INSTITUTE FOR APPLIED MANAGEMENT & LAW, INC.
450 Newport Center Drive, Suite 390, Newport Beach, CA 92660
Telephone: (949) 760-1700 Facsimile: (949) 760-8192

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THE CERTIFICATE IN ESSENTIALS OF HUMAN RESOURCE MANAGEMENT SEMINAR

BLOCK I: LEGAL ASPECTS OF HUMAN RESOURCE MANAGEMENT

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BLOCK I:

EMPLOYMENT LAW OVERVIEW

These Block I Employment Law Overview materials were prepared by the law firms of **Brenda K. Heinicke, LLC** & **Bryan Cave LLP** for the Institute for Applied Management and Law's Certificate in Essentials of Human Resource Management Seminar

Note about these Block I materials: Our special thanks to **Brenda K. Heinicke, Esq.** and **Shay Hable, Esq.** for their special efforts in preparing these materials.

BRENDA K. HEINICKE is an employment attorney in Colorado Springs, Colorado, where she has her own law firm devoted exclusively to the representation of management in all areas of labor and employment law. After receiving her law degree *with honors* from the University of Denver and being selected for the Order of St. Ives, Brenda served as a prosecutor for a short time and then joined the labor and employment department of Sherman & Howard, L.L.C., a large Denver-based law firm, where she practiced for over eight years. For several of those years, Brenda was the chairperson for the El Paso County Bar Association's employment law section, and she received the bar association's Outstanding Young Lawyer award. Brenda has been a lead instructor for the Institute for Applied Management and Law's (IAML) nationally recognized employment law seminars since January 2000 and has presented in-house trainings for companies such as Beckman Coulter, Toyota, Wal-Mart, FedEx, Origen Financial, Agrium, and Reddy Ice. She is one of IAML's most popular and highly-rated instructors. Brenda is also featured in an IAML training videotape designed to alert new employees to their employer's expectations. Brenda can be reached at 719/955-4990 or Brenda@heinickelaw.com.

SHAY HABLE practices in the area of labor and employment law at Bryan Cave Powell Hastings in Atlanta. Her practice includes representing management in employment discrimination lawsuits in various state, federal and administrative jurisdictions, including race, sex, disability, family and medical leave and other discrimination claims. Ms. Hable's litigation experience also includes contract and fraud disputes arising from employment and independent contractor relationships. Ms. Hable has practical experience defending clients in consolidated actions in multiple jurisdictions. In addition to litigation matters, her practice encompasses a wide array of counseling in employment and related issues, including review of employee handbooks and employment practices and policies. She has assisted clients involved in employment audits, layoffs, outsourcing and reorganizations. Ms. Hable has provided clients with guidance in employment disputes and investigations and drafted and reviewed enforceable employment contracts, restrictive covenants, and separation agreements. She is a lead instructor in IAML's Certificate in Essentials of Human Resource Management Seminar and has published several articles on employment law.

TABLE OF CONTENTS

EMPLOYMENT DISCRIMINATION LAWS

EMPLOYMENT DISCRIMINATION LAWS

I. INTRODUCTION

Over the last 25 years the employer-employee relationship has become increasingly regulated by the federal and state governments. Employment litigation has mushroomed, and multi-million dollar verdicts against companies are not unusual. In order to ensure compliance with the law and minimize the risk of liability for employment actions, executives and managers can not afford to be uninformed about the rules. This syllabus provides a general outline of all the primary laws regulating employment and labor.[1]

II. SIGNIFICANT FEDERAL LEGISLATION GOVERNING EQUAL EMPLOYMENT OPPORTUNITY

1. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which prohibits discrimination on the basis of race, color, religion, sex, or national origin.

2. Age Discrimination in Employment Act of 1967, as amended. 29 U.S.C. § 621 et seq., which prohibits discrimination with respect to persons ages 40 and older.

3. Equal Pay Act of 1963, enacted as § 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d), which prohibits discrimination in pay on the basis of sex.

4. Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981, 1983, 1985, and 1986, which prohibit discrimination on the basis of race and sex.

5. The Americans with Disabilities Act. 42 U.S.C. §§ 12101-12217 and the ADA Amendments Act, which prohibit discrimination in employment against any qualified individual with a disability because of that disability.

6. Rehabilitation Act of 1973, as amended, 29 U. S. C § 701, et seq., which prohibits discrimination on the basis of physical and/or mental handicap.

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[1] This syllabus should not be relied upon as a source of legal advice to handle a particular employment problem.

It should be noted that many of the 50 states, counties and municipalities have enacted laws which govern employment, including equal employment opportunity. In some instances, these laws provide greater protection to a particular protected group than provided under federal law.

III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Prohibited Bases of Discrimination.

1. Title VII of the Civil Rights Act of 1964 as amended 42 U.S.C. § 2000e et seq. ("Title VII"), prohibits an employer from discrimination against applicants and employees with respect to any employment opportunity on the basis of their race, color, religion, sex, or national origin.

2. This prohibition applies to all actions and conditions relative to employment, including hiring, termination, compensation, and terms, conditions or privileges of employment.

3. The protections of Title VII are not limited to groups which have been traditionally perceived in the United States to be minorities. Rather, Title VII prohibits discrimination of Whites as well as Blacks, Hispanics, or Asians; and males as well as females.

B. General Theories of Discrimination Under Title VII.

1. Disparate Treatment.

   a. Disparate Treatment is the most commonly encountered theory of discrimination under Title VII. Disparate Treatment is simply treating similarly situated individuals differently in their employment because of such individual's race, color, religion, sex, or national origin.

   b. Burdens of proof allocation in a disparate treatment case:

      (1) The employee-plaintiff must establish a prima facie case of discrimination, i.e., that he or she is a member of a protected group and was the subject of an adverse employment action.

      (2) The employer-defendant then has the burden to articulate a legitimate nondiscriminatory reason for the adverse employment action.

      (3) If such a reason is articulated, the employee-plaintiff must establish that the asserted non-discriminatory reason is merely a "pretext" for discrimination in order to prevail.

Pretext is generally proven through the use of comparative evidence of how the employer treated other similarly situated persons under similar circumstances. For example, an employer discharges a black employee for the non-discriminatory reason of excessive absenteeism. The employee alleges that he was discharged because of his race and not absenteeism, and points to three white employees who had more absences than he did and who were not discharged. If it turned out that the three white employees had more absences and were not discharged, this would be strong comparative evidence that the black employee was discharged because of his race and not because of his absences. In other words, the employer simply utilized excessive absenteeism as a "pretext" for discharging the employee because of his race.

2. Mixed-Motive Cases.

a. A "mixed-motive case" exists where an adverse employment action is based on a mixture of prohibited and legitimate factors. For example, the Supreme Court in Price Waterhouse v. Hopkin, 490 U.S. 228 (1989), dealt with mixed motive inherent in sexual stereotyping.

In that case a female employee was denied a promotion based upon negative evaluations by her male counterparts that reflected sexual stereotyping. For example, she was criticized for not dressing in a feminine way and not wearing makeup.

b. The Civil Rights Act of 1991, which amended Title VII, sets out the burden of proof allocation in a mixed-motive case:

(1) First, an employee must prove that a prohibited factor played a part in the adverse action.

(2) The employer then must prove that it would have taken the same action in the absence of the prohibited motivating factor.

(3) If the employer can demonstrate that it would have taken the same action anyway, then it may avoid monetary damages, but it still may be subject to declaratory relief, injunctive relief, such as barring the employer from engaging in such unlawful practices or ordering affirmative action, attorneys' fees and costs.

3. Sexual Harassment.

a. Two Types of Sexual Harassment.

(1) First Type: "quid pro quo." Tangible job benefits are conditioned on sexual favors. "Go out with me and we will discuss your possible promotion," or "If you don't spend the night with me, you'll be fired." Generally, quid pro quo sexual harassment involves a supervisor because a peer does not have authority to grant job benefits.

(2) Second type: results from the creation of a "hostile environment." This occurs when unwelcome verbal and/or physical conduct of a sexual nature creates an "offensive" atmosphere or unreasonably interferes with an individual's job performance. Supervisors or fellow employees may be involved.

(a) Improper use of language can create hostile environment. Examples:

(i) "When are you going to get something to put in that sweater?"

(ii) comments about anatomy in general

(iii) sexual jokes and sexually oriented obscenity

(b) Conduct also can constitute harassment.

(i) Passing around or posting dirty or sexually explicit material, including nude or scantily clothed females, has been found to create an offensive environment.

(ii) Conduct not even directed at the complainant can be harassment. If an employer who tolerates such conduct, or who engages in a personal or sexual relationship with someone who can influence employment decisions about him or her, receives a promotion or favorable evaluation, other employees can claim that they were denied favorable

treatment because of their unwillingness to submit or the willingness of another employee to submit. Also, experience has shown that some of the most bitter sexual harassment cases result from consensual relationships, especially illicit ones. In many cases, pillow talk. etc., engaged in during the relationship, has been presented on the witness stand to establish harassment.

(iii) According to EEOC policy guidelines, widespread favoritism in the work place based on the granting of sexual favors might be sufficient to establish the existence of an illegal hostile and offensive environment. The EEOC noted that both men and women who find such an atmosphere offensive can establish a violation based on the "hostile and offensive environment" form of sexual harassment.

(iv) Managers who engage in widespread sexual favoritism may also communicate a message that the way for men or women to get ahead in the workplace is by, granting sexual favors. This type of environment can form the basis of an implicit "quid pro quo" harassment claim for men or women, as well as a "hostile and offensive environment" claim by those who find this offensive.

b. In order to constitute harassment under either category, the conduct must be "unwelcome." In determining whether the conduct is "unwelcome," the following factors are helpful:

(1) Did the victim make a contemporaneous complaint about the conduct?

(2) If the victim did not make a contemporaneous complaint, is his/her failure to do so justifiable, i.e., was the decision not to complain motivated by fear of retaliation?

(3) Did the victim act in a sexually aggressive manner, use sexually oriented language or solicit sexual advances?

c. When Is An Employer Liable For Sexual Harassment?

(1) An employer's liability no longer turns on whether the harassment is characterized as "quid pro quo" or "hostile work environment."

(2) Whether an employer is vicariously liable for harassment by its supervisory employees depends upon whether the harassment has resulted in a "tangible employment action" – such as termination or failure to promote – being taken against the employee.

(a) When a plaintiff employee can show there was a tangible employment action due to harassment by a supervisor, the employer is strictly liable for the supervisor's conduct.

(b) Where there has been no tangible employment action, but the employee still can prove that he or she was subjected to a hostile work environment – unwelcome comments or conduct so severe or pervasive as to alter the conditions of employment – by a supervisor, the employer remains vicariously liable for the harassment, subject to an affirmative defense. To establish that defense, the employer must prove both:

(i) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and

(ii) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or failed "to avoid harm otherwise."

(3) The focus on the existence of a tangible employment action rather than on the type of sexual harassment involved now creates the possibility of the following scenario:

A plaintiff may be subject to "quid pro quo" harassment by her supervisor who threatens to terminate her if she refuses to spend the evening with him, but if she ultimately is not terminated or subjected to any other tangible employment

action, the harassment need be analyzed under a hostile work environment theory – which affords the employer the right to raise the affirmative defenses (above) – rather than under a strict liability theory.

d. EEOC Guidelines for a Strong Sexual Harassment Policy.

(1) Employers may be able to insulate themselves from significant liability for sexual harassment hostile work environment by maintaining "an explicit policy against sexual harassment that is clearly and regularly communicated to employees" as well as effective complaint procedure for victims of sexual harassment.

(2) To be effective, an employer's sexual Harassment policy should be widely disseminated and provide for prompt, adequate remedial action.

(3) Once an employer is notified that sexual harassment has occurred, the employer may escape liability by taking prompt action that is reasonably calculated to end the harassment.

e. Training In What Constitutes Sexual Harassment.

(1) All employees should be trained in what constitutes sexual harassment and how to make a complaint under Company policy.

(2) It is particularly important that supervisory staff are aware of the company's policy and what steps they should take once they are on notice that an employee may be complaining of sexual harassment. Failure of a supervisor to act subjects the company to liability.

4. The Pregnancy Amendments to Title VII.

a. In 1978, Title VII was amended to prohibit discrimination on, the basis of "pregnancy, child birth, or related medical conditions." Because the amendment is written such that "pregnancy, childbirth or related medical condition" is encompassed under the definition of "sex," an employer is prohibited from taking adverse employment actions against a female employee on the same basis as other sex discrimination.

b. In addition, the 1978 pregnancy amendments require that women affected by pregnancy, childbirth or related medical conditions "shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ."

(1) This provision means that women affected by pregnancy must be treated the same as other employees suffering a temporary medical disability. Thus, if the company has a sick leave or medical leave program permitting temporarily disabled persons to have a leave, the pregnant woman must be granted a leave on the same basis a person with a broken leg.

(2) Likewise, if the company's medical insurance policy provides coverage for temporary medical disabilities, such as broken legs and other types of sickness, it must also cover payments for pregnancy, childbirth, and related medical conditions.

5. Disparate Impact.

The disparate or adverse impact theory of discrimination is applied to an employer's practices or selection devices which are neutral on their face, but nevertheless operate to exclude a particular race, sex, or ethnic group at a disproportionate rate.

a. There are three distinct categories of employment practices or selection devices to which the disparate impact theory has been applied:

(1) Scored tests: i.e., written tests used to qualify applicants for particular jobs.

(2) Non-scored objective criteria: i.e., education and experience requirements, height and weight restrictions, arrest and conviction records, garnishment and the like.

(3) Subjective criteria: i.e., oral interviews, supervisor recommendations for promotions and the like.

b. The applicant or employee bears the burden of identifying each specific personnel practice which is challenged; generally the cumulative effect of a number of employment practices cannot be examined for disparate impact. Instead, the specific practice which is alleged to have caused the disparate impact, such as word-of mouth

referral or an interview process, must be isolated and its causal effect shown.

c. There are two exceptions when a plaintiff need not point to a specific selection device as having an adverse impact.

(1) First, where the components of an employer' selection process cannot be separated for analysis, then the entire decision-making process may be attacked.

(2) Second, where there are particular "functionally integrated practices" which are part of the same criterion test (i.e., height and weight requirements), then the functionally integrated practices may be analyzed as one employment practice.

d. Whether or not an employment practice or selection device has an adverse impact on a particular group is determined by statistical evidence, and specifically, by comparing the exclusion rate of the relevant protected group to the exclusion rate of other groups.

(1) A mere statistical comparison of minority representation in upper and lower level jobs in an organization will not in and of itself suffice to make out a prima facie case of disparate impact.

(2) A plaintiff must also show that the disparity is caused by the challenged employment selection device.

e. The relevant statistical comparison, is between the qualified applicants for the job and the minority representation among the incumbents in that job.

(1) To effectively satisfy this burden, an employee will have to show that the minority composition of the qualified pool of applicants, whether internal or external, is different from and significantly higher than the minority composition of the incumbents selected for the higher level jobs.

(2) If the employment practice or selection device disproportionately excludes the protected group members, and that disparity is actually caused by the challenged employment selection device, then disparate impact is established.

For example, assume that the employer requires that an applicant for the position of assembler be able to lift 75 pounds, and that the employer has 50 males and 50 female otherwise qualified applicants for the job. Assume further, that application of this lifting requirement excludes 35 of the female applicants, but only 15 of the male applicants. This lifting requirement is neutral on its face, yet its application results in a substantial adverse impact on female applicants.

f. If substantial adverse impact is demonstrated for a particular employment practice or selection device, the employer then must prove that the challenged practice or device is job related for the position in question and consistent with business necessity.

Thus, in the example given above, the employer would have to prove that a person's ability to lift 75 pounds is a requirement for successful performance of the assembler's job.

g. If the business necessity defense can be established, then such an employment practice or selection device is permissible and does not violate Title VII unless the employee can prove that other employment practices or selection devices can be utilized to serve the employer's legitimate business interest without resultant disparate impact, thus demonstrating that the employer's defense was pretextual.

(1) Of course, any alternative practices offered in this respect must be equally as effective as the employers chosen selection procedures in achieving legitimate employment goals.

(2) As such, cost or other burdens of the proposed alternative become relevant in determining whether it would be as effective as the challenged practice in serving the employer's legitimate business goal.

h. The courts have not yet clearly defined what constitutes "substantial" adverse impact. However, the Supreme Court in Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988) made it clear that a statistical disparity alone is insufficient to establish a prima facie case of disparate treatment under Title VII. A plaintiff must show that the statistical disparity is actually caused by the challenged employment criteria.

i. Objective criteria.

(1) If scored tests are utilized by an employer and those tests are found to have a substantial adverse impact upon a protected group, the Uniform Guidelines require that job relatedness be established by one of the three statistical validation methods specified in the Guidelines. Courts have accepted this approach.

(2) The Guidelines also require that non-scored objective criteria be validated by one of these three methods if substantial adverse impact is established.

(3) The records which employers are required to maintain pursuant to the Uniform Guidelines will usually be subject to discovery in employment litigation.

(a) These records are a particularly useful method of proof in disparate impact discrimination actions.

(b) Moreover, the penalty for failure to maintain such records may be an inference of adverse impact, which the employer may find difficult to rebut.

j. Subjective criteria.

(1) Subjective employment decisions must be validated in a manner similar to objective employment decisions.

(2) Although some people assert that the interviews are invalid for predicting job performance, there are five ways to increase the quality and validity of interviews.

(a) First, gather as much information about the job the applicant is applying for as possible.

(b) Second, organize the format so that each interview has essentially the same elements. One widely used format contains the following elements: (1) greet the applicant and establish a rapport with him/her; (2) inform the applicant of the purpose and format of the interview; (3) ask the applicant about his/her education, experience, and career goals; (4) allow the applicant time to ask questions; (5) close the interview.

(c) Third, focus the interview question on the applicant's behavior, rather than goals, intentions or aspirations. Interviews that focus on behavior have shown significantly higher degree of validity than other interviews. The interviewer should remember that more recent behavior and long standing patterns of behavior are more accurate predictors of future behavior.

(d) Fourth, focus on gathering information that is not traditionally available from other sources, such as application forms and tests. Assessment of social skills is one type of information that is not readily obtainable from traditional sources.

(e) Fifth, consider using a number of interviews so that more of the applicant's behavior is observed and biases are counteracted when the applicant is evaluated.

6. Present Effects of Past Discrimination.

This theory of discrimination is applied to determine the validity of seniority systems.

a. Numerous companies, particularly in the South prior to the passage of Title VII, discriminated against protected groups by assigning them to relatively inferior employment positions.

b. Many such companies also had seemingly neutral seniority systems which restricted transfer, such as departmental seniority systems rather than plant-wide seniority systems.

This meant that a long-service employee of a protected group who had established substantial seniority rights in a low-paying, inferior department would have no seniority rights or protection against layoff should the employee transfer to a higher paying, more desirable department.

c. The Civil Rights Act of 1991 permits challenges to seniority systems when the seniority system is adopted, when an individual becomes subject to the seniority system or when a person is injured by the seniority system.

7. Failure To Make Reasonable Accommodations For Religious Beliefs.

a. Title VII prohibits discrimination based on religion.

b. Religion includes not only religious beliefs which are associated with traditional religions, but religious "observances and practices" as well. A particular belief, observance, or practice falls within this definition if it is sincerely held and occupies in the life of its possessor a place parallel to that filled by the God of those religions admittedly qualifying for the exemption.

c. Once it is determined that a particular belief is protected by Title VII, the employer has a duty to reasonably accommodate that religious belief unless it cannot do so without undue hardship on the conduct of the business. The employer should always make a documented effort to explore alternative methods of accommodating religious beliefs or observances.

For example, an employee is required to work all scheduled hours, including Saturdays as a part of her production job. That employee joins a church which forbids working on Saturdays, and from that time on refuses to work any Saturdays. Under these circumstances, an employer might ask other employee if they would voluntarily work the Saturday that the employee is scheduled, or offer to transfer the employee to another job which does not involve Saturday work as a reasonable accommodation to her religious beliefs.

d. The duty to accommodate, however, does not require the employer to (i) take steps inconsistent with an otherwise valid collective bargaining agreement: (ii) bear more than a de minimis cost in order to accommodate a religious belief or observance; (iii) impose an undesirable shift preference on other employees; or (iv) change its legitimate nondiscriminatory seniority system (e.g., in order to accommodate an employee who does not want to work on her Sabbath).

