have an unbiased and well-trained investigator conduct a thorough investigation.

Accused harassers most often claim defamation. An employer's statements made in connection with an investigation of a claim of harassment are typically subject to a "conditional privilege." This means that an employer is liable only if its allegedly defamatory statements were made with actual knowledge that the statements are false or with a reckless disregard for the truth. If an employer conducts a fair and reasonable investigation, this privilege should defeat a claim for defamation.

Off-Premises Harassment

The site of the harassing conduct does not govern an employer's duty to control harassment. If an employer knows, or should know, of work-related conduct that potentially violates its anti-harassment policy, the employer must take reasonable steps to ensure that the harasser does not continue the conduct, even if the conduct is occurring off premises. Notice, and not location, is the key consideration.

Employers are responsible for inappropriate conduct at company-sponsored social events. Moreover, if a group of employees goes out for drinks together, and one employee subsequently reports that another employee subjected him/her to unwelcome advances, the employer has a duty to respond to that report and ensure that such conduct does not carry over into the workplace and that the victim is made reasonably comfortable at work. In one case, an employer was held liable for failing to control inappropriate comments made

on an electronic message board that was set up, but not controlled, by the employer.

Liability for Harassment by Nonemployees

Employers can be liable for harassing conduct by a third party, such as a customer or a vendor. If an employer knows, or should know, that an employee is enduring inappropriate conduct by a third party, the employer must take reasonable steps to stop the inappropriate conduct. For example, if a customer made inappropriate remarks to an employee, the employer should ensure that the employee does not have to deal with the customer in the future.

An employer can help protect itself from claims of harassment by independent contractors by including an anti-harassment policy in independent contractor agreements and making compliance mandatory. Employers should consider obtaining indemnification agreements in such contracts to protect against any liability for acts by the independent contractor.

Customer Discrimination and Equal Access Claims

Businesses are increasingly faced with complaints and litigation by customers (and advocacy groups) who assert that the business has discriminated against customers based on race or has denied access to disabled customers. In order to minimize the risk posed by such complaints, companies should consider adopting specific policies governing customer service and providing customers with an avenue for their complaints. At a minimum, businesses should train staff to treat all customers equally, with respect and dignity, regardless of race, sex, age, national origin, disability, or any other characteristic. This idea, which is really just good business practice, can easily be incorporated into an employer policy manual and may help to reduce exposure to punitive damage awards in customer litigation.

In addition, just as policies regarding complaints of workplace harassment and mandating prompt, thorough, and effective investigations are a good defense to employee harassment claims, they can also be beneficial in handling customer complaints. A customer complaint policy should advise customers that the company treats all customers equally regardless of race, sex, age, national origin, disability, or any other characteristic; should designate someone at the company to receive complaints; and should advise customers that their complaints will be promptly addressed.

PERSONNEL POLICIES AND EMPLOYEE HANDBOOKS

General Tips

Lawsuits based on language contained in employee handbooks and other written employment policies and procedures are becoming increasingly common. Courts have found written employment policies to constitute employment contracts or enforceable promises, and an employer's failure to adhere to them can result in breach-of-contract and promissory estoppel liability. Nevertheless, a properly drafted employee handbook can be a valuable tool for disseminating information about a company and its policies, as well as a guide for management to promote nonarbitrary, consistent application of company policies and practices.

To limit potential liability, employers should regularly review their handbooks to determine whether they contain language that can be the basis for a wrongful discharge lawsuit or other employment claim. When an employer distributes a handbook, it should be prepared to follow the specific terms and conditions set forth in the handbook. The provisions of an employee handbook must be tailored to the employer's individual characteristics, such as size, unionization status, industry, and professional vs. service. All employers, however, could benefit from the following general guidelines.

Disclaim Any Promise of Job Security

Every employee handbook, policy manual, or similar document distributed to employees should contain a clear, prominently displayed, and unmistakable disclaimer of any promise of job security. Courts in several states have ruled that such disclaimers can be an absolute defense against breach-of-contract claims. Appropriate disclaimers should be included not only in employment applications, but also in the handbook itself and, most importantly, in the acknowledgment form employees sign upon receipt of the handbook.

Such disclaimers should state that the handbook and other policies are not intended to constitute employment contracts or promises. These disclaimers should also specify that employment with the employer is for no definite period and may be terminated by the employee or the employer at any time with or without notice and with or without cause. Disclaimers should also identify specific people who have the authority to bind the employer to contracts that modify the at-will employment relationship and describe how such contracts or modifications must be implemented. Disclaimers should state that, absent such modifications, the at-will nature of the employment relationship cannot be altered.

Courts have differed widely in their opinions as to the effectiveness of particular forms of disclaimers. Even within states, there are divisions of opinion among judges. A disclaimer is most likely to be held effective when it appears in a formal written employment document. The less formal the document in which the disclaimer appears, the less likely it is that the disclaimer will be found effective. For this reason, all employers are advised to consider adding disclaimers in employee handbooks, acknowledgment forms, personnel policies, and employment applications.

Avoid Making Contractual Obligations

The language of each provision in a handbook should be evaluated by an attorney for any terms or phrases that could give rise to enforceable contract rights that the employer may not have intended to grant.

Use Clear and Concise Language

Handbook provisions should clearly and accurately describe the employer's practices and policies to avoid interpretations the employer does not intend. In this regard, individual provisions that apply only to certain classes of employees should clearly indicate which employees are covered. As examples, many employers grant vacation or other benefits to part-time employees on a prorated basis, and exempt employees may not be subject to certain types of suspension without pay. Therefore, provisions discussing such rules should

clearly identify which employees are eligible for the described benefit or subject to the listed conditions.

Specifically Allow for Flexibility and Modification

It is neither possible nor practical for an employee handbook to address every policy or employment situation that may arise. For this reason, employers should specifically state that the handbook is not all-inclusive and contains only general statements of company policies. The handbook should also state that its provisions may be modified at the employer's discretion. Moreover, certain individual provisions (for example, discipline rules) should also state that management has flexibility and that the terms of the handbook are not all-inclusive.

Good Policies to Include in an Employee Handbook

- ***Application-of-handbook provision***, indicating which employees are covered by the handbook and setting forth the company's right to change and modify the handbook and its contents.
- ***Equal employment opportunity policy***, indicating that equal employment opportunities are practiced by the employer in all phases of employment and that no retaliation will be taken against employees exercising rights under company policy or applicable law.
- ***No-harassment policy***, covering sexual harassment and other discriminatory harassment. The policy should conform to the guidelines set forth earlier in this guide.
- ***Employment-at-will policy***, if the employer maintains an at-will employment relationship. This should be conspicuously placed at the front of the handbook and should specifically state that the employment relationship is terminable at the will of either the employee or the employer at any time for any reason.

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- ***Handbook acknowledgment form***, which the employee signs and returns to the employer. The form should acknowledge receipt of the handbook and agreement to read the handbook. Contract disclaimer and employment-at-will language should also be included on the form.
 - ***Family and Medical Leave Act policy***, if the employer is covered under the FMLA or analogous state law.
 - ***Telephone and electronic communication systems policy***, retaining the employer's property rights to all information transmitted through electronic communications (i.e., email and computer systems) and negating any privacy expectations in such communications. Employees should be specifically notified that communications may be monitored in accordance with applicable law.

Policies That Give Rise to Claims

The following are practical tips for redressing problems frequently encountered with employee handbooks or policy manuals. In implementing any of the following suggestions, however, an employer must evaluate the labor relations climate that exists at its place of business and in the surrounding community. For example, if employees have been or are likely to be the target of a union organizing drive, an employer may not want to include some of the suggested language in its handbook.