C. **Procedures Under Title VII.**

1. Administrative Procedures for Employees of Private Employers.

a. The EEOC is charged with the responsibility of preventing unlawful employment practices by employers, unions, and employment agencies. In fulfilling this responsibility, the EEOC accepts and

investigates charges of discrimination filed by or on behalf of a person claiming to have been the subject of an unlawful employment practice.

b. A charge of discrimination must be filed within 180 days of the claimed discriminatory act in order to be actionable.

(1) The period is extended to 300 days if the unlawful employment practice occurs in a state which has a state agency charged with the responsibility of investigating charges of discrimination.

(2) If the charge is not filed within the applicable time period, the charging party is barred from pursuing the discrimination claim, unless there are facts or circumstances that have occurred that cause the period to be tolled or extended.

c. After a charge has been filed, the EEOC conducts an investigation to determine whether the charge has merit.

(1) The first step in this investigation begins with a request that the employer provide certain information to the EEOC.

(2) The second step in the EEOC's investigation is the holding of a fact-finding conference which is attended by the charging party and representatives of the employer.

(a) The purpose of this conference is to gather the facts, narrow the disputed issues, and explore possibility of settling the charge on a "no-fault" basis.

(b) The employer should always attend this conference.

(c) The fact-finding conference provides a forum for early discovery of the charging party's claims at a time when the individual is probably not represented by an attorney. Many times the charging party does not understand the necessary elements to establish discrimination and will make damaging statements.

(3) Charges which are not settled and which are not the subject of a "cause/no cause" determination immediately following the fact-finding conference are sent to continuing investigation where additional information is usually sought.

d. If the EEOC makes a "cause" determination, finds that it finds reasonable cause to believe that an unlawful employment practice was committed, the EEOC attempts to eliminate the unlawful employment practice by informal methods of conference, conciliation and persuasion.

(1) A proposed conciliation agreement is sent to the employer which includes a remedy to eliminate the unlawful practices, and to take appropriate affirmative action.

(2) If the employer is willing to conciliate, a face-to-face meeting between the employer and an EEOC conciliator takes place, and oral or written counter-proposals are exchanged.

(a) In the normal situation, the conciliator represents the interests of the charging party and the EEOC.

(b) If a conciliation agreement is reached, it is a tripartite agreement involving the EEOC, the charging party and the employer.

(c) If conciliation efforts fail, the EEOC can institute a lawsuit on behalf of the charging party or can issue a right-to-sue letter to the charging party in which event the charging party may institute the lawsuit on his or her own behalf.

e. In the event that the EEOC makes a "no cause" determination that there is not a basis for determination that an unlawful employment practice has been committed, the EEOC will issue a right-to-sue letter to the charging party, and the charging party may institute a lawsuit.

f. A lawsuit, whether filed by the EEOC or a charging party, is filed in the federal district court.

2. Retaliation.

a. It is unlawful for an employer to take any adverse employment action against an applicant or employee because they have filed a charge of discrimination with the EEOC, or protested a particular employment practice which she claims to be discriminatory.

b. Thus, once a charge is filed, the employer must use extra caution before taking any adverse employment action against the charging party to make sure that it is justified by legitimate, nondiscriminatory reasons.

1. Arbitration.

In January 2002, the U.S. Supreme Court decided that an agreement between an employer and an employee to submit employment claims through the alternative dispute resolution policy does not preclude litigation by the EEOC against the employer. EEOC v. Waffle House, Inc., 122 S.Ct. 754 (Jan. 15, 2002).

3. Title VII Litigation.

a. As noted above, the EEOC may institute suit on behalf of a charging party. If it does not, the charging party has 90 days after receipt of the right-to-sue letter within which to file a lawsuit in federal court.

b. The charging parry can file an individual lawsuit which simply litigates the alleged discrimination suffered by him or can file a class action claiming to represent a class of similarly aggrieved plaintiffs. If the charging party seeks to represent a class, a class certification hearing must be held to determine whether the class action requirements of Federal Rules of Civil Procedure, Rule 23 have been met.

c. The scope of any lawsuit, whether it be an individual action or a class action, is limited to the kind of discrimination charged in or related to the allegations in the EEOC charge and flowing out of the investigation of such allegations.

d. Under the Civil Rights Act of 1991, a Title VII plaintiff is entitled to a jury trial.

(1) In addition to back pay, front pay (in appropriate cases) or reinstatement, injunctive relief, reasonable attorneys' fees and court costs, where intentional discrimination is found, the employer may be ordered to pay compensatory relief for pain and suffering and punitive damages where a non-governmental employee is found to have acted with malice or reckless indifference to an individual's federally protected rights.

(2) At present, compensatory and punitive damages are capped according to the size of the employer:

Employer Size	Damage Cap
15-100 employees	$ 50,000
101-200	100,000
201-500	200,000
501+	300,000

(3) Employers are generally liable for punitive damages based on discriminatory employment decisions by high level managers. Employers may be immune from punitive damages arising from such decisions, however, if the high level manager's discriminatory decision, was contrary to the employer's good faith efforts to comply with Title VII by enforcing a non-discrimination policy.

e. In class actions, the courts may issue orders requiring hiring and promotion goals.

4. Calculation of Employer Size.

The U.S. Supreme Court adopted the "payroll method" for purposes of determining whether a company meets the 15-employee requirement to be covered by Title VII. Walters v. Metropolitan Educational Enterprises. Inc., 519 U.S. 202, 117 S. Ct. 660 (1997). Thus, the proper focus is on the number of workers on the payroll rather than those actually working on each day.

The U.S. Supreme Court unanimously rejected the "day-by-day" method, finding that it "would turn the coverage determination into an incredibly complex and expensive factual inquiry."

IV. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Prohibited Bases of Discrimination.

1. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. ("ADEA") makes it unlawful to discriminate against employees or job applicants on account of age if they are 40 years of age or older.

2. The ADEA prohibits discrimination against this protected age group with respect to hiring, termination and all terms and conditions of employment.

3. The ADEA prohibits discrimination between two persons both of whom are in the protected group. Thus, an employer cannot favor an employee or job applicant who is 45 years old over one who 50 years old where such preference is based on age.

4. The ADEA, does not, however, prohibit age discrimination directed to individuals who are younger than 40.

B. **Exceptions to ADEA Prohibitions.**

The ADEA permits an employer to differentiate between older and younger employees in six situations:

1. The ADEA permits differentiation based on age where age is a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business."

   a. Courts generally construe exceptions such as this one very narrowly, and it is difficult to establish age was a BFOQ.

   b. Some examples mentioned in the regulations of possible BFOQs are where federal laws and regulations set compulsory age limits for hiring or retirement, such as the regulations requiring airline pilots to retire at age 60, and where someone is hired to advertise or promote a product designed for either youthful or elderly consumers.

   c. In addition, some courts have found a BFOQ to exist where there is a high degree of risk to human life (such as in the case of driving a bus), coupled with an inability to measure an individual's functional, as distinguished from chronological age.

   d. Caveat: The EEOC takes the position that the ADEA requires an employer who has disqualified an employee from a job based on age-BFOQ to give that employee the same employment options as other employees disqualified for non-age-related reason.

2. The ADEA permits an employer to differentiate between employees when such differentiation is based upon reasonable factors other than age.

   a. For example, an employer may establish physical fitness requirements for a job and then hire or promote an individual based upon the

results of a physical examination, so long as the fitness requirements are reasonably necessary for the work and are applied equally to all applicants, regardless of age.

b. An employer, however, cannot assume that everyone over a certain age is unable to perform the duties of a particular job. Even if the employer's records show that no 60-year-old employee has ever been able to do a particular job, the safe course is to examine every person individually to see whether he or she in fact does meet the fitness standards for the job.

c. Under this exemption, an employer may also differentiate between employees based upon such factors as the quality of their work, educational level, or performance on a validated test, where such factors are related to job requirements and are applied uniformly to all employees.

d. However, an employer typically cannot differentiate between employees just because it costs the employer more to employ older workers, such as where the employer must pay a higher insurance premium for coverage of older employees.

3. Indeed, while the U.S. Supreme Court held that disparate impact claims are cognizable under the ADEA, the language of the statute expressly permits employers to utilize reasonable factors other than age as grounds for employment-related decisions that may differentially impact members of the protected class (over 40 years of age). As a result, it is much easier for an employer to defend a disparate impact claim under the ADEA than under Title VII.

4. The ADEA permits an employer to discharge or discipline an employee for good cause such as serious misconduct, poor quality of work, or excessive absenteeism or tardiness. Where the employee to be disciplined is in the protected age group, the employer must be especially careful to establish a record of the facts and circumstances leading to the disciplinary action.

5. The ADEA permits the employer to observe the terms of a bona fide seniority system so long as such system is not intended to evade the purposes of the ADEA.

In order to be bona fide, a seniority system:

a. must be based on length of service as the primary criterion;

b. must not give lesser rights or less favored treatment to those with longer service;

c. must not have the effect of continuing age discrimination which may have existed before the effective date of the ADEA; and

d. The essential terms and conditions of the seniority plan must be communicated to employees and applied uniformly, regardless of age.

6. The ADEA permits the employer to observe the terms of a bona fide employee benefit plan, such as a retirement, pension or insurance plan, so long as such plan is not a subterfuge for age discrimination in other aspects of the employment relationship.

a. The terms of such a plan, however, may not be used to excuse the failure to hire any individual or to require or permit the involuntary retirement of any individual because of his age.

b. Moreover, the Older Workers Benefit Protection Act amends the ADEA to require that an employer provide the same benefits to older workers as younger workers, or show that the cost of providing reduced benefits to older workers is at least as great as the cost of providing standard benefits to younger workers.

c. The rules covering benefit plans are extremely complex and also have implications under the Employee Retirement Income Security Act and the Internal Revenue Code. Thus, it is vital to consult with counsel to ensure that a company's plans comply with all applicable regulations.

7. While the ADEA prohibits mandatory retirement, there is one relevant exception for bona fide executives or high level policymakers who have an annual retirement benefit which equals at least $44,000. Such individuals may be retired at age 65. However, this exception has been construed very narrowly by the courts.

C. **Advertising Practices.**

The ADEA prohibits certain advertising practices which indicate any preference based on age.

1. Thus, the applicable regulations make it unlawful to post or publish a help wanted notice or advertisement which contains a phrase such as "age 25 to 35," "young," "boy," "girl," "college student," "recent college graduate," or even "age 40 to 50," "age over 65," and "retired person."

2. While the courts have been more flexible in this area than the regulations, it is not worth the risk of a lawsuit to use such language in a help wanted ad.

3. It is permissible to state certain educational requirements such as "college graduate" and to specify a minimum age less than 40, such as "not under 21."

D. **Retaliation.**

Like Title VII, the ADEA prohibits retaliation against an individual for filing a charge or opposing any practice made unlawful by the statute.

E. **Record-Keeping Requirements Under the ADEA.**

The regulations concerning the record-keeping requirements under the ADEA do not require any particular form for keeping records, but only that certain types of information be kept on file for a certain number of years.

1. The regulations require an employer to keep for three years records for each of its employees which contain the name, address, date of birth, occupation, rate of pay, and weekly compensation of each employee.

2. The regulations also require an employer to keep for one year from the date of the personnel action to which the records relate, records relating to:

   a. job applications, resumes and other inquiries submitted to the employer in response to a help wanted ad or notice of job opening, including records relating to the failure to hire any individual;

   b. promotion, demotion, transfer, selection for training, layoff, recall, or discharge;

   c. job orders submitted by the employer to an employment agency or labor organization to recruit personnel for job openings;

   d. test papers completed by applicants and test results considered by the employer in connection with any personnel action; and

   e. advertisements and notices relating to job openings, promotions, training programs, and opportunities for overtime work.

3. In addition, the employer must keep on file any employee benefit plans, as well as copies of seniority systems and merit systems which are in writing, for the full period the plan or system is in effect, and for at least one year after its termination.

4. Application forms and preemployment records of applicants for temporary positions must be kept for 90 days from the date of the action to which the record relates.

F. **Litigation Under the ADEA.**

1. The EEOC enforces the ADEA and may itself bring suit in federal court. If the EEOC elects to sue, the aggrieved individual is precluded from filing suit. If the EEOC does not sue on the individual's behalf, an aggrieved person may file suit.

2. There are several procedural requirements which must be satisfied before a suit is brought.

   a. Any lawsuit under the ADEA must be brought within two years of the alleged violation, or within three years if a "willful" violation is alleged.

   b. The statute does not define a "willful" violation; the courts have held that willfulness requires bad faith evasion of the law or intentional, knowing, and voluntary conduct.

   c. Aggrieved parties cannot bring a civil action until 6O days after a charge alleging unlawful discrimination has been filed with the EEOC.

   d. This charge must be filed within 180 days after the alleged unlawful act occurred, but if there is a state law prohibiting age discrimination, the charge must be filed within 300 days after the alleged unlawful act, or within 30 days after termination of the state proceedings, whichever is earlier.

3. Upon receiving the charge, the EEOC will attempt to eliminate the alleged unlawful practice informally by means of conciliation, conference, and persuasion.

4. If the plaintiff is successful in an action under the ADEA, the law authorizes the courts to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of this Act."

   a. A court can compel employment, reinstatement, or promotion.

b. It can grant back pay which the plaintiff would have earned had the unlawful act not occurred.

c. Liquidated damages in an amount equal to the back pay awarded may be granted in cases of willful violations.

d. Punitive damages are not available.

e. Most cases considering the issue have held that compensatory damages for mental distress or pain and suffering are not recoverable.

f. A successful plaintiff may also recover his or her attorneys' fees and costs from the losing party.

G. **Older Workers' Benefit Protection Act.**

On October 16, 1990, President Bush signed into law the Older Workers Benefit Protection Act (the "Act"), also known as the "Betts Bill" because it was designed to overturn the 1989 United States Supreme Court's decision in Public Employee Retirement System of Ohio v. Betts. The Act makes substantial modifications to the ADEA. These modifications significantly impacted employee benefit plans and waivers of employee rights and claims under the ADEA.

1. The Betts Decision.

a. In Betts, the United States Supreme Court faced a challenge to Ohio's public employee pension plan which allowed employees who became disabled prior to the age 60 to retire with significant disability retirement benefits, but limited those employees who became disabled after the age of 60 to normal retirement benefits. In many cases, the normal retirement benefits were substantially less than disability retirement benefits.

b. The Supreme Court held that this provision was lawful under Section 4(f)(2) of the ADEA, which, the Court held, permits discrimination based on age where an employer follows the terms of a bona fide employee benefit plan that was not a subterfuge for age discrimination.

c. The Supreme Court's Betts decision thus paved the path for widespread age based distinctions in employee benefit plans. The Act places a major road block in that path.

2. The Impact of the Older Workers Benefit Protection Act.

a. Employee Benefit Plans -- Significant Prohibitions Against Age Discrimination and Regulation of Benefit Plan Contents.

The Act creates a new Section 4(f)(2) of the ADEA to replace the one interpreted in Betts. New Section 4(f)(2) as well as other new sections are designed to insure equality of treatment between older and younger workers under employee benefits plans.

(1) First, the Act adopts the EEOC's equal cost regulations which the Supreme Court had rejected in Betts.

(a) Under these regulations, an employer must provide the same benefits to older workers as younger workers, or show that the cost of providing reduced benefits to older workers is at least as great as the cost of standard benefits to younger workers. Cost comparisons are made on the basis of five-year age brackets.

For example, if an employer provides reduced life insurance benefits to employees beginning at age 60, the employer must show that the premium cost of such insurance for employees age 60-64 is equal to or greater than the premium cost for employees age 55-59.

(b) The EEOC's regulations also contain other technical restrictions on the reduction of benefit for older workers.

(c) In any action challenging the payment of lesser benefits to older workers, the employer will bear the burden of proving the equal cost defense. Obviously, any employer with a benefit plan that provides reduced benefits to older workers should consult immediately with its insurer and/or actuary to make certain that there is a cost justification for such reductions.

(2) Second, the Act specifically authorizes voluntary early retirement incentive programs, but only so long as those programs are consistent with the ADEA's purpose, i.e., are not

used as a subterfuge for discrimination against older workers, or to effect mandatory retirement at any particular age.

(3) Third, the Act permits retirement plans to continue to have a minimum age for normal or early retirement benefits, and allows defined benefit pension plans to continue to subsidize early retirement benefits or supplement retirement benefits or supplement retirement benefits until employees qualify for Social Security benefits.

(4) Fourth, the Act significantly affects severance pay benefit plans.

(a) Under Betts, an employer could have a severance pay plan that provided no severance benefits to employees who were eligible for retirement benefits. That is no longer true.

(b) Under the Act, employers are not permitted to refuse severance benefits merely because an employee is eligible for retirement when an event triggering severance occurs. The only exception is that an employer is allowed to deduct from severance payments (a) certain amounts that a pension-eligible employee actually receives in retiree health benefits and (b) the value of certain early retirement benefits.

(c) However, the retiree health benefit deduction is subject to certain limitations and restrictions. Moreover, where a deduction is made and the employee fails to receive the retiree health benefits the employer promised, the Act allows the employee, in addition to any other legal remedies available, to bring suit for specific performance of the obligation to provide retiree health benefits.

(d) In addition, to be able to offset early retirement against severance payments, (a) the pension benefits must be made available as a result of a contingent event not related to age, e.g., upon the sale of a business or the closure of a facility, and (b) the employee must be eligible for an immediate and nonreduced pension,

(5) Fifth, an employer may maintain a long term disability plan that allows long term disability benefits to be reduced by (a) pension benefits that an employee voluntarily elects to receive and (b) payments for which. an employee who has attained the later of age 62 or normal retirement age is eligible to receive.

(6) Sixth, the Supreme Court in Betts, had made it clear that a seniority system or employee benefit plan put into effect prior to the effective date of the ADEA could not be a "subterfuge" designed to avoid the purpose of the ADEA. Thus, any discrimination that was a part of an employee benefit plan or seniority system instituted prior to the ADEA's effective date could be maintained by an employer without fear of violation of the ADEA. Congress in passing the Act overturned this exception by providing in the Act that "a seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan."

b. Waiver of ADEA Claims.

In enacting the Betts bill, Congress did more than overturn the Betts decision. It also clarified what had been a very murky area: the procedural requirements applicable to valid waivers of employee rights under the ADEA.

The Act, provides that an individual may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary. Under the Act, a waiver is not considered to be knowing and voluntary unless it satisfies the following minimal procedural standards:

(1) The waiver must be in writing, and it must be written in such a way that it is calculated to be understood by the individual to whom it applies. Where the waiver is part of a benefit package or program applicable to more than one employee, it must be in writing, and calculated to be understood by the average individual eligible to participate.

(2) The waiver must specifically refer to rights or claims arising under the ADEA.

(3) The waiver may not require employees to waive rights or claims that may occur after the date the waiver is executed.

(4) The waiver must be contractually valid, i.e., the employee must receive valuable consideration for the waiver in addition to any benefits or amounts to which the employee was already entitled to receive.

(5) The employee must be advised in writing to consult with an attorney prior to signing the agreement containing the waiver.

(6) The employee must be given a period of at least 21 days within which to consider the waiver. Alternatively, if the waiver is requested in connection with a termination or severance program offered to a group or class of employees, each employee must be given at least 45 days within which to consider the waiver.

(7) The waiver must be part of an agreement that is revocable for at least seven days following the employee's signing of the agreement, and the waiver will not become effective or enforceable until the seven day period has expired.

(8) Where the waiver is requested in connection with a termination or severance program offered to a group or class of employees, the employer at the outset of the 45-day waiting period must inform each eligible employee in writing of (a) the class of employees who are eligible, the specific eligibility requirements for participation in the program, and any applicable time limits on participation, and (b) the job titles and ages of all employees eligible or selected for the program, and the ages of all employees in the same job classification or organizational unit who are not eligible or selected. The courts are quite strict with these requirements, and legal counsel should be involved in determining the proper names to be included on the employee list.

The sum and substance of these requirements is that any employee who is asked to waive ADEA rights will be advised of the possibility that he or she may wish to forego any benefits from the employer and sue instead. In addition, where a class of employees is being asked to waive rights, the employer must give each member of the class "free discovery" as to the impact of the program on older workers. Where a charge of age discrimination has been filed with the EEOC, or a lawsuit has been commenced, the waiver requirements are somewhat relaxed. Under those

circumstances, a waiver is considered voluntary and knowing if, at a minimum, in addition to satisfying only points 1-5 above, the employee or former employee has been given "a reasonable period of time" within which to consider the waiver agreement. That reasonable period, of course, conceivably could be less than 21 days.

V. EQUAL PAY ACT

A. Statutory Requirements.

Sex-based discrimination in rates of pay to employees, whether male or female, is prohibited by the Equal Pay Act of 1963, 29 U.S.C. § 206(d). The Equal Pay Act was enacted as § 6(d) of the Fair Labor Standards Act, 29 U.S.C. § 206(d) ("FLSA").

1. Specifically, the Act provides that there may be no discrimination in rates of pay between the sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

2. The Equal Pay Act, however, specifically permits differences in wages if paid pursuant to "(i) a seniority system, (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex."

B. Coverage.

In determining whether equal wages are being paid for substantially similar work, the wages of employees at a "district physical place of business," rather than an entire business or enterprise, are compared. Thus, if an employer has two separate facilities at distinct locations which are not an integrated operation, the wages at the first location will not be compared to the wages at the second location.

1. In determining whether jobs involve equal skill, effort, and responsibility, courts consider such factors as experience, training, education, ability, and duties. Jobs do not entail equal skill, effort, or responsibilities, even though they entail most of the same routine duties, if the more highly paid job involves additional tasks which require extra effort, consume a significant amount of the time, and are of an economic value commensurate with the pay differential. In determining whether jobs are performed under similar working conditions, "surroundings" and "hazards" are generally the factors considered.

2. As is clear from the above, the tests under the Equal Pay Act of "equal pay for equal work" turns upon the particular facts in each case. However, once

the jobs are analyzed and it is established that there is a pay differential between two jobs requiring substantially equal work, the employer must prove one of the statutory defenses.

C. **Administrative Enforcement.**

The administrative responsibility for enforcing the Equal Pay Act bas been delegated to the EEOC. The EEOC is entitled to enter an employer's premises and to examine any records which employers are required to keep under the FLSA. Such records, recording wages, hours and related information, must be made and preserved for up to three years.

D. **Judicial Enforcement.**

1. Section 16(a) of the FLSA, which is incorporated into the Equal Pay Act, provides that a criminal complaint can be filed against any person who willfully violates the Act. A person who is convicted can be subject to a fine of not more than $10,000, or to imprisonment for not more than 6 months, or both.

2. Section 16(b) authorizes employees to bring suit for back pay in state or federal court on behalf of themselves and other employees similarly situated who consent in writing to become a party to the lawsuit.

   a. This private right of action, however, terminates when the EEOC files an action seeking back pay for the private complaint.

   b. The EEOC is authorized under Section 16(c) to sue for wages due employees, and under Section 17 to seek injunctive relief against withholding wages found by the court to be due to employees.

3. If an employer is found in violation of the Equal Pay Act, a court can order both legal and equitable relief, including but not limited to reinstatement, promotion, payment of back pay, and an additional equal amount as liquidated damages.

   a. The court, however, may in its discretion deny liquidated damages, in whole or in part, if the employer acted in "good faith" and had "reasonable grounds for believing" that no violation of the FLSA was occurring.

   b. Furthermore, a successful employee can recover his reasonable attorneys' fee and court costs.

4. Any action not commenced within two years after the cause of action accrues is barred, except that suits for willful violations may be commenced up to three years after the causes of action accrue.

E. **Comparable Worth Theory.**

In the past, the EEOC considered embracing a new theory in the equal pay area--"equal pay for jobs of comparable worth."

1. The regulatory agencies and various women's and plaintiff's groups pushed for the adoption of this theory on the basis that an earnings gap between men and women exists in the United States and that women are segregated into lower paying jobs.

2. The comparable worth theory is grounded on the argument that whole groups of jobs are undervalued because they are traditionally held by women. This undervaluation results in lower wages and, it is argued, amounts to sex discrimination under Title VII and the Equal Pay Act.

3. The comparable worth theory advocates that jobs be evaluated for purposes of compensation based on their overall contribution or worth to the employer.
4. This theory does not consider the availability of qualified individuals to perform jobs as a factor in determining compensation.

5. At the present time this theory has not been accepted by any federal appellate court, but some state statutes do embrace this concept for state government positions.

VI. THE CIVIL RIGHTS ACTS OF 1866 AND 1871

A. **Introduction.**

The Civil Rights Acts of 1866 and 1871, 42 U.S. C. §§ 1981, 1983, 1985, and 1986, were enacted shortly after the Civil War in order to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments to the U. S. Constitution. In recent years these Acts have been used as an independent remedy against employment discrimination. Although the Civil Rights Acts reach few areas not covered by Title VII, a plaintiff may choose to bring an action based on the Acts in order to avoid some of the procedural requirements of Title VII or to seek additional remedies, such as unlimited compensatory and punitive damages (such damages capped under Title VII).

B. **The Civil Rights Act of 1866.**

42 U.S.C. § 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right *** to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

This statute provides a federal remedy against racial discrimination in private employment, but the statute does not apply to discrimination based upon sex.

C. **The Civil Rights Act of 1871.**

42 U.S.C. § 1983 requires governmental involvement, or "'state action" in the alleged unlawful practice and thus is rarely used against a private employer.

42 U.S.C. § 1985 provides a cause of action where two or more persons conspire to deprive any person of equal protection and equal privileges, under the law. 42 U.S.C. § 1986 provides a cause of action against any person who has knowledge of such an unlawful conspiracy and does nothing to prevent it when it is within his power to do so.

1. Although there has not been much employment discrimination litigation under §§ 1985 and 1986, it is clear that these sections apply to discrimination by a private employer based on race.

2. In any event, the possibility of a §1985 action being brought against a corporate employer is remote since the general rule is that a corporation cannot conspire with itself. It the challenged conduct is essentially a single act by a single company, the fact that two or more agents of the company participated in the decision will not make the action into a conspiracy.

3. Of course, two separate entities, such as an employer and a union, may be jointly responsible for a discriminatory practice and may both be sued under § 1985.

VII. AMERICANS WITH DISABILITIES ACT (ADA) & AND THE ADA AMENDMENTS ACT (ADAAA)

A. Scope.

The ADA prohibits employment, transportation and accommodation discrimination against individuals with disabilities. The protections provided to disabled Americans under the ADA are similar to those protected under civil rights legislation protecting against discrimination on the basis of race, color, sex, national origin, religion and age. The ADA, however, does not preempt other state or federal legislation that provides greater or equal protection to Americans with disabilities. The ADA applies to employers engaged in an industry affecting commerce who have 15 or more employees.

Effective January 1, 2009, in response to several U.S. Supreme Court decisions that it felt limited the scope of the ADA, Congress enacted the ADA Amendments Act (ADAAA), which broadened the definition of "disability" under the ADA. The ADAAA does not, however, affect the legal obligation to "reasonably accommodate" a disability.

B. Definitions.

1. Disability.

The Act defines disability in three broad categories: (1) a physical or mental impairment that substantially limits one or more of an individual's major life activities, such as caring for oneself, performing manual tasks, walking. working, learning, breathing, speaking, hearing or seeing; (2) having a record of such impairment; (3) being regarded by the employer as having such an impairment.

a. What qualifies as an impairment?

(1) A physical or mental "impairment" includes any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems. It also includes any mental or psychological disorder.

(2) Examples of things that do not qualify as impairment include: cultural or environmental disadvantage (such as never being taught to read), physical characteristics such as left-handedness, eye color, or height or weight that are within the normal range and are not the result of a physiological

disorder, pregnancy; characteristic predisposition to illness or disease.

b. Does the impairment "substantially limit" a major life activity?

(1) What does "substantially limits" mean?

(a) "Substantially limits" used to mean either the total inability or a severe restriction on the ability to perform a major life activity as compared to the general population.

(b) The ADAA changes the interpretation of this definition of disability in the following ways:

(c) Previously, if an employee's medication or treatment helped so much that the employee was not substantially limited in a major life activity (such as epilepsy medication that keeps seizures at bay), the employee was not disabled. Now, employers must determine whether the employee is substantially limited without regard to medication or other mitigating measures (except for ordinary eyeglasses or contact lenses).

(d) The ADAA also broadened the incredibly strict interpretation of "substantially limited," which previously meant the impairment prevents or severely restricts the employee from performing activities of central importance to most people's daily lives. It is not entirely clear how the standard has changed, except that the courts are instructed to err on the side of holding that the employee has a disability.

(2) What is a "major life activity?"

(a) A condition that impedes the performance of one, or even a few, jobs does not limit a major life activity.

(b) An individual typically is found to be substantially limited in working if he is restricted in the ability to perform either an entire class of jobs or a broad range of jobs in various classes.

(c) Other "major life activities include things such as walking, breathing, hearing, seeing, caring for oneself, and even reproduction.

(d) Under the ADAAA, the list of "major life activities" has been broadened to include eating, sleeping, standing, lifting, bending, reading, thinking, concentrating, communicating, and the operation of "major bodily functions" (e.g., the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions).

2. Qualified Individuals.

The ADA seeks to ensure that "qualified individuals" are not denied job opportunities because of their disability. A qualified individual is a person who, "with or without reasonable accommodation, can perform the essential functions" of the job that the person currently holds or is seeking.

a. This definition requires an assessment of whether the person is qualified to do the job, even if reasonable accommodation is necessary.

b. Although the employer is still free to select the most qualified applicant for the job, the employer can not take into account the existence or consequences of the disability of a qualified individual when making the employment decision.

c. The fact that an individual has claimed to be totally disabled in order to receive state or federal disability benefits does not prevent that individual from claiming to be qualified for a particular job. Although an individual who has claimed to be totally disabled is not completely barred from also claiming to be qualified for a particular job, an individual making such a claim must explain why they were totally disabled for the purposes of received disability benefits but were nonetheless qualified for the job at issue,

3. Reasonable Accommodation.

Employers are required to make reasonable accommodation for qualified persons, so long as they can do so without incurring significant difficulty or expense. What constitutes "reasonable accommodation" is decided on a case by case basis.

a. The hardship that accommodation will cause the employer is taken into consideration. Undue hardship exists when any action taken by the employer to accommodate a qualified individual would impose significant difficulty or expense on the operation of the business in light of four factors:

(1) the nature and cost of the accommodation;
(2) the overall financial resources of the facility;
(3) the overall financial resources of the employer; and
(4) The type of operation that the employer is running.

b. Under the ADA, if a determination is made that an accommodation would cause undue hardship to the employer, the employer may still be required to pay for that portion of the accommodation which would not cause undue hardship.

c. Examples: What is a reasonable accommodation?

(1) Reallocation of job functions: An employer generally is not required to eliminate or reassign essential job functions, fundamentally alter the nature of a job or create a new position to reasonably accommodate a disabled employee.

(2) Light-duty work: An employer often put an injured employee on a light-duty assignment on a temporary basis. The ADA does not, however, require the employer to convert a temporary light-duty job into a permanent one. Thus, employers are not in violation of the ADEA when they refuse to allow a disabled employee to remain in a temporary light-duty job.

(3) Work at home: While generally, an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home, the key to the analysis is the nature of the employee's essential job functions, Most jobs involve team work under supervision, personal contact and coordination with colleagues, and working under time restraints – all of which require employees to work on site. Employers, however, should explore the possibility of restructuring an employee's job to allow him to work at home, it may be considered a "reasonable accommodation" in certain situations.

(4) Leaves of absence: Reasonable accommodations include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. An employer may have an obligation to provide a leave beyond that permitted under its existing leave policy or required under another statute, as long as the leave does not create an undue hardship.

While an employer may be required to provide leave of absence as a reasonable accommodation, the length of leave is not at all certain. A number of courts have held that an indefinite leave of absence may be unreasonable and may constitute an undue hardship for an employer under the ADA. Further, excessive absenteeism may preclude an employee's status as "otherwise qualified" to do the job.

(5) Returning to work following a leave:

(a) Under the ADA, an employee may be entitled to return to the identical position unless holding the job open would constitute, an undue hardship for the employer. A request to return to work can be denied if the employee is unable to perform the job with or without accommodation.

(b) An employer may be required, however, to accommodate an employee returning from leave with intermittent leave and flexible work schedules. The ADA also requires that an employer must transfer an incumbent "qualified individual with a disability" to a vacant, equivalent position.

(6) Exclusion from seniority system: If an established seniority system is in place, pursuant to a collective bargaining agreement, most courts have held that an employer is not required to accommodate a disabled employee and place him in a position to which other employees are entitled via the seniority system. If the seniority system is not memorialized in a collective bargaining agreement, but is a matter of company policy, the employer may have an obligation to accommodate a disabled employee by placing him in a position over a more senior coworker. Federal courts have issued conflicting decisions, but as a general rule, a company (non collective bargaining agreement) seniority system may

be considered as a factor in the reasonable accommodation analysis.

(7) Modified training: Under some circumstances, employer may be required to provide modified training materials or a temporary "job coach" as a reasonable accommodation. A permanent job coach, however, may not be reasonable accommodation.

4. Regarded As Claims. Employees who are not actually disabled may sue under the ADA if they can prove that they were "regarded as" having a disability by the employer. Under the ADAAA, individuals bringing "regarded as" claims need only show that they were subjected to an action prohibited by the ADA because of an actual or perceived impairment, regardless of whether the impairment was perceived to "substantially limit" them in a major life activity. Employers need not, however, reasonably accommodate employees regarded as disabled.

C. **Prohibitions.**

1. Discrimination.

a. The ADA prohibits an employer from discriminating against a qualified individual in regard to application procedures, hiring, firing, advancement, compensation, job training or other terms, conditions, and privileges of employment. This includes failure to make reasonable accommodations as discussed above.

b. The ADA prohibits an employer from using selection criteria, such as qualification standards and tests, which effectively screen out qualified individuals with disabilities unless the employer can show that the selection criteria is both job related and a business necessity. Even if the selection criteria satisfies these two standards, the employer must still show that it could not accommodate the qualified individual with a disability, without undue hardship.

2. AIDS and Addictions.

a. The ADA provides protection for both those who have AIDS and for those who test HIV-Positive.[2]

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[2] The U. S. Supreme Court held that individuals suffering from asymptomatic HIV infection also are protected by the ADA.

(1) However, the Act does allow employers to deny jobs or benefits when the employer can show that those with AIDS or HIV-positive results pose a direct threat to the health and safety of other individuals in the work place.

(2) A "direct threat" means a significant risk of transmitting the infection to others in the work place that cannot be reduced by a reasonable accommodation.

(3) An employee who seeks an accommodation based on having the HIV virus could be compelled to take a medical examination to confirm the presence of the virus.

b. The ADA does not protect individuals who are current illicit drug users. However, rehabilitated individuals or those who have been through a supervised rehabilitation program and are not currently using drugs are covered by the act. The ADA allows the employer to require that all his employees be drug and alcohol free while at the work site, including the use of drug testing. The employer can hold all employees to the same standard of performance regardless of the employees' drug or alcohol use.

3. Pre-employment Inquiries.

a. While the ADA prohibits an employer to inquire whether the applicant has a disability, the employer can make inquiries into the job-related abilities of the applicant.

b. Employers can also require post-offer/pre-acceptance medical examination of each applicant. However, the employer must take steps to ensure all results of such an examination are kept confidential. Furthermore, if the employer requires one applicant to take a physical, it must require all applicants to the same physical.

4. Benefits.

The ADA also prohibits an employer from discriminating against a qualified individual with a disability with respect to employment benefits.

D. **Defenses.**

Employers must show that qualification standards, tests or selection criterion that screen out qualified individuals with disabilities are both job related and justified by a business necessity.

E. **Remedies.**

Remedies under ADA are the same as for Title VII. Thus an aggrieved applicant or employee could be awarded injunctive relief, back pay, front pay and/or reinstatement, attorneys' fees and compensatory and punitive damages, according to the damage caps.

F. **Enforcement and Posting Requirements.**

The EEOC has been given primary responsibility for enforcing the ADA. Employers are required to clearly post in a conspicuous place a notice which clearly describes the provisions of the act. The EEOC has issued a multi-volume technical assistance manual for employers

VIII. REHABILITATION ACT

A. **Coverage.**

Both the United States government and a majority of state governments have enacted laws prohibiting discrimination in employment against the physically and/or mentally disabled. The federal law, the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., applies to federal government contractors with contracts in excess of $10,000 or more.

B. **The Definition of "Disabled."**

Simply stated, as defined in the Rehabilitation Act and interpreting government regulations issued by the Office of Federal Contract Compliance Programs ("OFCCP"), the government agency that enforces the Act, "disabled" people are people who have "physical or mental impairment that substantially limits one or more of such person's major life activities."

1. The term includes such people as people confined to wheel chairs, amputees, the blind, the deaf, etc.

2. It also includes, however, a vast multitude of people who additionally have not been thought of as disabled – people with heart conditions, back problems, diseases such as epilepsy or AIDS, even alcoholics and drug addicts except in certain situations, those currently using alcohol or illegal drugs.

3. Therefore, the safest course for a government contractor to follow when it wishes to base an employment decision on a physical or mental condition is to assume that the applicant or employee is disabled, and entitled to the protection of the Rehabilitation Act.

C. Requirements of the Rehabilitation Act.

1. Obligation Not to Discriminate.

By entering into a government contract for $10,000 or more, a federal government contractor agrees not to discriminate against qualified applicants or employees with disabilities. Qualified individuals with a disability are those that can perform a job with "reasonable accommodation" to their disability. The commitment means that a government contractor cannot refuse to hire or promote someone or pay the person lesser benefits, or otherwise treat him differently than other applicants or employees, simply because he is disabled. There are only two recognized exceptions to this general rule of non-discrimination.

a. First, a government contractor is only forbidden from discriminating against qualified individuals with a disability. Thus, where an applicant or employee's physical or mental condition renders it impossible for him to satisfy the requisite essential functions of the specific position for which he has applied or occupies, the government contractor need not hire or retain him.

As an example, a government contractor would not have to hire a blind person to test drive cars, because that person obviously could not drive. On the other hand, a government contractor would have to hire a blind person for a position where his blindness did not affect his ability to perform the position.

b. Second, a government contractor need not hire an individual whose physical or mental condition renders it impossible for her to perform the duties of the specific position applied for without significantly risking substantial harm to himself or others. Such an employee also is not qualified to occupy that position.

As an example, a government contractor would not have to hire an epileptic, who is subject to seizures, for a job on an assembly line where she would be operating an overhead crane. The reason is that if the epileptic had a seizure while operating the crane, she might cause parts to drop from the crane and injure other employees. The

government contractor might, however, be required to hire the epileptic for a position where a seizure would not endanger other employees.

c. To date, the single most common problem that government contractors have experienced in terms of their obligation not to discriminate has been with applicants who have physical conditions, especially back problems or heart conditions, that make hiring them risky for both the contractor and the applicants themselves because their performance of their job is likely to cause further deterioration of their conditions.

(1) Most employers have traditionally declined to hire an applicant whose physical condition might be adversely affected by performing the duties of a job.

(2) The OFCCP's present position is that a government contractor may consider only an applicant's present ability to perform the essential functions of the job safely without posing a "direct threat" to himself or to other employees. A government contractor cannot refuse to hire an applicant solely because his or her physical condition is likely to be aggravated, even if irreparably, by performing the duties of the job. This position may ultimately be reversed by the courts. If it is, it would add a third exception to the "no discrimination" rule discussed above.