- ***Permanent employment***—Any references to “permanent employment” in a handbook should be eliminated and replaced with the term “regular full-time employment.” In defining regular full-time employment, employers should state that employees are hired for no definite period. This wording makes it more difficult to claim that an employment contract for a specified period exists or that an employee has been hired on a permanent basis.

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- ***Probationary periods***—Many employers have policies that establish probationary periods so they can evaluate an employee’s work performance and presumably terminate the employee without following any progressive discipline procedures. Caution should be exercised, however, in the wording of a probationary period policy because the establishment of any type of probationary period implies that once employees complete their probationary periods, they may be terminated only for “just cause.” In that regard, the concept of a probationary period is inconsistent with the concept of at-will employment.

Employers that want to implement probationary periods should consider calling them “introductory periods” or using other language that does not implicitly promise additional rights upon completion of the period. In addition, it is advisable to include a statement in the probationary period policy that provides that when the employee completes probation, the relationship with the employer is still one of employment-at-will. To give the introductory period some meaning apart from an implication of a promise of continued employment, the employer might link the completion of the introductory period to the commencement of some benefit, such as eligibility for holiday pay.

- ***Progressive discipline/disciplinary procedures***—Employer manuals and handbooks commonly specify certain disciplinary procedures that *must* be followed before an employee is dismissed. These procedures, however, may prompt disgruntled employees to claim that an employer that failed to follow the procedures was bound to do so by the terms of the written policy. Handbooks and manuals often contain progressive discipline and discharge policies that set forth specific offenses and penalties. These policies should, at a minimum, state that the procedures are only guidelines, are not all-inclusive, and are not intended to apply to every situation. They should state that the guidelines are not meant to change, and do not change, the employment-at-will relationship.

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- ***Leave caps***—Employer handbooks sometimes set maximum time periods for leaves, after which termination is automatic. The EEOC has taken the position that such a policy is a *per se* violation of the ADA. Employers should treat leaves, provided as an accommodation, on a case-by-case basis.

 - ***Destroying exempt status under FLSA***—Handbooks should include necessary exceptions for exempt employees. For example, exempt employees may not be subject to partial-week suspensions unless they receive salary during the suspension, and paying overtime to exempt employees may undermine their classification as exempt.

EMPLOYEE EVALUATIONS

There are compelling business and legal reasons for employers to give employees performance appraisals. Thoughtful performance evaluations are instrumental in a variety of human resources decisions, including compensation, transfers, promotions, and terminations. Proper job evaluations, conducted on a regularly scheduled basis, are helpful in monitoring performance and provide a specific record to support employment decisions. Performance appraisals are crucial to all employment decisions because evaluations are often presumed to be the most definitive and reliable source of information regarding an employee's performance. The first evidence attorneys and courts usually consider in adjudicating employment claims are the employee's performance appraisals during the period leading up to the adverse employment decision.

Performance evaluations tell employees how they are performing and prevent surprises in the future. They advise employees of what management expects and how well the employee is meeting the expectations. Properly prepared evaluations can limit discrimination claims or provide a defense should litigation occur. On the other hand, perfunctory evaluations that do not inform employees of how well they are actually doing their jobs can haunt employers during litigation. Too often, supervisors or managers who rate employees have not been trained on how to conduct a proper evaluation. As a result, they often check "satisfactory" or "good" without giving very much thought to whether these terms accurately reflect the employee's performance. The person filling out a performance evaluation often uses the same comments for virtually all employees. Such use of the performance review is relatively meaningless, unreliable, and risky. Indeed, it is common in employment litigation for employees to challenge discharge decisions by referring to a long history of favorable performance evaluations. Because they are used as a motivation tool, performance evaluations often are unrealistically high and may inadvertently give the employee a reasonable expectation of continued employment.

General Guidelines

All supervisors and human resource professionals who conduct performance evaluations should be trained that evaluations must be honest, accurate, and candid, and that they should evaluate both the strengths and weaknesses of employees. Evaluations should also be reviewed by another manager or supervisor who has no direct personal interest or bias regarding the employee. Lastly, evaluations should be disclosed to and discussed with the evaluated employee. The employee should always be given a chance to respond to or comment on the evaluation.

An employer wishing to implement an effective employee performance evaluation process should consider the following general guidelines:

- Provide clear written instructions to all supervisors involved in the evaluation process.
- Conduct training for supervisors and human resource professionals involved in the evaluation process to ensure their familiarity with the nature and importance of the various job duties of the employee being evaluated.
- Implement a performance appraisal system that is job-related.
- Take reasonable precautions against improper bias by the supervisors.
- Require more than one level of management to review and approve the appraisal.
- Conduct central monitoring by human resources to ensure uniform performance-rating standards.
- Allow the employee to comment or respond to the evaluation.

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- Allow employees to appeal poor performance evaluations within a reasonable period.
 - Require supervisors to identify specific performance goals as part of the evaluation process.

Instructions for Supervisors

Supervisors and managers who evaluate employees should be given instructions that explain the system's importance and purpose as well as the need for honesty, accuracy, and fairness. The instructions should include information that is helpful to supervisors and managers in dealing with potential problems. These instructions should include a directive to the supervisor or manager to review an employee's job description before evaluating the employee. The supervisor or manager should sign a form acknowledging that he or she has read the instructions and will comply with them, and the form should be placed in the supervisor's or manager's personnel file.

Training

A program for training supervisors or managers in conducting performance reviews also should be implemented. Such training will generally take several hours and will include a number of practice exercises to demonstrate typical errors made in performance evaluations and to increase the overall reliability of evaluations. The errors that most often occur in evaluating employees include excessive leniency, the tendency to avoid the ends of a rating scale (like "superior" or "poor"), and the inclination on the part of some managers or supervisors to rate an employee in each area on the basis of an overall impression, rather than on the basis of how the employee has performed in each specific area.

Failure to train supervisors and managers on how to evaluate employees can make discrimination cases more difficult to defend. On the other hand, if supervisors and managers are trained to evaluate employees, if they follow

through with what they have learned in training, and if these evaluations are well-documented, they can be valuable, not only in preventing or defending a lawsuit, but in improving employee efficiency as well.

Job descriptions, if available, should be reviewed when preparing performance reviews. A job description allows the supervisor and employee to start with a common basis for determining the quality and quantity of an employee's work. Training for managers should also explain how the company uses appraisals in its promotion and discipline system.

Job-Related Appraisals

Job-related evaluation forms should be used. A "canned form" is usually inappropriate. The rating choices on any form should be as specific as possible and related to the area of performance being evaluated. The often-used "unsatisfactory," "satisfactory," "good," and "excellent" ratings are usually too general and meaningless to properly evaluate particular jobs. These terms are very subjective, for what is "good" for one supervisor may only be "satisfactory" for another. Furthermore, a choice of "not observed" or "not applicable" should be available to the supervisor.

In designing the performance evaluation forms, employers should use categories that call for the evaluation of specific job behavior, not personality traits. Doing so will help lead to job evaluations that are properly focused on the employee's performance on the job, rather than to evaluations that may seem to be a personal attack on the employee.

An evaluation that seems to be a personal attack on the employee may lead to the argument that the evaluation reflects stereotypes about protected groups, prejudice, or some other improper motive to treat the employee harshly. Commenting about personality traits rather than job behavior might also raise problems under the ADA, because those personality traits might be the result of a psychological condition.

Similarly, the criteria for evaluation should be as objective as possible. For example, an evaluation of a supervisor should focus on the results of the unit or the way in which the supervisor interacts with other members of the unit, rather than simply being a subjective assessment of the person's judgment or initiative. Obviously, subjective evaluations are part of performance appraisals, particularly for higher-ranking employees. In evaluating subjective indicators of performance, however, the employer should direct evaluators to give specific examples to illustrate the subjective criteria.