2. Obligation To Take Affirmative Action.

In addition to being forbidden to discriminate against handicapped applicants and employees, government contractors are required to take "affirmative action" to employ and advance in employment qualified disabled persons.

a. This means that the government contractors must do more than hire those qualified handicapped persons who come to them. They must actively go out and seek disabled persons to apply for jobs with them.

b. For example, they must contact employment services that specifically refer disabled persons, educational institutions that serve the disabled, and similar recruitment sources.

3. Obligation To Develop Written Affirmative Action Programs.

Those government contractors who employ 50 or more people and have a contract of $50,000 or more must develop a written affirmative action program concerning employment of the disabled for each of their establishments.

An affirmative action program in the disabled area consists primarily of a description of the contractor's affirmative action policy, reviews of the personnel process and physical and medical qualification standards, external dissemination of policies, outreach and positive recruitment, safeguards against harassment, audit and reporting procedures, training of management and hiring personnel, and an official responsible for program implementation.

2. The Obligation To Make Reasonable Accommodation.

Under federal law, a government contractor is obliged not to discriminate against qualified disabled applicants and employees. Qualified disabled applicants and employees are those who can perform the duties of the position applied for or occupied with "reasonable accommodation" to their disability. It is the government contractor's obligation to make such reasonable accommodations as it can to enable disabled applicants and employees to perform jobs for which they could not otherwise qualify. In other words, whenever a disabled applicant seeks a job for which he is not qualified, before a government contractor rejects him, it must ask itself whether there are any actions, i.e., accommodations, it can take that will qualify the applicant for the position.

A government contractor, however, is required to make only those accommodations that are reasonable.

a. A reasonable accommodation is one that imposes no undue hardship on the conduct of the government contractor's business.

b. In determining whether a hardship is undue, a contractor may consider the cost and difficulty of making the accommodation, the resultant impact of the accommodation on safety to other workers or the public, and the impact of making the accommodation on the business operations, functions or facility.

4. Employers Must Make Accommodations Only After Notice of Employee's Disability.

Traditional notions of agency law are used to impute the agent's knowledge to the employer. If an employee's physical condition constitutes a disability, the Employer is held to be on notice of that disability when the employee's supervisor becomes fully aware of the disability. A company's liability for

failure to reasonably accommodate an employee with a disability thus turns on the extent to which the supervisor was on notice of the severity of the employee's condition.

5. Enforcement and Remedies.

Any disabled applicant or employee who believes that a government contractor has violated its affirmative action obligations or its obligation not to discriminate may file a complaint with the OFCCP within 300 days of the alleged violation.

a. After giving the contractor a chance to resolve the complaint internally if the contractor has an internal review procedure, the Department of Labor ("DOL") will investigate the complaint.

b. If the investigator finds that a violation has occurred, the DOL must first attempt to remedy it by a process called "conciliation and persuasion. " In other words, it must try to negotiate a settlement of the complaint with the government contractor.

c. In a refusal to hire or discharge case, the DOL may well require the payment of back pay and hiring or reinstatement to the applicant or employee as part of the negotiated settlement.

d. If the complaint is not resolved through informal means, the DOL has a choice of going to federal court and suing the contractor for breach of its agreement not to discriminate against the disabled, or of holding an administrative hearing to determine whether the contractor has breached his obligations. The DOL now favors the latter alternative.

e. If an administrative hearing results in the DOL's administrative law judge finding that a violation of the Rehabilitation Act has occurred, the DOL can impose one of three sanctions:

(1) withhold payment under the contract to the contractor;

(2) cancel current government contracts; and

(3) "debar" the contractor, i.e., put it on a list of contractors with whom the government will refuse to do business in the future.

(4) Usually, where an individual complaint has led to the hearing, these sanctions will only be imposed if the contractor fails to

pay back pay to and reinstate or hire the applicant or employee.

f. Most courts thus far have held that disabled individuals, unlike members of racial minorities and women under Title VII and protected age group members under the ADEA, do not have the right to bring their own private federal court actions against government contractors under the Rehabilitation Act. These courts have held that a disabled person's only avenue to remedy violations of the Act is through the OFCCP and DOL.

EXECUTIVE ORDER 11246

A. **Coverage.**

1. Executive Order 11246, as issued in 1965 and as amended thereafter, requires that every government contract between the federal government and a contractor contain provisions against discrimination in employment, including, but not limited to, the following provisions:

   a. The contractor will not discriminate against employees or applicants because of race, color, religion, sex or national origin.

   b. The contractor will take affirmative action to insure that applicants and employees are employed without regard to such factors.

   c. The contractor will comply with all provisions of the Executive Order and the rules, regulations and order of the Secretary of Labor issued thereunder, including furnishing required information and reports.

   d. In the event of noncompliance by the contractor with the nondiscrimination clauses of the contract or with any such rules, regulations or orders, the contract may be canceled, terminated or suspended and the contractor may be declared ineligible for further government contracts.

   e. The contractor will include the same requirements in every subcontract or purchase order so that such provisions shall be binding upon each subcontractor or vendor.

   The Executive Order designates the Secretary of Labor as the responsible agent for administration of its requirements. The Secretary of Labor has in turn established the Office of Federal Contract Compliance Programs ("OFCCP") which has overall administrative responsibility for the program.

2. The OFCCP has issued specific rules and regulations which implement the provisions of the Executive Order. Such rules and regulations define a "government contract" broadly so that an employer is a government contractor if it does business with the federal government.

3. A "government subcontract" is broadly defined as any agreement between a government contractor and any person under which any portion of the contractor's obligations under the government contract is performed.

   For example, if pursuant to a contract with the Department of Interior to build a bridge, XYZ Company contracts with ABC Company to supply 10 trucks which will be used in the construction of the bridge, ABC Company would be a government subcontractor subject to the Executive Order and the OFCCP rules and regulations.

   a. The OFCCP rules and regulations exempt most federal contracts and subcontracts not exceeding $10,000, and contracts for work performed outside the United States by employees who are not recruited within the United States.

B. <u>Affirmative Action Obligation</u>.

The OFCCP places two additional obligations on a government contractor and subcontractor having 50 or more employees, and a contract or subcontract amounting to $50,000.

1. First, such federal contractor or subcontractor must file annually with the applicable federal contracting agency an EEO-1 Report, which provides a statistical breakdown of the contractor's or subcontractor's work force by ethnic group and sex.

2. Second, such federal contractor and subcontractor must develop a written affirmative action compliance program for each of its establishments. This written program must include at least the following:

   a. General language which essentially follows that set forth in the OFCCP rules and regulations.

   b. Work force analysis which breaks down the contractor's or subcontractor's work force in each department or line of progression by ethnic group and sex.

   c. Job group analysis which analyzes the ethnic breakdown and sexual breakdown of its work force by groups of jobs requiring similar skills

or having similar job content, wage rates and promotional opportunities.

d. Utilization analysis which requires the contractor or subcontractor to calculate the availability of minorities and females using an 8-factor analysis, and compares the availability statistics and the utilization statistics of minorities and women obtained through the job group analysis.

e. Minority and female goals and timetables by job group which is required where underutilization is found. Underutilization occurs any time the contractor or subcontractor's utilization of women and minorities in its work force is less than the availability statistics.

C. Enforcement.

1. The OFCCP is authorized to conduct so-called compliance reviews of a contractor's or subcontractor's compliance with the Executive Order. In conducting such an investigation, an Equal Opportunity Specialist ("EOS"), the OFCCP investigator, initially requests the written affirmative action program and supporting documentation which are reviewed. Thereafter, the EOS will conduct an "on site" investigation on the company's premises which may include an in-depth analysis of the company's employment practices and can entail interviews with employees.

2. Any deficiencies (noncompliance found by the EOS) should be submitted to the contractor or subcontractor in writing. The EOS thereafter attempts to conciliate the deficiencies by obtaining either a conciliation agreement or a letter of commitment from the contractor or subcontractor correcting the deficiencies. If conciliation fails, a show cause notice can be issued and an administrative complaint filed against the contractor or subcontractor.

   a. An administrative hearing before an administrative law judge is held concerning the alleged noncompliance by the contractor or subcontractor. After the hearing, the administrative law judge issues a recommended decision which is submitted to the Secretary of Labor for a final determination.

   b. If the contractor or subcontractor is found in noncompliance, it can appeal the OFCCP finding of noncompliance to the appropriate Federal District Court, and thereafter to the United States Court of Appeals. If the OFCCP's decision is upheld, or it is not appealed, the contractor or subcontractor is debarred from obtaining further government contracts or subcontracts.

3. The OFCCP rules and regulations provide that it can seek affected class back pay. An affected class is simply identifiable victims of discrimination.

   a. Back pay can be recovered for a period of two years if it is a non-willful violation, or three years for a willful violation.

   b. The OFCCP also takes the position that it can obtain back pay relief for any individual who has been discriminated against, whether or not the incident of discrimination is beyond the statute of limitations recognized under Title VII.

   c. In other words, the OFCCP specifically recognizes the present effects of past discrimination theory discussed earlier. The OFCCP publishes a compliance manual for federal contractors.

LABOR LAW--THE NATIONAL LABOR RELATIONS ACT

LABOR LAW - -THE NATIONAL LABOR RELATIONS ACT

LABOR RELATIONS AND LABOR UNIONS

A. A Brief Outline of Legislation.

1. The National Labor Relations Act ("NLRA" or the "Act") of 1935, also called the Wagner Act, is the original act regulating the relationship between employers and unions in the United States. The Wagner Act gave employees the right to organize, the right to bargain collectively, and the right to engage in concerted activities such as strikes and picketing. It also created the National Labor Relations Board ("NLRB"), a quasi-judicial body responsible for enforcing the Act.

2. The NLRA, as amended since 1935, is still the basic law governing employer-union relationships. It was amended in 1947 by the Labor Management Relations Act, also called the Taft-Hartley Act. The Taft-Hartley Act modified the original NLRA by restricting some union activity and guaranteeing certain freedoms of speech and conduct to employers and individual employees.

3. The most recent amendment to the NLRA was the Labor Management Reporting and Disclosure Act of 1959, known as the Landrum-Griffin Act. This amendment principally added regulations governing internal union affairs.

4. The Norris-LaGuardia Act, although not part of the NLRA, also deals with employer-union relationships. This act, passed in 1932, predates the NLRA. The Norris-LaGuardia Act prevents federal courts from issuing injunctions in labor disputes, except in certain carefully defined situations.

B. Outline of Statutory Provisions Under the National Labor Relations Act and Its Amendments.

1. Coverage.

   The provisions of the NLRA generally apply with respect to all employees, other than supervisors and managerial employees. Special rules apply to certain types of employees.

   For example, confidential employees are excluded from voting units in union representation elections. Professional employees have all of the rights prescribed for other employees under the NLRA and the additional right to determine whether they wish to be represented separately from

non-professional employees. Guards are entitled to organize but may not be included in a voting unit with other employees. Employee protections under the NLRA do not extend to independent contractors who, by definition, are not employees under the Act.

a. Independent Contractor.

An excluded independent contractor is distinguished from a covered employee by the amount of control exercised by the company contracting for the services. If the company contracting for the services controls only the result to be accomplished, an independent contractor status results. If, however, the party contracting for the services controls the means and manner by which the result will be accomplished, then an employer-employee relationship is established. All factors in the relationship will be weighed in making this determination. Typically, however, an independent contractor will have a substantial investment in the business, will perform services for more than one company, and will be paid on the basis of a fee rather than an hourly wage.

b. Supervisor.

A supervisor is defined by § 2(11) of the NLRA as an "individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." If an individual has the power to exercise any of the supervisory functions set forth in this section, he or she is classified as a supervisor even though most of the time is spent on other duties. To be distinguished from a supervisor is a "lead" person who does not have the powers noted above but who may serve as a conduit in the assignment of work from a supervisor to employees.

c. Managerial Employee.

A managerial employee is one who formulates and effectuates management policies and one who has discretion in the performance of job duties. A management trainee is an example of a managerial employee.

d. Confidential Employee.

A confidential employee is one who assists or acts in a confidential capacity to persons who formulate and effectuate management policies with respect to labor relations. For example, a secretary who performs confidential work involving labor relations for a personnel manager may be excluded as a confidential employee.

e. Guard.

A guard is defined in § 9(b) of the NLRA as "any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." An armed and uniformed individual employed at a plant entrance to enforce such rules typically would be a guard who would not be subject to inclusion in a voting unit which includes non-guard employees.

f. Professional Employees.

A professional employee is generally an individual whose work is predominantly intellectual and varied in character, involving the consistent exercise of discretion and judgment, and requiring knowledge of an advanced type customarily acquired by study in an institution of higher learning. Typical examples of professional employees would be doctors, engineers and lawyers.

2. Employee Rights.

a. Section 7 of the NLRA gives covered employees the right (i) to organize, form, join or assist labor organizations, (ii) to bargain with their employer collectively through representatives of their choosing, and (iii) to engage in other concerted activity, such as strikes and picketing, for the purpose of collective bargaining or mutual aid or protection. Section 7 also gives employees the equal right to refrain from concerted activities. Employees may not be discharged or otherwise discriminated against for exercising their § 7 rights.

b. Under § 7, employees have the right to act together with or without a labor organization. Therefore, any employee activity which is arguably for the benefit of an employee group may be a protected activity under § 7 of the NLRA even though no formal labor organization is involved.

For example, if several employees were to walk off the job protesting lack of adequate heating in the plant, they would be engaged in protected, concerted activities, even though no union was involved.

3. Labor Organization.

a. A labor organization is defined by § 2(5) of the NLRA as any organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with the employer concerning grievances, work disputes, wages, rates of pay, hours of employment, or conditions of work. Thus, a labor organization could be any group of employees working together, even though no formal structure is involved.

b. In most cases, employees of a particular employer are usually members of a local union affiliated with the national union. This local union might be confined to the employees of a large employer in a particular locale or might include employees of several smaller companies. The local unions are in turn affiliated with the national union.

c. In a limited number of cases, employees of a particular employer form an independent union which is confined solely to the representation of employees of that employer and which is not affiliated with a national union.

4. Unfair Labor Practices.

Section 8 of the NLRA specifically lists certain practices which are unlawful for an employer and for a union.

a. Employer Unfair Labor Practices.

Pursuant to § 8(a), an employer commits an unfair labor practice if it:

(1) Interferes with, restrains, or coerces employees in the exercise of the rights guaranteed them in § 7 of the NLRA.

(2) Dominates or interferes with the formation or administration of any labor organization or contributes financial or other support to it.

(3) Encourages or discourages membership in a labor organization by discriminating in regard to hire or to tenure of employment, or any term or condition of employment.

(4) Discharges or otherwise discriminates against any employee because he has filed charges or given testimony under the NLRA.

(5) Refuses to bargain collectively with the representatives of its employees.

b. Union Unfair Labor Practices.

Pursuant to § 8(b), a union commits an unfair labor practice if it:

(1) Restrains or coerces employees in the exercise of their § 7 rights or an employer in the selection of the employer's representatives for the purposes of collective bargaining or adjustment of grievances.

(2) Causes or attempts to cause an employer to discriminate against an employee to whom union membership was not available on the same terms and conditions or for whom union membership has been terminated on some ground other than his failure to tender periodic dues and initiation fees.

(3) Refuses to bargain collectively with an employer where the organization is the recognized or certified representative of employees.

(4) Engages in or encourages another to engage in unlawful secondary activity.

(5) Requires employees covered by a union security agreement to pay a membership fee which is excessive or discriminatory.

(6) Causes an employer to pay for services which are not performed or not to be performed.

(7) Pickets, threatens to picket, or causes to be picketed any employer to force the employer to recognize or bargain with the union, unless the union is currently certified as the employees' representative, where the employer has lawfully recognized another union or another union has been certified

within the past twelve months, or where a representation petition has not been filed within a reasonable period of time from the commencement of picketing. Picketing to truthfully advise the public that the employer employs no union members or has no contract with the union is legal unless it induces another employer's employees to refuse to deal with that employer.

c. Union Security.

(1) Under § 8(a)(3) an employer is permitted to enter into a so-called "union shop" agreement with a union representing the employer's employees. Such an agreement may impose mandatory union membership but only after 30 days of employment or 30 days after the effective date of the agreement, whichever is later. A union (or employer) is constitutionally prohibited from compelling an employee to become a "full union member." In the event that an employee refuses to become a full union member, he or she nevertheless may be required to pay an "agency fee" to the union.

(2) Under § 8(b)(2) a union is permitted, pursuant to a union shop agreement, to require the discharge of an employee for failing to pay required dues or initiation fees. If, however, the union refuses to allow an employee to join for any reason other than his failure to pay dues and initiation fees, the employer may not terminate the employee or take other action against him for his failure to join the union.

d. Unlawful Secondary Activity by Unions.

(1) As noted above, § 8(b)(4) of the NLRA makes it an unfair labor practice for a union to engage in certain "secondary" activity against the employer. Unlawful secondary activity is to be distinguished from lawful primary activity.

(2) For example, primary activity would be a strike by employees against their own employer. Secondary activity occurs where, in connection with a strike against or dispute with the primary employer, picketing is directed against a neutral secondary employer in an effort to cause that secondary employer to cease doing business with the primary employer. On the other hand, persuasion directed to the secondary employer, short of picketing or other economic activity, in an effort to have the

secondary employer cease doing business with the primary employer, is not unlawful.

C. Union Organizing Campaign.

1. Permissible and Prohibited Employer Conduct.

When a union begins campaigning among employees, the supervisors will usually be the first to notice unusual activity. The passing around of union authorization cards obviously indicates union activity. Often when a union begins organizing, supervisors will notice discussions by small groups of employees which break up when a supervisor approaches. Supervisors should be alerted to watch for such activity and to report it to the company. Sophisticated union organizing is often initiated on a secretive, underground basis to keep knowledge from the company until the campaign is already well organized.

a. When To Begin Campaigning Against The Union.

Once an employer becomes aware that the union is attempting to organize its employees, it must decide whether to step in and campaign against the union at this stage, merely ignore the union until it demands recognition, or file a petition for a secret ballot election.

(1) If the company immediately begins campaigning against the union, it may be able to head off the signing of union authorization cards and thus prevent the union from gaining enough support to seek a representation election.

(2) On the other hand, the company has only limited material it can use against the union. If it begins campaigning at this stage, it may end up with no new material to use against the union later if the union does seek an election. Also, employees may become tired of hearing company arguments if they continue over such a long period of time. Finally, a strong response may give the union and the employees the impression that the company is afraid of the union.

(3) Between the two extremes of commencing a vigorous campaign at the outset, on the one hand, or doing nothing, on the other hand, it is in most cases appropriate for the employer to make a strong statement of its position in opposition to union organization and the reasons therefor, so that there will be no mistake among its employees about the company's

position, and this will tend to head off the signing of at least some authorization cards.

b. Instructing the Supervisors.

It is very important that the employer instruct its supervisors as to what conduct is lawful and what is unlawful in the context of a union organizing campaign. Unlawful conduct by supervisors is imputed to the employer. Supervisors have the right of free speech, which means that they may tell employees of the advantages that the employees already enjoy without a union and the disadvantages of a union. Supervisors may state facts as well as their opinions. There are a few activities which are forbidden under the law, however. The basic rules are that a company, through its supervisors:

(1) May not discriminate against employees because of their union activities or sentiments, including no discrimination in discipline, application of company policy, work assignments, layoffs, or the like.

(2) May not threaten employees for their union activities or sentiments or threaten employees with adverse consequences if the union should win an election.

(3) May not promise employees benefits or rewards if they work against the union organizing effort or if the union should not win an election.

(4) May not interrogate or question employees about their or other employees' union activities or sympathies, although supervisors may listen to what employees volunteer about such matters.

There are additional rules as well. A supervisor may not (i) undertake surveillance of union meetings to determine which employees are involved, (ii) call employees into the office for any private discussion which in any way relates to the union, and (iii) prohibit the wearing of union buttons or any other such insignia demonstrating employee support for the union.

c. Restricting Union Campaigning.

The union campaign may be conducted by employees and by non-employee union organizers. Tactics employed by the union will

usually include meetings with employees and passing out leaflets extolling the benefits of union membership.