If an employee is terminated due to job performance problems in aspects that are not included within the employer's system of evaluation, the employer will likely face a major obstacle in litigation because the employer will likely not have documented the reasons for the termination. Furthermore, it may be difficult for the employer to demonstrate that the job performance problem is truly important if the reason for termination is not even included in the employer's evaluation.

Objective and Independent Review

Employers must take precautions against supervisor and manager bias and arbitrary supervisory actions. During the training of supervisors and managers, employers must emphasize that they will not tolerate any job-related stereotype or bias. It is important that the employer implement a system for monitoring performance evaluations to make sure that biases do not taint the process.

Human resource managers should review all performance reviews before presenting them to employees. Having an additional level of review produces even greater reliability. The additional level of evaluation is obviously more significant when the superior has personal knowledge of the job duties and the employee's actual performance.

An employer should implement a central monitoring program of the review process to make sure that it is being uniformly, consistently, and honestly carried out for all employees.

Meaningful Evaluations

Reviews must be honest and candid. Although a supervisor can be unduly harsh on employees during an evaluation, excessive leniency is more common. Purposefully giving an employee better ratings than he or she deserves often backfires and can be the grounds for a lawsuit. Certainly, it is appropriate to note and praise good work done by the employee in the past, but an evaluation must also point out any deficiencies in performance. Goals should be set for an underperforming employee. The defense of wrongful termination litigation will be seriously undermined if the reason for termination is a problem that had been developing over time but was ignored in performance appraisals. The employer's case is damaged even further if the employee received unduly favorable performance evaluations, including favorable rankings on the categories of performance that are involved in the termination.

Generally, rigid mathematical quotas or requirements dictating the number or percentage of employees in each evaluation category by each supervisor are not advisable because some supervisors may have an imbalance of strong or weak performers in a particular unit. Supervisors should, however, be given general guidelines regarding the expected distribution of rankings, and deviations from that expected distribution should be justified.

Employee Acknowledgement

Employees should have the right to review the evaluation and be given an opportunity to comment on it. This can alert an employee to actual or potential problems. It shows that the employer is being fair. The employee should acknowledge in writing that he or she has read the evaluation. This prevents the employee from later claiming he or she was unaware of performance problems. If the employee disagrees with the evaluation, he or she should be allowed to state that on the evaluation form.

Limited Access to Evaluations

Limiting access to performance reviews is beneficial for a couple of reasons. First, it limits the chance of claims such as defamation, invasion of privacy, intentional infliction of emotional distress, or constructive discharge. Second, it fosters greater honesty if managers know that access to their reviews will be limited to the human resources department, the employee who is the subject of the review, and others with legitimate business reasons for reviewing them.

Record Keeping

Regulations issued by the EEOC require employers to keep records of personnel actions for at least one year from the date of the action and to retain records as to terminated employees for one year after the date of discharge. As a general practice, it is also advisable to keep employment records, including employee evaluations, for four years so that they are available to defend lawsuits brought under the major federal employment laws. Employers, however, should consult with local counsel to ensure that they comply with all state and local requirements and to assess whether documents should be retained longer due to state statutes of limitations.

Forced Rankings

Performance evaluations are often used with reductions in force (RIFs) under a “forced ranking” process whereby employees are placed into peer groups and evaluated by their supervisors to produce a ranked list. Once management decides which department will lose employees, the forced rankings are used to identify candidates for discharge. This process has been called both “rank and yank” or “rank and fire.”

This process has resulted in lawsuits challenging the process as a subterfuge for discrimination, particularly where, on a statistical basis, minorities or other protected groups fall in the lower range of the list. Yet a forced ranking process that takes due consideration of actual job performance, is truly nondiscriminatory, and is subject to the careful review of management as

described above, should survive scrutiny. Such programs, however, should only be implemented after consultation with counsel.

DISCIPLINE AND CORRECTIVE ACTION

General Considerations

Employers should have clear disciplinary standards, and they should apply them uniformly, for two reasons. First, uniformity meets a jury's notion of fundamental fairness. Second, the easiest way to win a discrimination lawsuit is to show that a young white male was given a lesser punishment for the same offense than someone in a protective class. Thus, if an employer is not prepared to fire one of its better salespeople for theft, then the employer needs to realize it will be very hazardous to fire another salesperson with poor sales who is also a thief.

Employers should adhere to any applicable timetables or procedures set forth in a company handbook or disciplinary guidelines. To implement a defensible discipline process:

- Use "objective" systems where possible.
- Do not wait until a problem becomes serious to take action.
- When a problem develops, the supervisor should discuss it with the employee and suggest ways of correcting the situation.
- Consider the employee's reasons for the behavior and explain why those are unacceptable. (Such discussions should be documented and placed in the employee's file; moreover, oral and written warnings should be given for specific problems.)
- Make a written record of oral warnings, written warnings, all specific problems, and terminations.
- Provide notice of the specific requirements with which the disciplined employees must comply to avoid further discipline or discharge and the period the requirements are in effect.

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- Be *especially* careful about documentation in dealing with protected-class persons. (Special concerns include uniformity, absence of evidence of discriminatory intent, and use of the “last chance” technique.)

Most employers use a progressive discipline system—an oral warning for the first offense, a written warning for the second offense, a suspension for the third offense and, finally, termination. The idea is to give employees a chance to correct their behavior, without the penalty for a minor offense being too severe. The employer’s policy, however, should be clear that some violations could result in immediate terminations. For example, most employers fire even first-time embezzlers.

Oral warnings—Oral warnings should be applied for relatively minor infractions. The supervisor should talk to the employee in private and inform the employee that he or she is administering an oral warning and that the employee is being given an opportunity to correct the behavior. The employee should be told that if the behavior is not corrected, the employee will be subject to more severe disciplinary measures. A notation that an oral warning was given should be made for the supervisor’s records and placed in the employee’s personnel file.

Written warnings—This type of notice should be issued by the supervisor if the employee continues to disregard an oral warning or if the infraction is severe enough to warrant a written record immediately. The supervisor should detail the nature of the infraction and sign the notice. He or she should discuss the warning with the employee and make certain the employee understands the reasons for the disciplinary action. A copy of the warning notice should be handed to the employee at the time of the discussion, and the employee should be asked to sign and date the notice acknowledging receipt. The original of the notice should be placed in the employee’s personnel file.

Suspension—This form of discipline normally is reserved for severe rule violations or for repeated violations for which the employee has already received a written warning and has made insufficient effort to improve performance or behavior. This is the most severe form of discipline given by a supervisor, short of termination. It should be applied only after a thorough evaluation by the supervisor and his or her superiors. The supervisor should document the events leading to the suspension and the duration of the suspension. The supervisor should tell the employee of the reasons for the disciplinary action and give the employee an opportunity to respond before implementing the decision to suspend. The original copy of the disciplinary suspension notice should be signed by the employee and placed in the employee's personnel file, with a copy given to the employee. When an employee returns from a period of disciplinary suspension, the supervisor should make certain that he or she gets back to his or her job with as little injury to his or her self-respect as possible.

Discussion of the problem with someone else—If undesirable behavior continues, the supervisor should discuss the problem with the appropriate human resource professional. Arrange a specific meeting between human resources officials and the employee. At the meeting, inform the employee, in writing, of each action or activity that must be corrected, and have the employee sign the document. Make certain the employee understands that the failure to comply with these requirements could result in discharge.