(1) The employer may take some steps to restrict this union activity.

(2) It is legal for the employer to prevent non-employee union organizers from entering its premises as long as the union organizers are able to reach employees off the employer's premises, such as on public sidewalks. If union organizers can communicate with employees on this public property, an employer may forbid the organizers from coming onto its property.

d. Permissible Restrictions on Employee Campaigning.

(1) As to employees, an employer may prohibit the distribution of literature during working time or in working areas. An employer must allow employees to distribute union literature during non-working time in non-working areas, such as in lounges or parking lots during lunch or break periods. An employer must also allow employees to orally promote the union at any place, including working areas, but may prohibit such oral solicitation during working time.

(2) If an employer adopts such rules restricting employee solicitation or distribution, the rules must be applied to all oral solicitation and distribution of literature, not just that involving unions. Such rules should be adopted before a union begins attempting to organize employees. If such rules are adopted only after the union appears, they may be viewed as an attempt to discriminate against the union, and therefore unlawful.

e. Changes in Working Conditions During Campaigning.

Once an employer is made aware of a union organizing campaign, generally it may not make unilateral changes in wages, hours or working conditions of the employees involved. However, the employer may continue to conduct its "business as usual."

(1) Any decrease or increase in benefits may be viewed as an attempt by the employer to influence employee feelings about the union.

(2) In certain circumstances, however, where the change in benefits is clearly unrelated to the union campaign, the change is allowed.

For example, if an employer has a practice of periodically reviewing and modifying wages or benefits, it may continue to do so on its usual schedule even though an election petition has been filed. Likewise, if an employer has decided upon certain changes in benefits before it becomes aware of the union organizing campaign, those increased benefits may be given.

(3) There are always two issues. When did the employer decide to make a change and why did the employer decide to implement in the mist of a union campaign?

f. Union Demands for Recognition.

(1) At the beginning of its organizing campaign, the union will attempt to get employees to sign authorization cards stating that they authorize the union to act as their representative. Although a union is required to have authorization cards of only 30% of the employees in an appropriate unit in order to obtain an NLRB conducted election, a sophisticated union will wait until it has cards signed by more than a majority of the employees, at which time it will usually approach an employer and demand to be recognized as the representative of the employees.

(2) When presented with such a demand an employer should avoid meeting with the union or examining the authorization cards. An employer is not required at this point to recognize the union. It should merely inform the union that it does not believe that the union represents an uncoerced majority of the employees in an appropriate unit and suggest that such matters should be resolved by means of a secret ballot election conducted by the NLRB.

(3) The union will usually petition the NLRB requesting an election to determine whether it is supported by a majority of the employees.

2. The Petition.

a. Filing of Petition.

(1) When the union files an election petition with the NLRB, the NLRB in turn forwards a notice of the filing and a copy of the petition to the employer.

(2) When the employer receives this notice it should send to the NLRB a list identifying its employees as of the last pay period before the petition was filed and request that the NLRB verify that the union does have authorization cards from at least 3 0% of the employees in the unit covered by the petition. The employer should make clear that this list is furnished confidentially, only for the purpose of name verification, and is not to be released to the union.

(3) If the NLRA finds that the union does not have authorization cards from 30% of the employees, the union may be given a reasonable time to cure the defect. If it is not cured, the petition will be dismissed.

b. Voter Eligibility Agreement.

The NLRB may seek to persuade the employer and union to enter into agreements as to the composition of the voting unit, which employees are eligible to vote, and when the election should be held. In many cases, the employer or the union will not be able to agree. In such cases, a formal hearing to decide these issues is scheduled at the regional office of the NLRB. The hearing will be held within 14-21 days of the date of filing the petition.

c. Hearing.

There are several possible issues at such a hearing.

(1) One type of issue concerns questions of the appropriateness of the unit petitioned for.

For example, there can be questions as to whether the appropriate unit includes one facility only or several facilities of the employer, or whether certain departments should be included in the appropriate unit. The presumptively appropriate unit is one confined to one facility, but depending upon the facts several facilities could constitute one appropriate unit.

The basic test is whether employees share a "community of interest" with other employees in the unit and all facts and circumstances concerning the employment relationship are relevant to such a determination.

(2) The second type of issue concerns questions of "unit placement," such as whether individuals are supervisors, management employees, confidential employees, or independent contractors, who are to be excluded from the unit, or whether individuals are professional employees who are entitled to determine whether they wish to be included in a unit with other employees.

(3) Evidence is taken at such a hearing in the form of testimony of witnesses and documentary evidence. Usually argument is presented in the form of a written brief which may be filed within 7 days following the close of the hearing. Following the submission of briefs, the regional director of the NLRB issues a decision. If an election is directed, the election is held between 25 and 30 days following the issuance of the decision.

(4) The period between the filing of the petition and the holding of the election can vary substantially, based upon the strategy decisions of an employer with respect to timing and the nature and extent of the issues. The period can be as little as five weeks where an election is agreed to and as many as ten weeks where issues are litigated. Oftentimes, the greater the delay, the greater the benefit to the employer in mounting its campaign and thus in ultimately winning the election.

d. Voter Eligibility List.

Within seven days after the election is set by the NLRB, or the agreement between the employer and union setting the election is approved by the NLRB, the employer must prepare a list of names and addresses of employees eligible to vote in the election and file it with the regional director of the NLRB. The regional director then makes this list available to all parties.

3. The Campaign.

a. Early in the election campaign, an employer should attempt to learn what the important issues are in the minds of the employees. Through

its supervisors, an employer can usually learn why employees were dissatisfied enough to support the union. The problem may be any of a number of things, such as wages or benefits, unpopular supervisors or poor communication between the employees and management.

b. Once the problem is discovered, the employer must decide how to handle it. Many problems may not be corrected during the course of the campaign because of legal restrictions on unilateral action prior to an election. On the other hand, there are problems that may be remedied prior to an election, such as those which involve supervisor conduct and communications.

4. The Election.

a. The election is conducted by secret balloting supervised by an NLRB agent. The actual time for voting will be set to give all eligible employees an adequate opportunity to vote, with minimum interference with the work day. The election is held on company time and property if the employer permits, for convenience to the voters.

b. Approximately one week before the election date, the NLRB sends out to the employer an official form entitled "Notice of Election" which outlines details of the election, including date, time, place, and eligibility rules. The employer must post these notices at least three working days prior to the election, in conspicuous places, such as bulletin boards and time card racks. Failure to post these notices in a timely manner may be grounds for overturning the election; which would be an unfortunate result if the employer wins the election.

c. Prior to election day, the employer should select one or more employees (depending on the number of eligible voters) to serve as company observers during the election. The union and the employer are entitled to have an equal number of observers present at the polls during the voting.

d. The outcome of the election is determined by a majority of the valid votes actually cast, not a majority based on those eligible to vote. Thus, if 100 employees are eligible to vote, but only 45 actually vote, and 23 of them vote for the union, the union wins. Thus, in right to work states, the employer must ensure that all eligible employees vote. Many employees in right to work states mistakenly believe that they will not be part of the bargaining unit, just because they are not union members.

5. Post Election.

a. Filing of Objections.

Any party who believes the election was not fairly conducted may file "objections" to the election by the close of business on the fifth NLRB working day after the tally of ballots has been served on the parties. The objections may be based either on (i) pre-election conduct after the election petition was filed which improperly affected the results of the election, or (ii) the manner in which the election itself was conducted.

(1) The following are examples of pre-election conduct which may result in the NLRB setting aside an election:

(a) Threats of reprisal;

(b) Loss of benefits;

(c) Promises by the employer of benefits;

(d) Forcing an employee to communicate his union sentiments;

(e) Surveillance by an employer or its supervisors of employees engaged in union activities;

(f) Requiring that employees wear employer-supplied campaign buttons; and

(g) A captive audience speech given within 24 hours of an election.

(2) The following are examples of conduct during an election which may result in the NLRB setting it aside:

(a) Closing the polls early;

(b) Use of election procedures which did not assure secrecy;

(c) A ballot box left unsealed and unattended; and

(d) Electioneering in the polling area while balloting is in process.

(3) If timely objections have been properly filed and supported with some probative evidence of "election interference," an NLRB agent conducts an investigation. The agent may seek additional evidence from the objecting party, as well as a statement of position and evidence from the other parties, and may request to take declarations from employees, supervisors and union agents with first hand knowledge of the actions in question. The same procedure is followed in investigating challenged ballots.

(4) Once the investigation of the objections and/or challenged ballots has been completed, the Regional Director of the NLRB then decides whether to proceed on the basis of the investigation alone, or to hold a hearing to take evidence.

(5) If the objections to the election are found to have merit by the NLRB, the election is set aside and a new election is conducted. A decision sustaining the objections, setting aside the election, and ordering a new vote is not directly reviewable in the courts. If the employer's pre-election conduct has been so serious as to prevent the holding of a fair rerun election, the NLRB may issue an order requiring the employer to bargain with the union without a new election being held.

(6) If the objections to the election are eventually overruled in a final decision by the NLRB, the results of the election are certified.

b. Certification of Election Results.

The Regional Director of the NLRB will issue a certification of the election results if there are no timely filed objections to the election and one "party" received a majority of the valid votes cast, or if the objections to the election are overruled.

(1) If no union receives more than half of the valid votes cast, the certification of election results will show merely that the union or unions are not the choice of the majority of the employees. The employer is free from any NLRB election

concerning that group of employees for one year from the date of the election.

(2) A union will be certified as the representative of the employees in the unit if it receives a majority of the valid votes cast. The employer then becomes obligated to bargain with the union for at least one year following the date of the certification.

D. Collective Bargaining.

Collective bargaining generally commences with a request by the union which has been recognized or certified as the majority representative of unit employees, for information and a date for an initial bargaining meeting with the employer. Section 9(a) provides that the collective bargaining representative of the majority of unit employees is the exclusive representative of all unit employees for the purposes of collective bargaining. This means that even though certain employees in the appropriate unit may not have joined the union or otherwise supported it, the union is obligated to represent them and the employer is obligated to deal exclusively with the union with respect to all unit employees. Thus, an employer may not take unilateral action with respect to wages, hours and other conditions and may not negotiate individual agreements with individual employees unless the union waives its right to prevent such unilateral action or individual bargaining.

It is common for both the employer and the union to prepare and exchange written proposals for contract terms. The parties then begin bargaining sessions at which they discuss the proposals and try to reach agreement on contract terms by compromising differences. The union is often represented at the negotiating table by a union business agent and a negotiating committee of employees. The employer is frequently represented by an attorney and/or labor relations manager. Negotiations for a contract may take a few days or may take several months; the negotiating sessions are scheduled by the parties. The parties also negotiate the term of a collective bargaining agreement which typically runs from one to three years. Contracts having a term of more than one year sometimes include a wage reopener clause under which the parties renegotiate wages at fixed intervals during the contract term, rather than fixing wages for the entire term of the contract.

1. Duty To Bargain in Good Faith.

Section 8(d) of the NLRA establishes a mutual obligation on the part of an employer and the labor union representing its employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

The term "good faith" is not statutorily defined but it has been construed to require that the parties negotiate with the view of reaching an agreement if possible. The NLRA does not compel the parties to reach an agreement, however. An employer is not required to make a concession on any specific issue or adopt a particular position. However, the employer is required to evidence some willingness to compromise its differences with the union.

The NLRB will find an unlawful refusal to bargain if either party refuses to meet at reasonable times or to discuss a mandatory subject of bargaining defined below, or if the employer unilaterally establishes any term or condition of employment. The NLRB may also find a refusal to bargain in good faith if a party engages in "surface bargaining," whereby it merely goes through the motions of bargaining with no intent to reach an agreement. The NLRB may also find an unlawful refusal to bargain where a party requires agreement on certain subjects of bargaining as a prerequisite to further negotiation.

a. Duty To Furnish Information.

Intertwined with the employer's duty to bargain in good faith is a duty to supply the union, upon request, with sufficient information to enable it to understand and intelligently discuss the issues raised in bargaining.

(1) The duty to furnish information arises when the union demands information which is relevant to the dealings between the employer and the union in its capacity as the employees' representative. The NLRB and the courts have adopted a broad "discovery type" definition of "relevant information," requiring only that it be directly related and reasonably necessary to the union's function as the bargaining representative.

For example, an employer will be required to supply information to support a claim that it is financially unable to agree to a union demand.

(2) Once the union makes a good faith demand for relevant information, the employer must make it available promptly and in a reasonably useful form. The employer must present the information in a manner not so burdensome or time consuming as to impede the process of bargaining, but not necessarily in the form requested by the union.

(3) If the employer believes that compiling the information will be unduly burdensome, it must assert that claim at the time the information is requested.

b. Subjects of Bargaining.

Potential subjects of bargaining are classified into three categories: (1) mandatory subjects, (2) permissive subjects and (3) illegal subjects.

(1) Mandatory Subjects.

Section 8(d) of the NLRA mandates bargaining with respect to wages, hours, and other terms and conditions of employment of employees within the bargaining unit.

(a) The mandatory categories of rates of pay and wages have been given a broad construction by the NLRB and the courts to cover every form of compensation for labor performed, whether direct or indirect, including paid holidays, severance pay, bonuses, pension benefits, profit-sharing plans and stock purchase plans. This list is by no means exhaustive.

(b) "Other terms and conditions of employment" include provisions for promotions, layoffs, discharges, work loads, work rules, safety, subcontracting of unit work, grievance procedure, use of bulletin boards by unions, seniority, union security, management-rights clauses, no-strike clauses, and numerous other matters.

(c) An employer's failure to bargain about a mandatory subject constitutes an unfair labor practice under § 8(a)(5) of the NLRA. Either party may, however, bargain to an "impasse" (discussed below) on a mandatory subject.

(2) Permissive Subjects.

If a subject falls outside of the definition "wages, hours, and other terms and conditions of employment," it is either a permissive subject or an illegal subject.

(a) It is lawful for either party to propose, for inclusion in a collective bargaining agreement, any clause relating to a permissive subject of bargaining, to bargain about that clause, and, if an agreement is reached, to include it in the final contract.

(b) However, the law does not compel bargaining about permissive subjects; a party which refuses to bargain over a permissive subject does not commit an unfair labor practice.

(c) Permissive subjects include those which are not mandatory or illegal subjects, including internal union affairs and settlement of charges or other legal proceedings.

(3) Illegal Subjects.

Parties are prohibited from bargaining about illegal subjects and may not include them in an agreement. Illegal subjects include provisions for a closed shop, segregation of employees on the basis of race, extra seniority for employees who return to work during a strike, and restraints on dealing with another employer's products prohibited by § 8(e) of the NLRA. A party which insists upon bargaining as to an illegal provision violates § 8.

c. Changes in Wages, Hours and Working Conditions during Bargaining.

The rule is that where a union has the right to represent employees, the employer is prohibited from making unilateral changes in wages, hours and working conditions of those employees, even though the changes may constitute improvements. Under these circumstances, the employer has the duty to bargain with the union about such matters until an agreement or impasse (discussed below) is reached with respect to the change.

An employer may put wage and benefits increases into effect for non-unit employees without incurring an obligation to give the same increases to unit employees.

d. Impasse in Bargaining.

Where parties are unable to reach agreement after exhaustive good faith negotiations, the law recognizes the existence of an impasse. When an impasse occurs, the employer may unilaterally implement its last, best and final offer with respect to wages, hours, and working conditions, as long as the impasse is not the result of the employer's bad faith bargaining or other unfair labor practices. However, the employer may not take action which amounts to a withdrawal of recognition of the union's representative status. A legal impasse may terminate and the duty to bargain will arise again where conditions or circumstances change, including a strike, change in business outlook, or substantial change in one party's bargaining position.

e. Government Involvement.

Section 8(d) of the NLRA requires written notice to the Federal Mediation and Conciliation Service ("FMCS") and the appropriate state conciliation service in connection with negotiations for a successor or renewal labor agreement. The FMCS, however, has no authority to force an agreement or to require either party to make concessions or do anything else. The FMCS can only attempt through mediation to assist the parties to resolve their differences.

2. Strikes and Lockouts.

United States labor policy presupposes the availability to the parties of two economic weapons, the strike and the lockout, to bring pressure to bear on the other side to compromise.

a. The Right to Strike.

Section 13 of the NLRA provides that the Act shall not be construed "to interfere with or impede or diminish in any way the right to strike," except as expressly limited by the Act. However, the right to strike is not an unqualified right.

b. Permissible Strikes.

A strike is protected, legal activity under the NLRA where there is a labor dispute between striking employees and their employer. Section 2(9) of the Act states, in part, that a labor dispute includes any controversy concerning terms or conditions of employment or the representation of persons in negotiating, maintaining or changing terms or conditions of employment.

Permissible strikes are classified either as unfair labor practice strikes or as economic strikes.

(1) An unfair labor practice strike is a strike initiated or prolonged in whole or in part in response to unfair labor practices committed by an employer. So long as the employer's unfair practices were a contributing factor, a strike is an unfair labor practice strike even if prompted in part or primarily by economic reasons.

(2) An economic strike is generally defined as one that is neither caused nor prolonged by an unfair labor practice on the part of the employer. Typically, a strike arising out of differences between the parties in negotiations for a labor agreement is an economic strike.

(3) An economic strike can be converted into an unfair labor practice strike where employees decide to continue striking because of an employer's unfair labor practices.

Strikers, whether unfair labor practice strikers or economic strikers, are entitled to strike and they may not be terminated or otherwise disciplined for exercising this right. However, an economic striker, though he may not be terminated, may be permanently replaced by a new employee.

c. Prohibited Strikes.

A strike is unlawful if it has an unlawful purpose or object, or if unlawful means are used to accomplish a lawful purpose. Employees who participate in an unlawful strike lose protections under the NLRA and may be terminated or otherwise disciplined for their participation. The following are examples of strikes having unlawful purposes:

(1) A jurisdictional or work-assignment strike whose purpose is to compel an employer to assign particular work or jobs to an employee belonging to the striking union.

(2) A strike by one union for recognition during a one-year period from the date of another union's certification as the employees' exclusive bargaining representative.

(3) A strike by a union that desires to terminate or modify an existing collective bargaining agreement, where the union has not given the notices to the employer or to the federal and state mediation agencies as required under Section 8(d).

(4) A strike in breach of a no-strike provision of a collective bargaining agreement, at least if the employer has not committed serious unfair labor practices.

The following are examples of unlawful means:

(1) The sit-down strike, in which the strikers remain on the employer's premises during the strike, taking possession of the property and excluding others from entry.

(2) Aggravated violence unprovoked by serious employer misconduct. Minor acts of violence incident to a strike may be disregarded. An employer may refuse to re-employ those individual strikers guilty of assaults upon non-strikers, malicious destruction of property, or disruption of the work of, or serious intimidation of, non-strikers.

(3) A partial strike in which employees remain at work but make a concerted effort to bring economic pressure upon the employer by refusing to work overtime or perform certain tasks, a slowdown or intermittent work stoppages.

d. Rights of Employees Respecting Picket Lines.

(1) The NLRB has held that employees engage in protected concerted activity when they respect the picket line established by other employees of their employer or refuse to cross the picket line at the premises of another employer whose employees are engaged in a lawful strike. Employees who respect a picket line under such circumstances themselves become economic strikers and cannot be terminated as a result.

(2) On the other hand, generally employees who honor a picket line in violation of a no strike commitment in their labor agreement are engaged in unprotected activity for which they may be disciplined, so long as no strike clause specifically identifies employees in the no strike prohibition.

(3) An employer has a corresponding right to operate its business and does not violate the NLRA by replacing non-striking employees who refuse to cross picket lines where the replacement is necessary to preserve efficient operations.

e. Employer Rights During a Strike.

An employer has the right to operate its business and hire replacements during a strike.

(1) Right to Operate.

An employer may operate its business during a strike by utilizing supervisory personnel, replacements, or subcontractor's employees, to perform unit work. However, the existence of a strike does not suspend the employer's obligation to bargain in good faith. If an employer refuses to bargain in good faith during an economic strike, the strike is converted into an unfair labor practice strike, thereby changing the status of the strikers to unfair labor practice strikers and entitling them to reinstatement as discussed below.

(2) Right to Hire Temporary or Permanent Replacements.

An employer may hire replacements for strikers but has several re-employment obligations to them.

(a) Strikers who have been engaged in an unfair labor practice strike are entitled to immediate reinstatement upon making an unconditional offer to return to work, even if the employer has hired permanent replacements or subcontracted the unit work during the strike.

(b) When an economic strike occurs, the employer is free to hire permanent replacements for the strikers and may lawfully refuse to reinstate strikers if they are permanently replaced at the time they make an unconditional offer to return to work. Economic strikers whose positions are filled by permanent replacements when they offer to return remain employees and are entitled to full reinstatement when a position for which they are qualified becomes

available unless they have in the meantime acquired regular and substantially equivalent employment.

(c) The employer is under no duty to reinstate strikers, whether unfair labor practice or economic strikers, who are guilty of strike misconduct, regardless of whether replacements have been hired.

f. Lockouts.

A lockout occurs when an employer prevents its employees from working to resist their demands or gain a concession from them. The legality of a lockout depends primarily on its purpose.

Basically, a lockout is unlawful where it is imposed for an unlawful purpose, such as to avoid bargaining on a mandatory subject of bargaining or to compel the union to accept the employer's proposal regarding a non-mandatory subject of bargaining.

Examples of legal lockouts include:

(1) Lockouts justified by unusual economic losses or operational difficulties that would result from a threatened strike.

(2) Lockouts used to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached, so long as the employer did not act to discourage union membership or discriminate against union members.

The legality of lockouts prior to an impasse to put economic pressure on employees to agree to the employer's position is unclear at this time. The NLRB takes the position that an employer may continue to operate its business with temporary replacements, but not permanent replacements, during such an offensive lockout.

E. Administration of the Contract.

1. Union Security and Dues Check-off.

The NLRA permits an employer and a labor organization to agree to the following forms of union security in a collective bargaining agreement: a union shop, agency shop, or maintenance of membership provision. As earlier noted, Section 14(b) allows a state to enact a right-to-work law.

a. A union shop under the NLRA typically requires employees, as a condition of employment, to tender uniform membership dues and initiation fees to the union, on or after the following (i) the beginning of employment or (ii) the effective date of the agreement, whichever is later. If the employee fails to tender the dues and fees under a union shop arrangement, the union may demand that the employer discharge the employee.

b. An agency shop typically requires that employees, as a condition of continued employment, pay the union a service fee equivalent to union dues.

c. A maintenance of membership agreement requires that employees who voluntarily become members of the union must remain members during the term of the contract.

Collective bargaining agreements typically include a dues check-off provision which is a device whereby the employer deducts union dues directly from the employees' paychecks and remits them to the union. Such deductions must be made pursuant to a written authorization by each employee.

2. Discipline and Discharge.

Collective bargaining agreements generally provide that management may discipline and discharge an employee for "just cause."

a. Some contracts enumerate certain offenses constituting "just cause." The employer's exercise of discipline is generally subject to the grievance and arbitration procedures set forth in the collective bargaining agreement.

b. An employee is entitled, upon request, to have a union representative present at an investigatory interview by an employer if the employee reasonably believes that the interview might result in disciplinary action. An employee also has the right to consult a union representative before such an interview.

c. There is no right under the NLRA to have a union representative present at a meeting held solely to inform an employee of a disciplinary decision which the employer has already made; however, a collective bargaining agreement may provide that union representation is required upon the request of the employee in such situations.

3. Grievance and Arbitration.

A labor agreement typically contains a grievance and arbitration procedure, under which grievances by employees and/or the union with respect to actions or inactions by the employer may be processed. The grievance and arbitration procedure is the quid pro quo for the union's commitment not to strike during the term of the agreement.

4. Duty To Bargain with the Union During the Contract Term.

The duty to bargain over mandatory subjects of bargaining which were not discussed and embodied in the terms of the collective bargaining agreement continues throughout the contract term. However, the parties may agree to include a so-called "zipper" clause in their collective bargaining agreement that would limit bargaining during the contract term and make the written contract the exclusive statement of the parties' rights and obligations.

LABOR STANDARDS LAW

LABOR STANDARDS LAWS

FAIR LABOR STANDARDS ACT

A. Requirements.

The Fair Labor Standards Act, 29 U.S.C. § 201 ("FLSA") is a federal law which establishes standards with respect to the wages and hours of employees. Although this outline does not address specific state law requirements, it is important to note that where a conflict exists between state law and the FLSA, the law establishing the higher standard applies. Detailed below are the most significant of the FLSA's requirements.

1. "Hours Worked."

The amount of compensation an employee should receive under the FLSA cannot be computed without first knowing the number of "hours worked."

a. Generally speaking, the FLSA deems as compensable all time during which an employee is required to be on duty or on his employer's premises or at a prescribed workplace, and all time during which he is "suffered or permitted" to work for his employer. Thus, if an employer knows or has reason to believe that an employee is working, even though the employee was not requested to do so, such work is compensable. It is not sufficient for an employer to promulgate a rule against working unauthorized hours. The employer must also enforce the rule.

b. In connection with accurately computing hours worked, it is important that an employer maintain strict enforcement of its timekeeping practices. Employees should be required to record the actual time they start and stop work. An employer, faced with a claim for additional compensation, may find it difficult to prove that an employee was not in fact engaged in early or late work where time records indicate otherwise.

2. Minimum Wage.

Employers are required to pay the federal minimum wage. Effective July 24, 2007, the federal minimum wage was increased to $5.85 per hour. Additional increases occurred on July 24, 2008 ($6.55/hour) and July 24, 2009 ($7.25/hour). Many states, however, have enacted a higher minimum wage than the federal requirement.

3. Overtime.

The FLSA requires that employees be paid one and one-half times their regular straight time hourly rate of pay for all hours worked in excess of 40 hours during a workweek.

a. Workweek defined.

(1) A workweek is seven consecutive, 24-hour periods, but it need not coincide with the calendar week. Thus, a workweek may be established that begins on any day of the calendar week and at any time of the calendar day.

(2) A single workweek may be established for all employees, or different workweeks may be established for different employees or groups of employees.

(3) However, once an employee's workweek is established, it remains fixed regardless of his working schedule. A workweek may be changed only if the change is intended to be permanent and is not designed to evade the state or federal overtime requirements.

(4) Each workweek stands alone for overtime purposes. The averaging of hours over two or more workweeks is not permitted.

b. "Regular rate of pay" defined.

(1) While an employer is permitted to compensate employees on an hourly, salaried, commission, or other basis, an employee's regular rate is nevertheless computed as an hourly rate. This hourly rate is generally determined by dividing the employee's total compensation in any workweek by the total hours actually worked in that workweek.

(2) The computed regular rate can never be less than the minimum wage required by the FLSA or state law, but it can be more. This regular rate is merely a rate on which the overtime premium, if any, is based. An employer thus need determine an employee's regular rate of pay only for workweeks in which the employee performs overtime work and is therefore entitled to overtime pay benefits.

(3) Specific considerations.

(a) Salaried Employees.

i) If a nonexempt employee is employed solely on a weekly salary basis, his regular hourly rate of pay is computed by dividing the salary by the fixed number of hours that the salary is intended to compensate. However, for a nonexempt salaried employee, only the maximum number of straight-time hours can be used to compute the regular rate of pay of a salaried employee, even if the employee has agreed to work a greater number of hours for the weekly salary.

ii) If a nonexempt employee is paid a salary for a fixed number of hours during a period longer than a workweek, such as a month, the salary must be translated to its weekly equivalent before the regular rate can be determined. For example, the weekly wage for an employee paid a monthly salary is determined by multiplying the monthly salary by 12 and dividing by 52. Once the weekly wage is determined, the regular hourly rate is determined in the manner described above.

(b) Commissioned employees: If commissions are paid, they are considered compensation, which must be included in determining a nonexempt employee's regular rate of pay. The employee's regular rate is computed by dividing the total commissions and salary for the workweek by the number of hours that he works in the workweek.

(c) Bonuses: The nature and purpose of a bonus determines whether the bonus will be included in the regular rate computations. Bonuses paid purely as gifts for <u>past</u> services and not measured by or dependent on an employee's hours worked, production, or efficiency are not construed as wages and are disregarded when computing the regular rate of pay. Christmas and special occasion bonuses fall

under this category. Bonuses intended to increase an employee's efforts are considered part of the employee's contractual pay rate and must be included in the regular rate computations.

(d) Payments other than cash: If payments are made to employees in the form of goods or facilities that are regarded as part of wages, the noncash wages must be considered when computing an employee's regular rate, unless they are excluded from wages under a collective bargaining agreement. The value of such noncash wages is generally their "reasonable cost," described in the regulations as an amount no greater than the lesser of the actual cost to the employer of the goods or facilities or the fair rental value of the lodging or fair price of the meals.

4. Child Labor.

The FLSA contains provisions which make unlawful the employment of children at ages below those set for various specified types of work.

a. In general, the FLSA requires a minimum age of 16 years.

b. However, certain hazardous occupations are foreclosed to children under 18 years of age. Among these specifically identified hazardous occupations are those involving the operation of power-driven metal-forming, punching, and shearing machines.

5. Exemptions.

There are several exemptions under the FLSA. Among the most important of these are the complete exemptions from the minimum wage and overtime pay requirements provided with respect to "executive," "administrative" and "professional" employees, and with respect to outside sales persons and computer personnel.

a. An "executive" is an employee whose primary duty consists of management of the enterprise or of a customarily recognized department or subdivision, who customarily directs the work of two or more employees, and who has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.

b. An "administrative" employee is one whose primary duty is the performance of office or non-manual work directly related to management general business operations of the employer or the employer's customers and whose primary work includes the exercise of discretion and independent judgment with respect to matters of significance.

c. A "professional" employee can be either a learned professional or a creative professional. The learned professional exemption applies only if the employee's primary duty is the performance of work requiring advanced knowledge in a field of science or learning which is customarily acquired by a prolonged course of specialized intellectual instruction. The creative professional exemption applies only if the employee's primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

d. An "outside salesperson" employee is one who is regularly engaged away from employer's place of business, making sales or obtaining orders or contracts for services to be performed. There is no weekly salary requirement for this exemption.

e. Certain "computer personnel" are also subject to an exemption, provided they have a primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, or software engineering. In addition, an exempt computer employee must be engaged in performing these activities as a computer systems analyst, computer programmer, software engineer, or other similarly-skilled worker in the computer software field. Finally, an exempt computer employee must be paid on a salary or fee basis at a rate not less than $455 per week or, if compensated hourly, at an hourly rate of not less than $27.63 an hour.

f. There is a special rule in the regulations for "highly compensated" workers who are paid total annual compensation of $100,000 or more. The employee's compensation must include at least $455 per week paid on a salary basis and the employee's primary duty must include the performance of office or non-manual work and the employee must customarily and regularly perform at least of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

g. Job titles are not relevant in establishing an exemption; it is the job content which counts. In determining whether an employee is exempt, a combination of three important factors are considered:

(1) Whether the employee is paid on a salary basis;

(2) What the employee's duties are; and

(3) The employee's compensation level.

h. To be paid on a salary basis, the regulations provide that an employee must receive compensation in a predetermined amount not subject to reduction because of variations in the quality or quantity of the work performed. Several exceptions to this rule, however, exist:

(1) Deductions may be made to an employee's compensation without upsetting salaried status for absences of a day or more for personal reasons other than sickness or accident, or for absences of a day or more caused by sickness or disability if made in accordance with a bona fide sickness and disability plan.

(2) Penalties imposed in good faith for violating safety rules of "major significance," such as "no smoking" rules in explosive plants, oil refineries and coal mines.

(3) Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules, such as rules prohibiting sexual harassment or workplace violence.

(4) Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment.

(5) Unpaid leave under the Family and Medical Leave Act

i. Exempt status will be denied when employees are covered by a policy that permits disciplinary or other deductions in pay as a matter of practice. Employers therefore should not subject their "salaried" employees to either (i) an actual practice of making deductions, or (ii) an employment policy that creates a significant likelihood of such deductions.

6. Recordkeeping.

Every employer subject to the wage provisions of the FLSA is required to make and preserve records concerning covered employees' wages, hours, and other terms and conditions of employment. No particular format is required. The most important types of records must be preserved for three years.

B. Enforcement.

The FLSA is administered by the Wage and Hour Division of the Department of Labor.

1. Aside from the Division's program of conducting routine investigations, investigations stemming from complaints by employees (employers are subject to civil or criminal penalties for discriminating against an employee who has filed a complaint), reinspection at companies previously found to have violated the law, and spot checks of companies located in industries revealing a high proportion of violations.

2. The Wage and Hour Division has the authority to enter upon an employer's premises to inspect and copy records, to question employees, and to investigate and gather data regarding wages, hours, working conditions and employment practices for the purpose of determining whether any violations of the law have occurred.

C. Sanctions for Violations.

1. Several types of remedies are available under the FLSA for violations of its provisions.

   a. A single employee or group of employees can sue the employer to recover back wages. In addition to back wages, the suit may request liquidated damages in an amount equal to the amount of wages due for "willful" violations and may also seek reasonable attorneys' fees and court costs.

   b. The Wage and Hour Division may supervise the payment of back wages due employees. If the employees agree to this method, the employer need not pay liquidated damages, attorneys' fees or court costs.

   c. The Secretary of Labor, without any prior request by an employee, may sue an employer for back wages and liquidated damages.

d. The Secretary of Labor may petition for a wage order in an injunction suit, regardless of whether the employee consents. Such a petition terminates the employee's right to sue personally, including the possibility of recovering an additional amount as liquidated damages.

2. Where the employer has not acted willfully in failing to pay wages, an FLSA wage suit must be started within two years from the date the wages became due, and where the employer has acted willfully, a wage suit must be started within three years from such date.

3. Criminal prosecution for violation of the FLSA is possible, but the Wage and Hour Division generally refers only especially aggravated violations to the Department of Justice for prosecution.

OCCUPATIONAL SAFETY AND HEALTH ACT

A. Requirements.

The Occupational Safety and Health Act, 29 U.S. C. § 651 et seq. (the "Act"), was enacted by Congress to assure so far as possible every worker a safe and healthful working environment. The Congressional policy as stated in the Act is also to encourage the states to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws. Thus, the Act allows a state to run its own health and safety program if it meets certain minimum requirements. Many of the 50 states have enacted occupational safety and health acts which regulate the work environment pursuant to this section.

The Secretary of Labor is delegated the responsibility for enforcing the Act, and the Secretary in turn has established the Occupational Safety and Health Administration ("OSHA") to assist him in administering this responsibility.

1. The Act requires an employer to furnish to each of its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.

2. Furthermore, an employer is required to comply with all occupational safety and health standards, rules, regulations and orders which are promulgated by the Secretary of Labor.

3. The Act requires that certain information and training be given to employees who handle "hazardous chemicals." A hazardous chemical is a chemical "which is a physical hazard or health hazard." While manufacturers are

required to provide material safety data sheets for all hazardous chemicals, employers must determine which hazardous chemicals their employees handle.

4. Employers must develop and implement a written hazard communication program.

5. Also, employers must train employees upon their initial assignment to work in a situs that exposes them to hazardous chemicals. The training must include:

   a. Methods and operations that the employees can employ to detect the presence of hazardous chemicals;

   b. Measures the employees can take to protect themselves from the hazardous effects of the hazardous chemicals; and

   c. The details and operation of the employer's hazard communication program.

6. Finally, the Act requires an employer with 10 or more employees to maintain records of all work-related injuries, illnesses, deaths, exposure of employees to toxic substances, and harmful physical agents.

   a. Basically, such records must consist of a log of occupational injuries and illnesses, a supplementary record of each occupational injury or illness, and an annual summary of occupational injuries and illnesses.

   b. The type of information to be retained and disseminated varies depending on the type of occupational injury or illness experienced. For example:

      (1) For occupational noise, the employer must retain records of employee decibel exposure measurements for 2 years, and of audiometric tests for the duration of the affected employee's employment.

      (2) For ionizing radiation, the employer must create and retain (for an unspecified length of time) radiation exposure records, and immediately notify OSHA regarding certain incidents and provide written reports.

      (3) For asbestos, the employer must create and retain records of the results of personal and environmental monitoring (of

various substances listed in three tables in 29 C.F.R. §1910.1001) and of employee medical examinations, for 20 years.

c. These records must be kept at each establishment for five years following the end of the year to which they relate and must be available for inspection and copying by OSHA Compliance Safety and Health Officers.

The Secretary of Labor has issued general and specific industry standards which cover every aspect of the employment environment. The standards are very detailed directives as to measures an employer must take to make the workplace safe for its employees. Noncompliance can result in substantial and embarrassing fines.

B. Administrative Enforcement.

An OSHA Compliance Officer has the right to come onto the employer's premises at reasonable times to conduct an inspection to determine whether or not the employer is in compliance with OSHA standards. However, a representative of the employer can accompany the OSHA inspector during the inspection.

1. An inspection can be initiated in one of two ways:

   a. First, any employee who believes that a violation of a job safety or health standard exists which threatens physical harm or who believes that an imminent dangerous situation exists, may request an inspection.

   b. Second, inspections may be initiated by the Department of Labor for the purpose of enforcing standards under the Act.

2. Pursuant to regulations promulgated by the Secretary, advance notice of inspections may not be given except in certain limited situations where notice will enhance the probability of an effective inspection.

   a. This prohibition is intended in large part to avoid giving the employer an opportunity to make minor or temporary adjustments in an attempt to create a misleading impression of conditions in the workplace.

   b. However, the employer can require the Compliance Officer to obtain a search warrant before it is required to permit access.

3. After the Compliance Officer completes the inspection, the Officer may issue a written citation to the employer.

   a. The citation is required to describe with particularity the standards alleged to have been violated and must fix a reasonable period of time for the abatement of the alleged violation.

      (1) OSHA provides for a scaled system by which an employer's violative conduct may be classified for penalty purposes. The types and degrees of violations within this scaled system are based on the gravity of the employer's culpability. A violation may be classified as:

         (a) Serious;

         (b) Other Than Serious ("Nonserious");

         (c) De Minimis; and

         (d) Imminent Danger: where the condition is immediately hazardous to employee safety or health.

         (e) Note that Serious and Other Than Serious violations may be further classified as "willful" or "repeated" violations.

   b. The employer is required to post the citation at or near each place a violation referenced in the citation occurred.

   c. A citation cannot be issued after six months following the occurrence of the violation.

4. After or concurrent with the issuance of the citation, the employer is notified of a proposed penalty or that no penalty is being proposed.

   a. The employer has 15 working days from receipt of the notification of proposed penalty within which to notify the Secretary of Labor that it wishes to contest the citation or proposed assessment of penalty.

   b. If the employer fails to notify the Secretary of its wish to contest the citation, the citation and penalty assessment as proposed is deemed a final order of the Commission and not subject to review by any court or agency.

5. If an employer notifies the Secretary that it intends to contest the citation, the assessed penalty, or the reasonableness of the abatement period, a hearing will be scheduled before the Occupational Safety and Health Commission ("Commission"). After such a hearing, the Commission renders its order, based on findings of fact, affirming, modifying, or vacating the citation, proposed penalty, or abatement which becomes final 30 days after its issuance.

6. If the Commission rules against the employer's appeal of the citation, the employer may file a petition with the appropriate United States Court of Appeals. The Commission, likewise, has the right to appeal any adverse ruling by the Commission.

C. Retaliation.

The Act prohibits an employer from discharging or in any other manner discriminating against any employee because the employee has filed any complaint or because of the exercise by such employee on behalf of the employee or others of any right afforded by the Act.

1. An employee who believes that he or she has been discharged or otherwise discriminated against may file a complaint with the Secretary of Labor within 30 days after such alleged violation.

2. The Secretary will thereafter investigate such complaint and will initiate an action in the federal court against the employer if there is a determination that the provisions of the Act have been violated.

D. Sanctions for Violations.

An employer who is found to have willfully or repeatedly violated the requirements of OSHA, standards, rules, or orders promulgated under the Act, may be assessed a civil penalty of up to $70,000, but not less than $5,000 for each violation.