The disciplinary notice—In deciding whether to discipline an employee, and in administering the discipline, the employer should carefully select language that describes the employee's offending conduct. In doing so, the employer should not use terms that might be viewed as a reference to an employee's psychological or medical condition or an attack on the employee's character.

Discipline Should Be Documented

Properly drafted documents regarding discipline decisions are vital in defending such actions in litigation. Judges and juries tend to credit written documents, and they get suspicious when there are no documents reflecting problems with the employee. In addition, memories fade with time, and written documentation can help recall events as they actually happened. Of course, the writing should be in a helpful form. Employers should assume that all documents relating to employment decisions will end up before a judge or jury. In this regard, several key points should be followed in drafting any employment-related documents:

- Be truthful and accurate.
- Use plain, nontechnical language.
- Accuracy is much more important than speed. Take your time and do it right.
- Try to critically review your first draft of the document. Ask yourself, “What impact will this have on a jury?” “Does it accomplish what is necessary?”
- Have the human resource department or an attorney review important documents.
- Although it is never too late to prepare a document, strive to prepare the document as soon after the incident as possible.
- Tell the whole story.
- State expectations for the future, even if merely restating the rule.

Disciplinary documents should also clearly state the consequences of additional violations. Documents should be dated, and the author should be

clearly identified. They also should be signed and dated by the employee. If the employee refuses to sign the document, the supervisor should note the date the employee was presented with the document and the fact that he or she refused to sign it, and then should sign the document under the notations. The document should be labeled as “Confidential” and should be treated as such. The document should be legible, though it need not be typed.

If a record of an event is based on the reports of third parties, be certain to follow these guidelines in making a record based on the reports. Take careful, legible notes. Allow and encourage employees to make changes to their statements in their own handwriting. At the end of the notes, include the statement: “These notes accurately reflect the statements that I gave to [note-taker’s name] regarding my observations. I gave this information voluntarily. I have been given the opportunity to review the notes and to make any changes that I felt were necessary to make the notes accurate.” Then have the person read the statement and sign it. If a person refuses to sign the notes, at least have the person review the notes. Then sign the document indicating that the notes were reviewed and verbally approved by the third party. Remember, there are no casual notes. All documents, informal or formal, casual or not, are subject to discovery in litigation. In the event of litigation, all notes will be scrutinized.

Workplace Investigations

Investigations should always be done prior to deciding to discipline an employee. The investigation should include, at a minimum, statements from witnesses and an interview with the employee who is under investigation. Remember that fair and reasonable treatment will be the jury’s standard—“Did the employee get a fair shake?” “Would I want to be treated that way?” Also, if outside investigators are used, employers must conform to obligations imposed by the Fair Credit Reporting Act (FCRA).

TERMINATING THE EMPLOYMENT RELATIONSHIP

The Basics

Although employment terminations are inevitable, they are not the goal of a good employee relations program. Rather, employers should attempt to make each employee the best possible employee. Virtually every employment termination is stressful and the terminated employee will not be happy with the decision. Whatever the reason for the termination, the terminated employee may believe that he or she did nothing wrong and it was not his or her fault. In addition, employment terminations are often traumatic events, especially for the terminated employee. As a result, most terminated employees consider the termination to be a direct personal attack and an affront to their reputation and self-esteem.

Further, every termination decision will be reviewed by someone who is not on the employer's side. A terminated employee will usually talk about the termination with someone. At the very least, it may be a spouse, family member, friend, colleague, or former coworker. Then again, it may be a union business agent, government investigator, or attorney. Hopefully, it will never be a judge or jury. The best way to protect against the individual ever telling his or her story to a judge or jury is to treat the employee fairly and with respect. A terminated employee who believes that he or she was treated unfairly, whether or not the termination violated the law, is far more likely to go to a lawyer or government agency than is an individual who feels that the treatment was reasonable, fair, and honest under the circumstances.

Establish Termination Procedures

Employment relationships end for a variety of reasons, both voluntary and involuntary (from the employee's perspective). Voluntary terminations include resignations and retirements. Involuntary terminations include layoffs, restructuring, job eliminations, reductions in force (RIFs), and terminations for misconduct and poor performance.

It is critical for an employer to establish a “termination procedure” that has three parts: 1) making the termination decision, 2) communicating the termination decision, and 3) handling post-termination issues. A process or procedure that is fair at each stage and responsive to the individual can go a long way toward preventing employment claims and lawsuits.

Making the Termination Decision

Misconduct or poor performance will, at least in part, be the reason for most involuntary terminations. The primary exception is when the decision is made on an entirely objective basis, such as a layoff by seniority or a plant closing. Even in layoffs and RIFs not based on seniority, there is often an analysis of performance and skills to determine who should or should not be terminated.

Certain procedures already should be in place because the “investigation” stage of the process can take time. In layoff, restructuring, and RIF situations, make sure you provide sufficient time to make the best decisions. In misconduct situations, consider suspending the alleged wrongdoer during the investigation. By doing so, you relieve some of the pressure to make a quick decision before completing the decision-making process. At the same time, by having the employee off site, you limit the risk of further misconduct.

However, the investigation of misconduct or evaluation of performance is only the first step in a multistep termination process. Next, any decision to terminate an employee should be reviewed by others. A supervisor or manager should almost never have the authority to terminate an employee “on the spot.” Rather, the greatest authority that any one individual should have is to remove the employee from the area or facility—to suspend pending investigation—without speculating about what further action may occur (other than a full investigation). Selecting the person to conduct this review will depend on your management structure but, in the end, the employee’s manager, senior management, and human resources should

participate in any termination decision. Many employers involve legal counsel, as well. Because the employee will have someone “review” the termination decision, it makes sense that the employer should do so, too. This review should analyze the fairness of the decision-making process/investigation and the decision itself.

Communicating the Termination Decision

One of the most difficult tasks a manager or human resources professional will face is telling an employee that he or she is fired. How this task is performed, and what the employer does in the few minutes after the decision is communicated, can have a profound effect on how the terminated employee feels and whether that individual will take further action regarding the termination.

Timing of the decision is also important. For example, it is generally a mistake to terminate an employee on Christmas Eve or on the afternoon before the individual leaves on a vacation. Interestingly, research shows that it is better to terminate an individual midweek, rather than on Friday afternoon. In the end, pick a time that will be least disruptive to the individual and employer. Often, this time is near the end of the day so the employee can leave with less disruption and embarrassment in front of coworkers.

Plan the termination in advance and have notes or a “script” ready. There should be two people from the employer present—generally a senior manager from the employee’s department or division and a person from human resources. The meeting should take place in private with only these three individuals present.

The termination meeting should not take more than 5 to 30 minutes, unless you provide an exit interview as part of the process. Communicate the termination decision early in the meeting and do so directly. Do not provide an inconsistent message or suggest that the decision is still under review. If

the employee attempts to challenge the decision, allow the person to speak but make it clear that the decision has been made. In addition, once you decide (ahead of time) on the reason for the termination, communicate that reason, and stick to it. The reason you give in the termination meeting is the reason that you must be prepared to state under oath in front of a judge and jury. If there are multiple or interrelated reasons, say so. The bottom line is: Be clear and consistent.

After communicating the decision, tell the individual what will happen next. If there is any employer property to be recovered (keys, ID, computer, cell phone, credit cards, pager, etc.), have a list ready and seek to recover that property before the person leaves. Also, briefly explain compensation and benefit information. Depending on your state, you may be required to pay final compensation (including wages through termination and accrued but unused vacation) at the time of termination. At the latest, you will need to pay these amounts on or before the next regular payday. Provide written information regarding insurance continuation, “retirement” or similar benefit programs, and (if required by your state law) unemployment compensation. If you are going to provide a severance package (discussed later in this chapter), briefly describe it, inform the individual that receiving the package is contingent on signing a release agreement, and give the individual the appropriate documents.