1. An employer who has received a citation for a serious violation of the Act, of any standard, rule, order, or regulation issued thereunder, will be assessed a civil penalty up to $7,000 for each violation.

2. Furthermore, if an employer fails to correct a violation for which a citation has been issued within the period permitted for its correction, it may be assessed a penalty of up to $7,000 for each day during which such failure or violation continued.

E. Ergonomic Standards.

OSHA has recently proposed sweeping new ergonomic regulations aimed at reducing the occurrence of musculoskeletal disorders (MSDs). If adopted, the proposed regulations would require that employers to whom they apply implement an extensive ergonomics program. The required program would include making a detailed analysis of individual jobs and promulgating procedures designed to reduce the occurrence of MSDs. The proposed regulations would apply to all employers operating manufacturing or manual handling operations. The regulations would also apply to any other employer if at least one employee shows symptoms of an MSD.

1. A California court recently upheld ergonomic regulations promulgated by Cal/OSHA. The California rule requires an employer to institute an ergonomics program whenever two or more employees, performing similar repetitive tasks, report repetitive motion injuries (RMIs). Cal/OSHA requires an ergonomics program that includes a worksite evaluation of each job process or operation alleged to have caused the RMI, implantation of measures to correct or control the hazard that allegedly caused the RMI and a training program for employees regarding RMIs.

THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act took effect on August 8, 1993. In summary, the law requires a covered employer to provide an employee up to 12 weeks of unpaid leave each year to care for a new child or seriously ill relative, or to recover from the employee's own serious health condition. In early 2008, Congress amended the FMLA to add two more qualifying events: 1) active duty leave; and 2) caregiver leave. The employer must continue to provide health care benefits during the period of leave and must restore the employee to the same or an equivalent position when he or she returns from leave.

A. Coverage.

The Act applies to employees[3] of an employer with 50 or more employees, provided that at least 50 of those employees work within 75 miles of the employer's work site. Thus, for example, an employer with more than 50 employees will not have to provide leave to an employee in a remote work site with fewer than 50 employees.

[3] Recent cases and regulations issued by the U.S. Department of Labor state that not only are current employees protected under the FMLA, but also prospective and former employees. For example, a former employee who had taken a medical leave while employed by Company X may sue Company X under the FMLA when it fails to re-hire the employee at some later point in time.

An employer is required to provide leave only to employees who have worked with the employer for at least one year, and who have worked at least 1,250 hours during the preceding 12 months.

B. Circumstances Requiring Leave.

Under the following circumstances, a covered employer must provide up to 12 work weeks of unpaid leave a year for employees:

1. New Children.

Both male and female employees are entitled to unpaid leave "because of the birth of a son or daughter of the employee and in order to care for" the child.

a. This provision covers not only the birth of employees' natural children but also the placement of adopted and foster children, legal wards, and stepchildren.

b. The leave must be taken within the first year after birth or placement of the child.

c. Employees must give the employer 30 days notice of their intention to take this leave. However, if the date of the birth or placement prevents that amount of notice, employees must provide only as much notice as is "practicable."

2. Care For Family Members.

Employees may also take unpaid leave to care for a spouse, son, daughter, or parent with a serious health condition that requires hospitalization or continuing treatment by a health care provider.

a. "Spouse" is defined in accordance with applicable state law, including common law marriages where recognized by the state. Partners in nontraditional living arrangements do not receive protection under the Act.

b. Employees must provide medical proof of illness and the amount of time the employee needs to care for the ill person.

(1) If the employer doubts the adequacy of the certification, it may seek a second, non-binding opinion at its own expense.

(2) If that opinion differs from the opinion obtained by the employee, a third, binding opinion can be obtained -- at the employer's expense -- from a health care provider to which the employee and employer agree.

c. Employees must make a reasonable effort to schedule treatment so it does not unduly disrupt the employer's operations.

d. The Act requires employees to give the employer 30 days notice of their intention to take leave, or as much notice as is practicable.

3. Employee Serious Health Condition.

An employer is also required to provide unpaid leave to employees who suffer from serious health conditions that prevent them from performing the duties of their jobs. In this case, as well, the employee must provide proof of need for the leave (and the inability to perform job duties), attempt to minimize disruption of the employer's operations, and provide notice of intent to take leave, as described previously.

4. Active Duty Leave.

On January 28, 2008, President Bush signed into law this amendment to the FMLA to provide leave for any "qualifying exigency" arising out of a service member's current tour of active duty or because the service member is notified of an impending call to duty in support of a contingency operation. The service member may be the employee, or the employee's spouse, son, daughter or parent. The Department of Labor issued regulations that define a qualifying exigency as:

- Up to seven days of leave to deal with issues arising from a covered military member's short notice deployment, which is a deployment on seven or fewer days of notice;
- Military events and related activities, such as official ceremonies, programs, or events sponsored by the military, or family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member;
- Qualifying childcare and school activities arising from the active duty or call to active duty status of a covered military member, such as arranging for alternative childcare, providing childcare on a non-routine, urgent, immediate need basis; enrolling or transferring a child to a new school; and attending certain school and daycare meetings if they are necessary

due to circumstances arising from the active duty or call to active duty of the covered military member;

- Making or updating financial and legal arrangements to address a covered military member's absence, such as preparing powers of attorney, transferring bank account signature authority, or preparing a will or living trust;
- Attending counseling provided by someone other than a health care provider for oneself, the covered military member, or a child of the covered military member, the need for which arises from the active duty or call to active duty status of the covered military member;
- Rest and recuperation leave of up to five days to spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment;
- Attending certain post-deployment activities within 90 days of the termination of the covered military member's duty, such as arrival ceremonies, reintegration briefings, and any other official ceremony or program sponsored by the military, as well as addressing issues arising from the death of a covered military member; and
- Any other additional activities that the employer and employee agree is a qualifying exigency which arose out of the covered military member's active duty or call to active duty status.

5. Caregiver Leave.

Also signed into law on January 28, 2008, this amendment allows an eligible employee to take up to 26 weeks of FMLA to care for a spouse, son, daughter, parent or next of kin ("nearest blood relative") who is a covered service member. The service member must have a "serious illness or injury" incurred while on active duty that renders the member medically unfit to perform the military duties of his or her office, grade, rank or rating.

C. Conditions Governing Leave.

The employer must provide unpaid leave for 12 work weeks.

1. If married employees work for the same employer and seek leave for a new child, the two employees are entitled to 12 weeks total leave between them, not 12 weeks each.

2. The employer may require, or the employee seeking leave may request, the use of paid vacation, personal, and family leave as part of the statutory leave for new children.

3. For leaves for the employee's or family member's illness, an employer may require -- or an employee may elect -- the use of paid sick leave, as well as vacation, personal, or family leave, for part of the unpaid leave.

4. When the employee uses paid leave, the employer is required to provide only the amount of unpaid leave necessary to bring the total leave period to 12 weeks.

5. With the employer's agreement, the employee may elect to take the 12 weeks of leave intermittently, or with a reduced work schedule, over a longer period.

   a. Leave for the employee's or family member's serious health condition may be taken on an intermittent basis without the employer's consent, if it is medically necessary.

   b. However, an employer may require an employee making such a request to transfer temporarily to an alternative position that better accommodates that type of leave, so long as the position has equivalent pay and benefits.

6. During the employee's leave, the employer must continue to provide the same health care benefits at the same cost to the employee as if the employee had not taken leave.

   a. However, if the employee fails to return from the leave for reasons other than the inability to work because of the employee's or a family member's serious health condition, the employer may recover the cost of providing the health benefits.

   b. Seniority and other benefits need not accrue during the leave period.

7. When the employee returns to work, the employer must restore the employee to the same position, or an equivalent position with equivalent pay, benefits, and terms and conditions. Some exceptions:

   a. The employer may deny the previous job to the 10 percent most "highly compensated employees" if necessary to prevent "substantial and grievous" economic injury to the employer.

   b. If the employee is unable to perform the essential functions of the job at the conclusion of the 12-week leave period, there is no requirement that the employee be reinstated to that position or any other.

c. An employee has no greater right to reinstatement or to other benefits or conditions of employment than if the employee had been continuously employed while on FMLA leave. The employer may be able to show that the employee would not otherwise have been employed at the time reinstatement is requested. For instance:

(1) The employee, before on FMLA leave, is performing poorly and the person who fills in for her during her leave performs much better. Her termination may be upheld because there is no evidence linking her leave of absence to her termination, which would have occurred even without the leave.

(2) If the employee is hired for a specific term or only to work on a discrete project, and the term or project ends during the employee's leave, the employer has no obligation to restore.

8. New Regulations. Effective January 16, 2009, for the first time in the fifteen years since the FMLA was passed, the Department of Labor (DOL) issued new regulations that address the many complaints and comments about the FMLA by both employees and employers. While the DOL has made clear that the new regulations do not decrease employee rights, below are several clarifications helpful to employers:

a. An employee needing FMLA leave must follow the location's usual and customary **call-in procedures** for reporting an absence, absent unusual circumstances. If the employee does not follow the call-in procedures, the employer many delay or deny FMLA leave for the absences. This change is intended to improve upon the disruption caused by lack of advance notice of unscheduled absences; previously, the employer had to grant FMLA leave if the employee notified that an absence might be FMLA-qualifying within one to two business days, but this time requirement has been deleted in favor of the employer's own call-in procedures.

b. When an employee **substitutes paid leave** (such as vacation, sick leave, or emergency leave) for FMLA leave, the employer can now require that the employee follow the location's policy to request and use such leave, such as using a specific form, taking leave in certain increments, or providing a certain amount of notice. If the employee fails to comply, the leave would be unpaid (but still covered by the FMLA if it qualifies).

c. If an employee is using leave under a prior certification, the employer may request that the employee specifically tell it when an

absence is covered by that FMLA certification. While employees usually do not have to use any "magic words" to request FMLA leave, they are expected to be more specific when they have a certification on file and have used FMLA that that condition before. This will most commonly apply to intermittent leave situations.

d. The employer may request **recertification** of a medical condition the doctor defines as lifetime or indefinite **every six months** if the employee continues to have absences as a result of that condition. This will allow the employer to ensure that employees with chronic conditions or who use intermittent leave keep the location up to date on whether they are still entitled to FMLA leave, especially given that doctors often refuse to place a duration on a medical condition.

e. The employer may require that the medical certification specifically address whether the employee can perform the **essential functions of the employee's job**. This will allow a location to assess whether it can offer temporary modified duty or, more significantly, whether there may be further obligations to the employee under the Americans with Disabilities Act (ADA) after the FMLA leave has been exhausted.

SPECIFIC LAWS/RULES REGARDING EMPLOYMENT TERMINATION

SPECIFIC LAWS/RULES REGARDING EMPLOYMENT TERMINATION

THE BASIC PRINCIPLES OF CALIFORNIA WRONGFUL DISCHARGE LAW

A. The Nature Of The Employment Relationship And Employment "At Will."

1. At least in recent history, at will employment has been the historical norm.

2. Employees are entitled to quit or leave at any time.

3. Employers are entitled to discharge employees for good cause, bad cause, or no cause at all.

4. California has codified the "at will" principle in Labor Code § 2922, which provides:

> An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month. (Emphasis added.)

This section establishes a presumption of at will employment. See Harden v. Maybelline Sales Corp., 230 Cal. App. 3d 1550, 1554, 282 Cal. Rptr. 96 (1991); Semore v. Pool, 217 Cal. App. 3d 1087, 1095, 266 Cal. Rptr. 280 (1990) ("All employment termination cases begin with the presumption of at-will employment.").

B. Legislative Limitations On Employment At Will.

1. Congress and state legislatures have substantially eroded employment at will. A few examples follow.

a. Workers' compensation retaliation.

(1) **Cal. Lab. Code § 132a.** It is a misdemeanor for an employer to threaten to discharge an employee for filing, or intending to file, a claim with the Workers' Compensation Appeals Board, or testifying or intending to testify on behalf of another employee before the Workers' Compensation Appeals Board. Such discharged employee is entitled to reinstatement and back pay.

(2) **New York Workers' Compensation Law § 120.** Employee may not be discharged or in any other manner discriminated against because employee has claimed or attempted to claim compensation from his employer, or because he or she has testified in a workers' compensation proceeding.

b. Jury duty.

(1) **Cal. Lab. Code § 230.** Employer may not discharge or in any manner discriminate against employee for taking time off to serve on jury as required by law or for taking time off to appear in court as witness as required by law, provided employee gives reasonable notice of absence to employer. Employee discharged or otherwise discriminated against in violation of this section is entitled to reinstatement and back pay.

(2) **New York Judiciary Law § 519 and Penal Law § 215.14.** Upon prior notice, employee must be given time off for jury duty or to testify as a witness to a crime. Time off can be without pay.

c. Health or safety complaints.

(1) **Cal. Lab. Code § 6310 - 6311.** Under Section 6310, no employee may be discharged or otherwise discriminated against for making written or oral complaints to any governmental agency having statutory responsibility for employee health or safety or for testifying in a proceeding before such agency. Any employee discharged or discriminated against in violation of Section 6310 is entitled to reinstatement and back pay. Under Section 6311, no employee shall be discharged or laid off for refusal to perform work where such performance would result in violation of an occupational safety or health standard or safety order and such violation would create real and apparent hazard to the employee. Such employee is entitled to reinstatement and back pay.

(2) **New York Labor Law § 740(1)-(7).** Prohibits an employer from taking retaliatory action against an employee because such employee (a) discloses, or threatens to disclose to a supervisor or to a public body an illegal activity, policy or practice that presents a "substantial and specific danger to the

public health or safety"; (b) provides information to, or testifies before, any public body conducting an investigation into any such illegalities; or (c) objects to, or refuses to participate in any such illegal activity, policy or practice. An aggrieved employee is entitled to an injunction to restrain continued violations, reinstatement with full back pay and benefits and reasonable costs and attorneys' fees.

d. Political activities.

(1) **Cal. Lab. Code § 1101 - 1105.** These sections prohibit an employer from interfering with or coercing any employee in his or her political activities or affiliation or retaliating against an employee who discloses information to a government agency ("whistle-blowing"), and includes a provision prohibiting discrimination on the basis of sexual orientation.

e. Wage garnishment.

(1) **Cal. Lab. Code § 2929.** No employee may be discharged because of a threat to garnish wages or because his or her wages have been garnished "for the payment of one judgment."

(2) **15 U.S.C. § 1674.** No employee may be discharged because his or her wages have been garnished "for any one indebtedness."

f. Retaliation For Labor Code/Law Claims.

(1) **Cal. Lab. Code § 98.6.** Employee may not be discharged or in any manner discriminated against because he or she files claim or complaint relating to his or her rights under the jurisdiction of the Labor Commissioner, or testifies or intends to testify in such a proceeding. Employee discharged or discriminated against in violation of this section is entitled to reinstatement and back pay.

(2) **New York Labor Law § 215.** Prohibits an employer from discharging, penalizing, or in any other manner discriminating against an employee because he has made a complaint to his employer, or to the commissioner or his authorized representative, that the employer has violated any New York labor law, or because such employee filed a claim. An

employee who has been discriminated against is entitled to appropriate relief, including reinstatement with restoration of seniority, payment of lost compensation, damages, and reasonable attorneys' fees. Further, the employer may be fined between $200 and $2,000.

g. Union activity.

(1) **Cal. Lab. Code § 923.** The public policy of California is that terms and conditions of employment should result from voluntary agreement between employer and employee. Individual workers shall have full freedom of association, self-organization and designation of representatives. However, there is no duty to bargain absent a certification of a collective bargaining representative under the federal labor laws.

(2) **29 U.S.C. § 158(a).** It is an unfair labor practice for an employer to encourage or discourage union membership by discrimination with regard to hire or tenure of employment. It also is an unfair labor practice for an employer to discharge or otherwise discriminate against an employee for filing charges or giving testimony in connection with unfair labor practices.

h. "Whistleblowing."

(1) **Cal. Lab. Code § 1102.5.** No employer may prevent an employee from, or retaliate against an employee for disclosing information to a government or law enforcement agency "where the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute, or violation or noncompliance with a state or federal regulation."

(2) **False Claims Act 31 U.S.C. § 3729 et seq.** Passed in response to fraudulent practices by defense contractors during the Civil War, the False Claims Act (the "Act") was first adopted in 1863 and signed into law by President Lincoln. The Act in its present incarnation allows the government to recover treble damages from those making false claims or submitting false information in support of those claims. The Act contains a whistleblower protection clause, id. at § 3730(h), which not only protects employees against retaliation for assisting in an action filed or to be filed under

the Act, but also protects employees who make "internal" complaints; that is, reports of false claims made to company officials and not a government official or entity. Neal v. Honeywell, Inc., 826 F. Supp. 266, 273 (N.D. Ill. 1993), aff'd, 33 F.3d 860 (7th Cir. 1994).

(3) **Federal Clean Water Act.** Protects internal whistleblowers who "filed, instituted, or cause to be filed or instituted any proceeding under this chapter." 33 U.S.C. § 1367.

(4) **The Federal Whistleblower Protection Act of 1989.** Protects government employees from retaliation for disclosing potentially embarrassing or damaging information about government operations. 5 U.S.C. § 2302(b)(8).

i. Other federal, state and local anti-discrimination statutes (e.g., Title VII, Americans With Disabilities Act, Family and Medical Leave Act, California Fair Employment and Housing Act, New York Human Rights Law, Los Angeles and other municipal codes prohibiting discrimination on the basis of sexual orientation).

2. These statutory limitations are extensive. However, at least they are set forth in writing. Management can ascertain what they are and act accordingly.

C. Limitations On Employment At Will Imposed By The Courts.

Most states now recognize one or more significant exceptions to the "at will" doctrine. These exceptions include public policy theories, breach of contract theories, and claims for breach of the implied covenant of good faith and fair dealing. Taken together, they generally are referred to as the law of "wrongful termination."

1. Limitations implied from the law - the public policy exception -- a tort claim.

a. The basic theory of the tort. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839 (1980) -- Employee sued for wrongful discharge, claiming he was discharged for refusing to participate in an illegal price-fixing scheme. The California Supreme Court held that a tort action for wrongful discharge may lie if the employer "condition[s] employment upon required participation in unlawful conduct by the employee. " Id. at 178. The Court announced the basic theory of the tort:

> [A]n employer's authority over its employee does not include the right to demand that the employee commit

> a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for [public policy] wrongful discharge against the employer.

Id. The Tameny case also makes clear that tort remedies and damages (punitive as well as compensatory) are available for a wrongful discharge in violation of public policy. Id. at 176 & n.10, 177-78.

b. The key element is a fundamental public policy. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988) -- Reaffirming Tameny, the California Supreme Court agreed that a termination that violates public policy gives rise to tort liability. Although it did not decide exactly what constitutes a "public policy" violation, the Court set forth the following criteria: (1) the policy in question must affect society at large rather than a purely personal or proprietary interest of the employee or employer; and (2) the policy must be "fundamental," "substantial," and "well-established" at the time of the discharge. Id. at 668-71. The Foley Court noted:

> When the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying the Tameny cause of action is not implicated.

Id. at 670-71 (emphasis added).

c. Public policy claims must be grounded in a statute or constitutional provision.

Gantt v. Sentry Ins., 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874 (1992) -- The California Supreme Court later decided a key issue that Foley left unanswered:

> [C]ourts in wrongful discharge actions may not declare public policy without a basis in either constitutional or statutory provisions. A public policy exception carefully tethered to fundamental policies

> that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees, and the public. The employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes; so limited, the public policy exception presents no impediment to employers that operate within the bounds of law. Employees are protected against employer actions that contravene fundamental state policy.

Id. at 1095 (emphasis deleted).

Employing these criteria, the Court upheld a public policy claim where the plaintiff claimed he was terminated in retaliation for supporting a co-worker's claim of sexual harassment and refused to lie to investigators.

d. Some jurisdictions recognize the public policy claim where it is based on administrative regulations that serve a statutory objective.