It is important and beneficial to inform the person whom he or she should contact with any questions.

Before the termination meeting, it is important to assess “security” issues regarding the individual. It is a good idea to notify security that you are terminating an employee so that security is “on alert” if something happens. In addition, if the employee used or had access to a computer, during the termination meeting have your information systems department terminate the person’s computer access. If the terminated employee states that he or she had personal items on the computer, these can always be copied and sent to the individual. Also, determine whether you will allow the person to say

good-bye to coworkers and pack his or her belongings, or whether you will ask the person to leave immediately and will send personal belongings home. The final step in the termination meeting is to inform the employee regarding these “security” decisions.

Conclude the meeting by saying good-bye and wishing the person the best in the future. Avoid statements like, “You will be better off in the long run” or “I wish I didn’t have to do this” because these statements can be offensive.

Responding to Post-Termination Issues

An employer’s actions after the termination can result in legal liability, so it is important to have procedures in place for post-termination matters. Claims that can arise from the employer’s post-termination conduct include defamation, intentional infliction of emotional distress, and “blacklisting” or deliberate interference with the individual’s attempt to obtain new employment.

To the extent other employees or third parties (such as clients, vendors, or other business contacts) must be told of the termination, do so in a neutral manner. Simply state that the individual is no longer with the employer. Do not provide any details or other information. If pressed, simply state that it is the employer’s policy not to discuss personnel matters with others.

It is important that all employers have a reference policy that prohibits supervisors and managers from providing references about current or former employees. Rather, all employees should be advised that all reference requests must be sent to or forwarded to a specific person (such as the director of human resources). It also is important to require that all reference requests be made in writing and that all responses be provided in writing. Employers should inform all personnel to refuse to respond to telephone inquiries about a former employee asking details of performance or eligibility for rehire. Instruct personnel instead to respond to such calls by politely referring the caller to the appropriate person. (For example, “I am sorry but

I cannot provide you with any information. Let me transfer you to our director of human resources, who may be able to assist you further.”)

Relatedly, do not provide reference letters that are inconsistent with reasons given to the employee regarding the termination. In most circumstances, the best policy is to provide only a “neutral” reference letter confirming dates of employment and last position held.

If the employee has any rights under law or your benefit plans, such as health insurance continuation under COBRA or state law or rights under retirement plans, make sure that you adhere to any notification deadlines. Provide all required information in writing and keep a record of any communications. Respond to questions or requests for information promptly. Delays in responding to questions from terminated individuals will simply add to their suspicion about the termination and can lead to liability under ERISA.

Severance Agreements

Employers that must terminate an employee or group of employees often consider offering the employee(s) severance pay and/or benefits in conjunction with the termination. Generally, when an employer offers severance, it also seeks a release and waiver from the employee(s) of all claims arising out of their employment. Because of the various employment laws in effect, an employer cannot assume “one size fits all” when it comes to severance and release agreements. Therefore, an employer must tailor these agreements to the specific needs and circumstances of each situation.

Pros and Cons of Severance and Release Agreements

There are pros and cons associated with the use of severance agreements. The biggest benefit is that if an agreement is properly drafted and is signed by the individual, it will prevent an employee from recovering for claims against the employer related to the employment. In today’s litigious society, this provides peace of mind. Further, by preventing a lawsuit, an employer

not only saves the time, effort, and money that would have been expended in defending the suit, but also avoids adverse internal and external publicity.

On the other hand, if the agreement is not properly drafted, the release may not be enforceable. The employee will have received additional money for naught because an employer often cannot recover the severance paid if the employee ultimately files a charge or lawsuit, even though the employer can offset the amount of any severance against an award of damages in the event the employee prevails. Further, the release may notify the employee of rights and remedies that that employee did not know existed, prompting the employee to consider whether a possible cause of action exists or encouraging the employee to talk to an attorney. This is especially true if the employee consults an attorney.

Legal Requirements

Severance and release agreements fall into three general categories: single employee or multiple employees under the age of 40, single employee age 40 and over, and multiple employees age 40 and over. The simplest severance and release agreement is for an employee under the age of 40. If an employer wants to use a severance and release agreement for employees age 40 and over, the agreement must comply with the ADEA and the Older Workers Benefit Protection Act (OWBPA). In addition, several states have legal requirements for release agreements.

With respect to any release of ADEA claims, the waiver must be “knowing and voluntary.” Due to complexities in the law and court decisions interpreting the statute, an attorney should always be consulted on these issues. Generally, however, the OWBPA provides that a waiver is knowing and voluntary if:

- a) It is drafted so that the employee will understand what rights and claims are being waived;
- b) It specifically refers to the ADEA and the OWBPA;

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- c) It does not seek a waiver of any rights or claims that may arise after the agreement is executed;
 - d) The employee is given something of value to which he or she is not already entitled;
 - e) It advises, in writing, the employee to seek legal counsel;
 - f) The employee is given 21 days to consider the agreement; and
 - g) The employee is given seven days from signing the agreement to revoke it.

If a severance or other exit incentive is offered to multiple employees, the requirements to obtain a valid waiver are even more onerous and complex.

Summary of Common Contents of Severance and Release Agreements

Although there is no “one size fits all” severance agreement, certain items generally appear in all severance and release agreements:

- First, the termination date is specified, along with any remaining pay, accrued or earned vacation, or other benefit the employee is already entitled to receive.
- Second, the consideration that is being given for the release is described. Again, this must be something that the employee is not already entitled to receive. Consideration may include severance pay, employer-paid health insurance continuation, or outplacement services.
- Third, the agreement includes a release for all known or unknown claims. It should include claims under federal, state, and local law, and specific statutes or common law causes of action should be identified and included in the release. However, one area that an employer may

not require a release is for claims under the FLSA.

- Fourth, for employees age 40 and over, the OWBPA waiver requirements must also be met.

The severance and release agreement should include a “non-admission” clause stating that the agreement does not constitute an admission of liability of any kind on the part of the employer. Additionally, there should be “confidentiality” and “non-disparagement” provisions, which require the employee to keep the terms of the agreement confidential and prohibit the employee from making disparaging remarks about the employer. The agreement may also include “confidentiality,” “non-solicitation,” and “non-compete” provisions to protect an employer’s interests after the employee ends his or her employment by prohibiting the disclosure of certain information and/or engaging in unfair competition. Enforcement of these provisions by the courts varies from state to state. Therefore, an employer must ensure that it knows the appropriate standard and requirements for enforcement. An employer should also be aware of, and identify, any existing agreements with the employee that will remain in force. These agreements may include confidential information or restrictive covenant agreements.

Properly drafted, severance and release agreements can be useful tools to reduce the risks of litigation. Employers should consider using them in appropriate situations. Any release agreement should be reviewed by an employment attorney before it is offered to an employee.

LAYOFFS AND REDUCTIONS IN FORCE

Worker Adjustment and Retraining Notification Act (WARN)

WARN requires employers to provide 60 days' written notice before any "plant closing" or "mass layoff." The terms "plant closing" and "mass layoff" are misleading, and care must be taken to ensure that the statutory definitions are understood. Notice, when required, must be served on unions, unrepresented affected employees, the appropriate local government, and the "state dislocated worker unit."

WARN's administration in practice can be extremely complex. Additionally, the Act has a variety of ambiguous exceptions, exemptions, and exclusions. WARN is enforced by the direct filing of lawsuits by employees, unions, or government officials in federal court. Although a court cannot block a plant closing or mass layoff, an employer that fails to provide required notice may be liable for up to 60 days' wages and benefits to all aggrieved employees who should have been afforded notice, plus a fine of up to \$500 per day (up to \$30,000) for any failure to serve notice on the local government. Additionally, prevailing parties can recover attorneys' fees and costs. WARN liability is offset by severance pay only if the severance pay was not provided pursuant to a "legal obligation" (i.e., where it was not required under a labor agreement or binding severance policy). The \$500/day fine is nullified if a violating employer pays all employees the amount for which the employer is liable within three weeks after the plant closing or mass layoff.

The DOL has promulgated detailed WARN regulations, although it has no other authority (apart from the promulgation of regulations) to enforce or administer WARN's requirements.

The Decision-Making Process

Layoffs and RIFs, on the surface, sound like events that would usually not lead to problems because they inevitably are motivated by sound business reasons. However, depending on who is selected to be laid off and why, they can often lead to discrimination claims under various federal and state

discrimination laws, either because employees are selected for dismissal for improper reasons or because the selection criteria disproportionately affect a certain protected category of employees. RIFs are also a common source of class-action and multiplaintiff claims, which are especially costly and time-consuming to defend. Therefore, it is critical that the decision-making process be designed with great care.

To maximize the probable validity of the decision-making process, an employer must undertake several tasks before carrying out a layoff or RIF. These tasks include:

- 1) Documenting the business reason for the layoff or RIF and the numbers of employees to be reduced.
- 2) Developing the nondiscriminatory, business-related criteria for selecting employees to be affected by the layoff.
- 3) Reviewing any performance-rating system to be used for disparate impact on any protected group.
- 4) Reviewing the personnel files of employees selected for layoff to insure consistency with prior evaluations.
- 5) Comparing the relative representation of minorities and females before and after the selection process.

Finally, it would be prudent to have the results of these various tasks reviewed by an experienced attorney before implementing the layoff.

Preparation for RIF-Related Interviews

In every case, an adversely affected employee's supervisor and other decision makers should be prepared to accurately explain why each employee was selected for inclusion in the reduction, who made the relevant decisions, what benefits are available, and so on. Inconsistencies here predictably will

reappear as damaging impeachment testimony in any subsequently filed discrimination or employment-at-will lawsuits. Indications that an employee was given “short shrift” prior to departure will be viewed, particularly by a jury, as indicative of an impersonal or uncaring attitude that could result in prejudice at trial.

Other Considerations

The following additional suggestions may limit potential claims resulting from a RIF:

- ***Document all aspects of the RIF.*** Document the reasons for the RIF, individual reduction selections, the criteria used, and the process followed at all stages of the RIF.
- ***Union-related issues.*** In unionized work settings, err on the side of giving the union the opportunity to engage in decision bargaining as well as effects bargaining. Carefully evaluate potential labor contract obligations implicated by the planned reduction.
- ***Safety in numbers.*** Two or more members of management should be involved at every level of decision making during a RIF and during every meeting with affected employees.
- ***Review exit incentive issues and releases.*** Take special precautions to ensure that voluntary “early out” programs or early retirement incentives are in fact “voluntary” and nondiscriminatory. If written waivers or releases are desired, be sure to comply with the requirements of the OWBPA.
- ***Reduce numbers, not dollars.*** Workforce reduction goals should be stated in numbers of employees to be reduced or positions to be eliminated, rather than dollars to be saved.

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- ***Evaluate and avoid “smoking gun” references.*** Review company bulletins and other documents to ensure there are no inadvertent references to age or some other protected characteristic. Make sure that all supervisors and managers are aware that email and voice-mail transmissions are often recoverable and discoverable, even if deleted.

 - ***Evaluate potential disparate impact.*** Review tentative selection decisions and any performance rating systems for possible “adverse impact” discrimination. Be careful, however, during any EEO review to avoid creating an inadvertent “smoking gun” that could result, for example, if decision makers conduct their own EEO review, especially if that review occurs at the same time they are making selection decisions. Insulate the EEO review process from the selection process by making the EEO review remote in time (i.e., clearly after tentative selection decisions were made), remote by person (i.e., conducted by someone other than selection decision makers), and reviewed by legal counsel to determine the extent to which material can be protected from disclosure through application of the attorney-client privilege.

 - ***Consider retention/demotion.*** Employees selected for termination should, to the extent possible, be considered for transfer, relocation, or even demotion based on objective criteria (or documented subjective criteria).

 - ***Avoid selective protection or “hints” concerning probable inclusion/exclusion.*** Recent college graduates or other categories of mostly younger employees should not be insulated from RIF decisions. Additionally, especially if voluntary exit incentive programs are being considered, it is very important to avoid management “hints” concerning whether particular people should or should not worry about potential inclusion in the involuntary RIF.

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- ***Watch out for alleged salary discrimination.*** Do not disfavor higher-paid employees, since higher salaries can be associated with age.

 - ***Display employment posters.*** Ensure that the appropriate federal, state, and local fair employment practice posters (and other employment posters) are displayed (to ensure that the statute of limitations for filing age, race, or other types of claims begins running from the time of an employee's termination).

 - ***Contract issues.*** Be sensitive to claims based on an informal or oral "contract" of continued employment, reviewing all company benefit programs, all handbooks, and employment applications.

 - ***Review benefits issues.*** Carefully review and evaluate employee benefit plans and all benefit issues that might be implicated in or impacted by the planned RIF.

SINGLE-PLAINTIFF AND MULTI-PARTY EMPLOYMENT LITIGATION, INCLUDING CLASS AND COLLECTIVE ACTIONS; THE ALTERNATIVE DISPUTE RESOLUTION OPTION; AND OTHER ISSUES

Types of Claims

Many of the types of claims discussed in this guide can be pursued by individual employees or former employees. In some cases, as noted in prior sections, employees must first pursue their claims before administrative agencies. Then, in many cases, after exhausting administrative avenues of relief, employees may sue in state or federal court.

Employment litigation, like any other type of litigation, brings with it unique risks and burdens. Matters have been taken out of the hands of management and placed in the hands of a third party—an arbitrator, judge, or jury—who may not understand the employer's business and may have biases against employers or businesses in general. In addition, litigation imposes burdens on employers and management. Fact-finding, document production, depositions, and hearings consume management time and distract managers from productive work for the company.

Perhaps most significant in terms of burden on an employer and potential exposure are claims brought by or on behalf of multiple employees or ex-employees. Most employment-related class or collective actions are brought under the antidiscrimination laws (Title VII, ADA, ADEA, etc.), ERISA, and the federal and state wage-hour laws. Each of these laws has distinct substantive and procedural requirements that affect the ability of a plaintiff to obtain class- or collective-action certification.

Multi-plaintiff actions can take a variety of forms. Under Rule 23 of the Federal Rules of Civil Procedure, a plaintiff can obtain certification of a class of employees, former employees, or applicants who have been affected by the same allegedly unlawful practice. Generally, although class members do not

need to take any action to be included in the case, the class members will have the right to opt out of the class action and file their own individual suit. These procedures typically apply to claims under Title VII, ERISA, and the ADA. Cases under the ADEA and FLSA use an opt-in mechanism whereby members of the proposed class must affirmatively state that they wish to be part of the case to be included. In still other cases, where a private plaintiff of the government (i.e., the EEOC) claims that an employer engaged in a pattern or practice of discrimination, a single plaintiff may be able to obtain relief on behalf of aggrieved persons who have not been joined in the case. In such cases, successful plaintiffs or the EEOC can obtain class-like monetary and injunctive relief on behalf of others.

Defense of significant employment-related cases does not end with in-depth understanding of the procedural rules and substantive law. It also requires an understanding of the milieu in which this litigation takes place, including:

- The potential impact of monetary or injunctive relief on the organization.
- The role of the media and the impact of its reporting.
- The effect of publicity and litigation defense on the defendant's workforce.
- The role of special interest advocacy groups and their efforts to influence the litigation's outcome.
- The effect of the litigation on the corporate image and, in the case of consumer-oriented companies, on the consuming public.
- How all of this adds up in terms of settlement pressures.

Obviously, when a class-action or multi-plaintiff suit is filed or looms on the horizon, an employer should contact its insurance carrier and should retain

competent counsel with experience handling such cases. The issues raised by multi-plaintiff and class-action litigation are unique in themselves, and additional unique issues arise when such claims are brought regarding employment practices.

Arbitration and Other Types of Alternative Dispute Resolution

Rather than litigating every case, most employers at some time consider alternative dispute resolution (ADR) techniques. ADR is an umbrella term for a variety of policies and practices with a common goal of reducing employment disputes, particularly litigation. A number of ADR techniques are available to employers, both at the pre-dispute and post-dispute phases of the employment relationship, including mediation, peer review panels, and arbitration. The use of ADR to resolve employment-related disputes, including federal employment claims, has grown dramatically. In fact, many employers now use mandatory pre-dispute arbitration agreements. These contracts are generally entered into at the time of hire, and they require the submission to binding arbitration of all disputes arising out of the employment relationship.

In order to assess the utility of any of these ADR techniques, employers should consider what facilities and geographical areas will be covered, which categories of employees will be covered (hourly employees, nonmanagerial, managerial, supervisory, nonsupervisory, senior executives, incumbent employees, and/or new hires), and what claims will be covered (all employment actions, disciplinary and nondisciplinary, and/or statutory and nonstatutory). Employers should weigh the pros and cons of ADR carefully and confer with legal counsel before adopting either pre-dispute or post-dispute ADR programs.

Advantages of ADR

Improves employee morale—By providing employees with a forum to air their grievances or complaints, ADR can improve morale and productivity and give employees greater participation in the decision-making process that

affects their everyday work lives. Many employees pursue litigation so they can have their claims heard by a third party. Some forms of ADR provide this outlet without going to court.

Improves managerial decision making—ADR can bring to light new information that a responsible employer may wish to take into account in making personnel decisions. This is particularly true where individuals in supervisory positions do not have the best “people skills.” If an employment decision was poorly made, an employer has the opportunity to reverse it or settle it before going to court.

Eliminates the need for employees to seek third-party help—By giving employees a greater say in decision making, employers hope to create an environment in which employees will not feel the need to seek third-party help, such as from unions, attorneys, or agencies. Surveys have shown that insecurity and a sense of powerlessness are the leading motivators for employees going to lawyers or unions. ADR addresses these concerns by giving employees a place to go with an employment dispute if they feel they were treated unfairly.

Limits employer’s exposure to high costs of court litigation and excessive jury verdicts—A primary reason to consider ADR is to avoid or minimize an employer’s exposure to the high costs of lengthy and time-consuming litigation, particularly jury trials. Damage awards in employment litigation have skyrocketed in many states because juries look for “deep pockets” against whom to assess punitive damages to punish conduct of which they disapprove or that they believe is unfair. Arbitration often results in lower and more realistic damage awards (although some startling exceptions have been known). Arbitrators are less likely to be swayed by emotions or anti-corporate sentiment and normally hesitate to award punitive or compensatory damages, except in egregious cases.

Can be fast and convenient—In some states and certain federal courts, parties must wait years for a jury trial, after protracted discovery. The

internal effect of lingering litigation often can be quite damaging. Because of its speed and informality, arbitration can be much less costly. Expensive motion practice, discovery, and costly procedures related to jury trials are largely avoided.

Results in predictable decisions—Arbitration can be more predictable than jury trials, especially in cases with facts favoring the employer. This makes it easier to assess potential liability and the settlement value of cases.

Improves privacy of process—The employer in arbitration may be able to reduce its exposure to adverse publicity because arbitration proceedings are not public proceedings.

Disadvantages of ADR

Uncertain enforcement—Presently, many questions about the enforceability of ADR procedures remain unresolved. Some courts or agencies permit litigation even if an employee refuses to submit to ADR. Arbitration agreements can prohibit an employee from filing a discrimination case in court, but cannot preclude an employee from filing an administrative charge of discrimination and may not preclude the EEOC from proceeding with an investigation and lawsuit. The resolution of these issues, for the time being, depends on the jurisdiction where a claim is brought, the specific ADR procedures that have been implemented, how ADR procedures were adopted, and the facts of each case.

Possible claim generation—By making claim-resolution procedures cheaper, faster, and more convenient for employees, there is a risk that ADR procedures will lead to an increase in the number of claims that an employer may have to address.

May result in difficult decisions regarding incumbent employees—Implementing ADR procedures for incumbent employees can involve difficult decisions concerning the type of ADR procedure to be established, how it will be adopted, and the employer response if employees refuse to

sign or accept proposed ADR agreements. If an employer adopts an ADR policy that will be applied to all employees who continue their employment beyond a particular date, an individual's continued employment could be regarded as acceptance of the policy. However, some courts or agencies might disagree, absent an explicit ADR agreement signed by the company and the employee. If such an agreement is offered to employees who refuse to sign, the employer may be confronted with a difficult decision as to whether the employees should have their employment terminated based on the refusal to accept ADR.

Limits opportunity for appeal—Some types of ADR—for example, binding arbitration—place significant authority in a single person. Depending on the specific procedure adopted, there is a risk that an arbitrator will render an absurd judgment or an astronomically high award in an employee's favor. In such a situation, ADR may be a disadvantage, because employers have far greater difficulty appealing from arbitration awards than they do from jury verdicts. For example, one U.S. Supreme Court case indicates that even “grievous error” is an insufficient reason to reverse an arbitration award on appeal.

Wild-card arbitrators—Some arbitrators may be less receptive than judges to technical legal and procedural arguments, such as statutes of limitations, and may be unfamiliar with the law pertaining to the discrimination statutes involved, because arbitrations of statutory claims are still uncommon. Summary judgments are rarely granted in arbitration proceedings. Arbitrators—especially those with a labor relations background—may also look to principles of progressive discipline and due process as evidence of nondiscriminatory treatment.

Possible surprises—Discovery is very limited in arbitration. Employers may be taken by surprise by the employee's evidence when the employer hears it for the first time at the arbitration hearing.

Dilutes employee at-will status—Mandatory ADR agreements may make it easier for the employee to assert contract-based claims if the employee is terminated.

“Split the baby” decision making—Arbitrators tend to reach compromise decisions, meaning that in arbitration often the best decision an employer can get is a small adverse award.

The Use of Personnel Records in Employment Litigation

Assume All Documents Are Available to Your Opponent

As a rule, the majority of documents used in wrongful discharge and other employment litigation, even those used by the plaintiff, come from the employer. Federal and state rules applicable to litigation permit employees and their attorneys to obtain access to a wide variety of the employer’s documents and records, not just the employee’s personnel file. Discoverable documents may include employment audits that evaluate a company’s compliance or noncompliance with employment laws, memoranda regarding efforts to meet the requirements of state and federal employment regulations, and reports regarding the hiring of protected classes or workplace disability issues. Rough drafts and handwritten notes may be discovered. Even documents prepared by the company after litigation has begun, including memoranda commenting on the facts or discussing defense strategies, may also be discoverable under certain circumstances.

Technology in the workplace has also created new sources of data. Email, even if deleted, may still be recovered. Plaintiffs now routinely seek computer-stored information—passwords, word processing files, databases, voice-mail transmissions, personal calendars, computer programs, and source codes. All employees and supervisors must be aware that electronic and voice transmissions are generally not private.

Exceptions to the rule of broad discovery are limited. Information protected by the attorney-client or other privilege is not subject to discovery. All

privileges, however, may be waived, sometimes inadvertently. An attorney's files, notes, and mental impressions are protected by a qualified "work product" privilege. An employer, however, cannot make otherwise unprivileged documents privileged simply by giving them to either in-house or outside counsel.

The employee's attempt in the course of litigation or arbitration to obtain production of communications—oral or written—between an employer and its insurer concerning the anticipated or pending dispute may be particularly problematic because the communications may include legal strategy and other confidential information. Accordingly, employers should make an effort to reduce the likelihood that the communications will have to be revealed. Although there is no way to guarantee that a judge or arbitrator will conclude that such communications are not discoverable, certain steps may reduce that risk. First, the communications should be between the insurer and the insured's attorney, not with the insured itself (although copies of written communications may be provided to the insured). The reason is that communications involving the attorney may be protected by the attorney-client privilege and/or the attorney work-product doctrine. While attorney-client and work-product communications are not absolutely privileged, discovery of such documents in litigation will not be ordered absent extraordinary circumstances. Second, unless a written record is required, the communications should be oral. Attempts to discover oral communications usually are less successful than discovery of documents because the precise words used in an oral communication tend not to be remembered for very long and, with the passage of time, memory of spoken words usually dims.

Employers should remember that there is no such thing as a truly "confidential" document in litigation. Marking internal documents or correspondence as "confidential" or "for your eyes only," or making them available on a "need-to-know basis," does not protect them from disclosure in litigation. Similarly, some employers erroneously believe that documents containing trade or commercial secrets, such as customer lists, or those

containing confidential information about other employees, are protected from discovery. The only way to limit improper dissemination of this type of information is generally to seek a protective order from the court after the document is requested by the employee's attorney.

The Benefits of Properly Prepared Documents

Given the increasing stream of employment litigation, a “paper trail” supporting the employer's action is more important than ever. Contemporaneously prepared, credible documents contribute to a successful defense in a variety of ways:

Help fact finder understand employer's case—Well-prepared documents show the chronology of events and help the judge, jury, or arbitrator understand what happened and how the employer's business works.

Enhance credibility of employer's case—When the employer's version of events is supported by documents, it is more believable, and the case is less likely to be reduced to a credibility contest between the employee and the employer's witnesses. Moreover, judges, jurors, and arbitrators know from their experiences that employers keep records, and a lack of documentation may make them suspicious of the employer's motives. This problem is compounded if the only documents from the employer are brought into the case by the plaintiff, since it is likely that the documents support the plaintiff's case.

Independent evidence—Under the rules of evidence, records kept in the employer's normal course of business can be used as evidence, even if the person who prepared them is not available to testify. If the preparer is available, the records can be used to refresh the witness's memory if he or she has an insufficient recollection of the incident at the time of the trial or hearing.

Can demonstrate that employee was treated fairly—Employers should have documents showing that employees had notice of company policies and the employees’ violations of those policies. If employees who are discharged for repeated policy violations sue, they will be less likely to win sympathy or their cases when employers can demonstrate with credible documents that the employees knew about the policy and that repeated violations could lead to termination. Also, as a practical matter, employees who believe they have been treated fairly are less likely to sue in the first place.

Keep the employee honest—An often-overlooked benefit of a good “paper trail” is that, if the employer’s version of events is well-documented, employees will be less able to fabricate events later to support their claims in litigation or arbitration proceedings. For example, an employee who has several disciplinary write-ups will be hard-pressed to later deny a problem with job performance.

Deter litigation—Employees will be less inclined to sue, and plaintiffs’ attorneys will be less interested in taking a case, if the disputed decision is well-documented.

Problematic Documents

Just as properly prepared documents can aid in the defense against, or even avoid, employment litigation or arbitration, there are several categories of documents that may seriously weaken the employer’s case.

Employers should keep the same types of documents for similarly situated employees. When employees are subject to disciplinary action for violating the employer’s rules and regulations, the employer should prepare the same document for the same or similar offenses.

Since inaccurate and incomplete records have less credibility, all documents, whether formal or informal, should be dated and signed so they can be placed in chronological sequence. If a fill-in-the-blank form is being completed, all applicable blanks should be filled in correctly, and proper

boxes should be checked. All facts should be accurate, and all relevant facts should be included.

Records should not contain vague statements or descriptions. Inappropriate employee conduct should be specifically described. For example, a performance evaluation stating that an employee is a “poor worker,” is “not a team player,” or “refuses to interact” with colleagues does not describe the problem. Instead, conduct should be specifically described. A more concrete example would state that the employee has “missed two sales meetings in the past three weeks,” or has “failed to meet his or her production quota in four of the past six months.” The need to specifically describe employee misconduct also applies to disciplinary write-ups and warnings.

Documents specifically describing employee conduct serve two main purposes. First, they let the employee know exactly what the problem is and what needs to be done to correct it. Employees who are given an opportunity to improve are more likely to believe they have been treated fairly and are less likely to sue. Second, they give the employer an accurate, credible record if litigation does occur.

Document Retention

Statutory retention requirements—Federal employment discrimination laws require employers to maintain personnel files and other documents for a specified period of time after an employee is terminated. State laws frequently contain similar requirements, which vary from state to state, and may require records to be kept significantly longer than the federal statutes.

Statutes of limitations—In determining how long personnel files and other employment-related documents should be retained, employers must consider not only record-retention requirements imposed by law, but also the statutes of limitation that govern potential claims against them. Employees frequently have years in which to bring claims against their employers and former employers.

Record-retention and destruction policy—Employers should have a record-retention policy and periodically destroy out-of-date records. A personnel specialist or employment law attorney can assist in identifying how long various records must be kept to comply with state and federal laws. Employers should also not overlook the need for a plan for the discovery and production of computer-stored information so that a discovery request for such information does not shut down the business.

CONCLUSION

The purpose of this guide is to provide employers with a basic understanding of the issues involved in avoiding and managing employment claims. Because each company has its own structure and concerns, the principles discussed here should be used as a starting point in tailoring policies and procedures to fulfill the requirements of individual businesses.

Employment law is increasingly complex. It is also rapidly changing. Continuing education for managers and human resource professionals through seminars and in-service programs makes good business sense. The proper management of human resources is often the hallmark of a well-run company. Developing sound employment practices now will pay dividends in preventing employment-related allegations and lawsuits in the future.

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Since its founding in Chicago in 1945 by Henry Seyfarth, Lee Shaw, and Owen Fairweather, Seyfarth Shaw LLP has grown into a full-service international law firm with more than 600 lawyers practicing in Atlanta; Boston; Chicago; Houston; Los Angeles; New York; Sacramento; San Francisco; Washington, D.C.; and Brussels. Its clients are located throughout the country and in all segments of the national and international economies and include many of the publicly traded corporations comprising the Fortune 500, as well as entrepreneurs, large and small privately held businesses, service sector clients, and numerous public sector entities.

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Employment Practices Loss Prevention Guidelines is a result of the collaborative effort by Seyfarth Shaw attorneys resident in the firm's offices throughout the United States. For additional information, please feel free (in conjunction with your Chubb claims representative) to contact any Seyfarth Shaw attorney with whom you may have worked, Charles C. Jackson (Chicago), or Kenwood C. Youmans (Los Angeles).



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