Green v. Ralee Eng'g Co., 19 Cal. 4th 66, 78 Cal. Rptr. 2d 16 (1998) -- Plaintiff sued for wrongful termination in violation of public policy, alleging his termination was caused by his attempts to enforce FAA safety regulations. Court held that fundamental public policy may be enunciated in administrative regulations that serve a statutory objective. The Court reasoned that the public policy behind federal regulations concerning airline safety has a basis in statutory provisions, as Congress specifically directed the FAA to maintain safety and security as the highest priority in air commerce. FAA regulations on air safety therefore met the Gantt requirement of a statutory or constitutional basis for public policy violations.

e. Some cases have rejected a public policy claim for lack of a "fundamental," "substantial," or "well-established" public policy.

(1) Sequoia Ins. Co. v. Superior Court, 13 Cal. App. 4th 1472, 1480-81, 16 Cal. Rptr. 2d 888 (1993) -- Public policy claim failed as a matter of law; plaintiff alleged that the employer, an insurer, attempted to persuade plaintiff to artificially increase claims reserves, thereby creating an illusion of loss and reducing customer refunds under Proposition 103; this allegation failed to allege conduct that violated a public policy

delineated in a constitutional or specific statutory provision, as there is nothing in Proposition 103 that prohibits taking claims reserves.

(2) Davaris v. Cubaleski, 12 Cal. App. 4th 1583, 1589, 16 Cal. Rptr. 2d 330 (1993) -- Affirming dismissal of a public policy claim; the employer's conduct -- harassing and humiliating plaintiff for taking a medical leave for surgery - did not violate a fundamental public policy; there is no fundamental public policy "to encourage proper medical care."

(3) Hunter v. Up-Right, Inc., 6 Cal. 4th 1174, 26 Cal. Rptr. 2d 8 (1993) -- Finding no fundamental public policy prohibiting fraud and deceit; even though fraud is prohibited by statute, it is not "a fundamental, well established, substantial policy that concerns society at large rather than the individual interests of the employer or employee"; fraud essentially involves a private dispute. Id. at 1186. The Supreme Court reiterated its holding in Foley that the employment relationship is "fundamentally contractual" and that tort damages are generally unavailable, except in cases of termination in violation of a fundamental public policy. Id. at 1180.

(4) American Computer Corp. v. Superior Court, 213 Cal. App. 3d 664, 668-69, 261 Cal. Rptr. 796 (1989) -- Ordering dismissal of a public policy claim; even if it were true that the employee was terminated because he questioned company officers about suspected embezzlement from the company, plaintiff in so doing served only the private interest of the employer, not a fundamental or substantial public policy.

f. Courts allow the claim to proceed where the Foley- Gantt standard is met.

(1) Cabesuela v. Browning-Ferris Indus. of California, Inc., 68 Cal. App. 4th 101, 80 Cal. Rptr. 2d 60 (1998) -- Court held that plaintiff-driver stated a cause of action for wrongful termination in violation of public policy and in violation of labor statutes by alleging he was terminated for making a complaint about unsafe working conditions.

(2) Phillips v. Gemini Moving Specialists, 63 Cal. App. 4th 563, 74 Cal. Rptr. 2d 29 (1998) -- Employee who was allegedly terminated after complaining that employer deducted money

from his paycheck without his consent can sue for violation of public policy; the Court concluded that in California there is a fundamental public policy against an employer retaliating against an employee for objecting to an unlawful wage deduction, noting that several California statutes require that workers be promptly paid all wages due them and specifically prohibit the type of deduction made in this case, and that wages are highly significant not only to the employee who earns them, but also to his family, and to society in general which will be burdened with supporting said persons if the employee is denied his wages.

(3) City of Moorpark v. Superior Court, 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445 (1998) -- Plaintiff suffered a work related injury to her knee; after she recovered, she told her supervisor she was ready to return to her job. Her supervisor, however, allegedly terminated her employment because she was unable to perform the essential functions of the job. Her employer subsequently denied plaintiff's request to be rehired, as plaintiff claimed she would be able to perform the functions of her position if certain accommodations were provided. Court held that disability discrimination can form the basis of a wrongful termination in violation of public policy claim; the prohibition of disability bias is clearly stated in the FEHA, this provision benefits the public at large, the unlawfulness of such conduct has been clearly established and this policy is "substantial and fundamental."

(4) Gould v. Maryland Sound Indus., Inc., 31 Cal. App. 4th 1137, 37 Cal. Rptr. 2d 718 (1995) -- Plaintiff alleged, inter alia, that the defendant company discharged him to avoid paying him accrued commissions and vacation pay and in retaliation for informing the company that it was not paying the required overtime wages to certain employees. Id. at 1143. The court held that if plaintiff was in fact discharged for the reasons alleged, the company had violated a public policy. The court found that prompt payment of wages due an employee is a fundamental public policy, citing relevant provisions of the Labor Code. Id. at 1148. Likewise, the court found that plaintiff's retaliation claim implicated a substantial and fundamental public policy because employers are required by statute to pay overtime wages. Id. at 1150.

(5) Holmes v. General Dynamics Corp., 17 Cal. App. 4th 1418, 1432, 22 Cal. Rptr. 2d 172 (1993) -- Employee allegedly was terminated in retaliation for repeated disclosures of General Dynamics' breaches of the federal False Statements Act; this implicated a substantial public policy and thus could form the basis of a public-policy wrongful discharge claim.

g. The public policy must be applicable to the employer. In Jennings v. Marralle, 8 Cal. 4th 121, 32 Cal. Rptr. 2d 275 (1994), the California Supreme Court held that a cause of action for wrongful discharge in violation of public policy will not lie if the defendant is exempt from the statute. Id. at 124-25. In Jennings, the defendant employed fewer than five employees and was therefore exempt from the age discrimination provisions of California's Fair Employment and Housing Act ("FEHA"). Id. at 126. Plaintiff's complaint alleged that her termination was based on age and therefore violated public policy, even though defendant was not subject to the FEHA, because of the statute's broad statement of public policy prohibiting age discrimination. Id. The Court rejected this argument, finding that it would be unreasonable to expect employers who are expressly exempted from the FEHA to nonetheless comply with the law from which they are exempted to avoid possible tort liability. Id. at 134-36.

h. Anti-discrimination statutes do not always preempt a common law cause of action for wrongful discharge in contravention of public policy. Rojo v. Kliger, 52 Cal. 3d 65, 276 Cal. Rptr. 130 (1990) -- The California Supreme Court rejected the argument that a public policy claim based on discrimination is exclusively governed by the antidiscrimination statutes. The Court held that the California Constitution, which prohibits discrimination based on sex, race, creed, color, or national or ethnic origin, sets forth a fundamental public policy against employment discrimination on any of those grounds, and may be the basis for a tort cause of action for wrongful discharge in violation of public policy, independent of California's Fair Employment and Housing Act. Id. at 89-90.

i. Public policy claims are recognized by many states. See, e.g., Ariz. Rev. Stat. § 23-1501(3)(b).

j. A public policy tort claim also may be brought against a subsequent employer who terminated an employee based on his actions during his prior employment. Skillsky v. Lucky Stores, Inc., 893 F.2d 1088 (9th Cir. 1990) -- Plaintiff was terminated from his employment with

Lucky's because he used abusive language and threatened his manager. He then was hired elsewhere but was terminated soon thereafter, allegedly because the second employer learned that he had filed California OSHA complaints against Lucky's seven years earlier. The court held that prohibiting retaliatory discharges for filing safety complaints extends to subsequent employers. Id. at 1094.

2. Limitations based on the facts - the implied contract exception.

Even though there is no written or oral employment contract providing for other than employment at will, courts increasingly will find an "implied contract," based on several different factors, which provides that an employee may be terminated only for good cause. Whether there was good cause for a termination is then left to a judge or jury to decide.

a. Employment applications/handbooks/company policies.

(1) Some courts have held that language in company documents, such as personnel policies, may constitute a contract between employee and employer. For example, a progressive discipline policy may create an implied contract that an employee could be terminated only for good cause. But see Davis v. Consolidated Freightways, 29 Cal. App. 4th 354, 367, 34 Cal. Rptr. 2d 438 (1994) (holding that the existence of a progressive discipline system did not create a triable issue of fact with regards to the issue of the existence of an implied contract).

(2) Many employers require employees to execute employment applications, agreements or employee handbook acknowledgments that state employment can be terminated without cause at any time. If properly drafted, these at will provisions entitle the employer to judgment on claims for breach of an implied contract and breach of the covenant of good faith and fair dealing.

b. Oral commitments or statements may also give rise to an implied contract providing for termination only for cause.

(1) E.g., Rabago-Alvarez v. Dart Indus. Inc., 55 Cal. App. 3d 91, 96-97, 127 Cal. Rptr. 222 (1976) (enforceable contract created by oral commitment to employ plaintiff "as long as employment is satisfactory").

(2) Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 776 (9th Cir. 1990) (upholding a jury verdict finding that the employer had impliedly promised the employee that she would be treated fairly and not be laid off except in accordance with personnel policies and procedures).

(3) But see Rochlis v. Walt Disney Co., 19 Cal. App. 4th 201, 213-14, 23 Cal. Rptr. 2d 793 (1993) (holding that the plaintiff's claimed promises made to him by the employer during employment negotiations were "too vague and indefinite" to support a breach of contract claim; "promises to pay salary increases or bonuses which are 'appropriate' to [plaintiff]'s responsibilities and performance or that [plaintiff] would have an 'active and meaningful' participation in creative decisions are not capable of enforcement in a court of law").

(4) Hillsman v. Sutter Community Hosps., 153 Cal. App. 3d 743, 750, 200 Cal. Rptr. 605 (1984) (holding that "a mere hope or expectation rather than a promise . . . [will not constitute an enforceable contract of] employment for a specified term . . . ."). See also Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917 (1981) ("oblique language will not . . . be sufficient to establish [an] agreement" which overrides the employer's right to terminate employment at will); Ladas v. California State Auto. Ass'n, 19 Cal. App. 4th 761, 772, 23 Cal. Rptr. 2d 810 (1993) (promises of excellent working conditions, inter alia, are mere "puffing" and not actionable; "To anoint such puffing language with contractual import would open the door to a plethora of specious litigation and constitute a severe and unwarranted intrusion on the ability of business enterprises to manage internal affairs.")

c. Hybrid situation: "the totality of the parties' relationship." In other cases, courts have found that a variety of factors, taken together, can create an implied contract not to terminate except for good cause.

(1) The seminal case is Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) -- A thirty-two-year employee had worked his way up from dishwasher to vice president. He claimed his discharge violated "fundamental principles of public policy" and was contrary to the term of an express or implied agreement of employment. The court

rejected the public policy claim but recognized that there could be an implied promise by the employer not to act arbitrarily in dealing with its employees:

> [T]here were facts in evidence from which the jury could determine the existence of such an implied promise: the duration of appellant's employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies.

Id. at 329. The court thus required "good cause" to discharge.

(2) In Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988), the California Supreme Court reaffirmed the Pugh decision. During his employment, Foley received a series of salary increases, promotions, bonuses, awards and superior performance evaluations. He alleged that company officers made repeated oral assurances to him that his job was secure so long as his performance remained adequate. He also alleged that during his employment, the company maintained written "termination guidelines" that set forth express grounds for discharge and a mandatory seven-step pre-termination procedure. On the basis of these representations, Foley alleged that he reasonably believed that the company would not discharge him except for good cause, and therefore he refrained from accepting or pursuing other job opportunities. Id. at 663-64.

The Court held that Foley had stated an "implied contract claim" that he would not be terminated except for "good cause." Id. at 682.

(3) Walker v. Blue Cross of Cal., 4 Cal. App. 4th 985, 993, 6 Cal. Rptr. 2d 184 (1992) -- Court of Appeal reversed summary judgment for employer on breach of implied contract claim; court held that at will language in an employee handbook was contravened by such factors as the plaintiff's nineteen years of service, consistent promotions, salary increases and the employer's implemented personnel policies.

(4) Tonry v. Security Experts, Inc., 20 F.3d 967 (9th Cir. 1994) -- Court held that an implied contract for continued employment was established under California law by: (1) employee's eight plus years of service and early promotion; (2) employee's relocation at employer's request and a series of increases in annual salary; (3) lack of criticism regarding employee's work; (4) employee's increase in ownership interest during employment; and (5) employer's custom of not terminating employees except for good cause. Id. at 971.

3. Limitations plucked from thin air -- "the implied-in-law covenant of good faith and fair dealing" exception.

a. Cleary v. American Airlines Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) -- First case to recognize an implied-in-law covenant by the employer of good faith and fair dealing, requiring "good cause" for termination based primarily on 18 years of service.

b. Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) -- Termination was based on fact that plaintiff was living with an employee of a competitor company. Jury verdict for plaintiff of $300,000 affirmed.

c. Khanna v. Microdata Corp., 170 Cal. App. 3d 250, 262, 215 Cal. Rptr. 860 (1985) -- Covenant is breached where employer discharges employee "in bad faith," with an "intent to frustrate the employee's enjoyment" of contract rights.

d. The implied covenant of good faith is not violated absent bad faith actions "extraneous" to the contract. Kuhn v. Department of Gen. Servs., 22 Cal. App. 4th 1627, 1637-38, 29 Cal. Rptr. 2d 191 (1994) (covenant means that neither party should "take any action extraneous to the defined relationship between them that would frustrate the other from enjoying benefits under the agreement"); Kelecheva v. Multivision Cable T.V. Corp., 18 Cal. App. 4th 521, 531-32, 22 Cal. Rptr. 2d 453 (1993) ("A breach of the covenant may then be established, inter alia, by a showing that defendant engaged in . . . bad faith action, extraneous to the contract, with the motive intentionally to frustrate the [employee's] enjoyment of contract rights . . . . ") (citations omitted).

It is not clear exactly what that test means, but it would appear to suggest a higher standard of proof than merely showing that a contract breach occurred.

e. The California Supreme Court greatly reduced the significance of this type of wrongful discharge claim in Foley v. Interactive Data Corp., supra, when it held that damages recoverable for breach of the implied covenant of good faith and fair dealing claims are limited to contract type damages. 47 Cal. 3d at 683-84. Therefore, if a jury finds that an employer lacked good cause to terminate and/or breached the duty of good faith and fair dealing to a terminated employee, the jury may award only actual lost wages and benefits -- emotional distress and punitive damages may not be recovered.

f. Cases since Foley have explained that an implied covenant claim cannot be used to convert an employment relationship that is terminable at will into one that is terminable only for good cause. See Rose v. Wells Fargo & Co., 902 F.2d 1417, 1426 (9th Cir. 1990) (when employment contract expressly provides that it may be terminated at will, covenant of good faith and fair dealing cannot be used to imply a requirement for good cause to terminate); Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1272 (9th Cir. 1990) (same); Flait v. North Am. Watch Corp., 3 Cal. App. 4th 467, 480-81, 4 Cal. Rptr. 2d 522 (1992) (plaintiff did not have a basis for his breach of covenant claim where his employment was at-will).

g. The covenant also cannot be redundant of the contract claim; courts have dismissed covenant claims that are purely duplicative of a concurrently pled contract claim. See Careau & Co. v. Security Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1395, 272 Cal. Rptr. 387 (1990) ("If the allegations [of a covenant claim] do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated.") (emphasis added).

4. Constructive discharge.

Even if an employee is not terminated, but resigns instead, wrongful discharge claims may still be pursued, if certain conditions exist.

a. The basic test: Whether the employer knew or should have known that a reasonable person in the plaintiff's position would have found the work environment so intolerable or aggravated at the time of the employee's resignation, that he/she would have been compelled to resign. See Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1246-47, 1251, 32 Cal. Rptr. 2d 223 (1994) (question is whether

reasonable person faced with allegedly intolerable employer actions or conditions would have no reasonable alternative except to quit).

b. Intolerable conditions: the plaintiff must show specific facts demonstrating that the work environment truly was intolerable.

(1) To amount to constructive discharge, "[t]he conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job." Turner, 7 Cal. 4th at 1246.

(2) The "adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable." Id. at 1247.

(3) Generally a single, trivial or isolated act of misconduct will not be sufficient to establish a constructive discharge claim. "Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger constructive discharge." Id.

c. Reasonable employee -- an objective standard: whether conditions were sufficiently intolerable or aggravated to constitute a constructive discharge is determined by whether a reasonable person would view the circumstances as such. Whether the aggrieved employee him/herself viewed the circumstances as such is not dispositive. Id. at 1248.

d. Employer intent or knowledge required: the employee must prove that the employer either deliberately created the intolerable conditions that triggered the resignation or, at a minimum, knew about the conditions and failed to remedy the situation in order to force the employee to resign. Constructive knowledge is insufficient. Id. at 1248-49.

e. Intolerable at the time of resignation: the intolerable or aggravated conditions must exist at the time the employee resigns. Id. at 1251.

(1) The effect of delay before resignation: the California Supreme Court has made it clear that the "reasonable employee" standard makes length of time between the onset of the allegedly intolerable conditions and the employee's resignation one relevant factor in determining the

intolerability of the working conditions, but it is not dispositive. Id. at 1254.

f. If a constructive discharge is established, a plaintiff may pursue all or any of the three wrongful discharge claims discussed above.

g. Recent examples.

(1) Kovatch v. California Casualty Management Co., Inc., 65 Cal. App. 4th 1256, 77 Cal. Rptr. 2d 217 (1998) -- Court reinstated a lawsuit brought by a worker who contends that he was harassed on the basis of his sexual orientation. The Court found that plaintiff had presented sufficient evidence of intolerable working conditions for a jury to hear his claim, noting that he presented evidence that his supervisor harbored anti-gay sentiments and wanted to terminate his employment because of his sexual orientation.

(2) Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490 (8th Cir. 1996) -- Court reverses constructive discharge finding. "An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged." Dissatisfaction with a work assignment normally is not so intolerable as to be a basis for constructive discharge.

(3) Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406 (9th Cir.), cert. denied, 117 S. Ct. 295 (1996) -- Despite plaintiff's contentions that he was not offered a new position, earned less than another vice president, was forced to move into a much smaller office, was excluded from key meetings, and that other executives were told not to speak to him about financial matters, Court affirmed summary judgment on constructive discharge claim; constructive discharge did not occur since the employee was not demoted, did not have his pay cut, was not encouraged to resign or retire, and was not disciplined.

(4) King v. AC&R Advertising, 65 F.3d 764 (9th Cir. 1995) -- Ninth Circuit held that an employee's claim for constructive discharge failed as a matter of law where employee claimed that: (1) his employment status changed to that of an at will employee; (2) his managerial responsibilities were reduced; and (3) a letter outlining the restructuring of his compensation

package included a reduction in his base salary (from $235,000 to $175,000) and a change in his bonus from a fixed $100,000 to a performance based bonus (which potentially would add $160,000 to his compensation). Id. at 768. In so holding, the court reasoned that, "[u]nder the standard set out in Turner and consistent with other California case law, we find that the undisputed facts are insufficient to prove the required intolerable or aggravated work conditions. . . . Because [plaintiff's] resignation was unreasonable as a matter of law, he was not constructively discharged." Id. at 769.

(5) Gibson v. Aro Corporation, 32 Cal. App. 4th 1628, 38 Cal. Rptr. 2d 882 (1995) -- Constructive discharge not found, in part because a demotion by itself is not enough to compel a reasonable person to resign and because the plaintiff did not tell the company (and the company never knew) he considered his working conditions as a sales representative to be intolerable. Id. at 1638-39.

(6) Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1253-55, 32 Cal. Rptr. 2d 223 (1994) -- California Supreme Court held that an employee's claim for constructive discharge in violation of public policy failed as a matter of law because: (1) the employee resigned more than four years after his "whistleblowing" reports of alleged misconduct by co-employees; (2) none of the allegedly intolerable conditions were "so obnoxious or aggravated as to cause a reasonable employee to feel compelled to resign;" and (3) the employee's single negative performance rating could not amount to a constructive discharge. The Court concluded that the employee's "resignation was voluntary and strategic, not . . . coerced or compelled. Id. at 1255.

(7) Tonry v. Security Experts, Inc., 20 F.3d 967 (9th Cir. 1994) -- Court upheld district court's finding of constructive discharge where, after having directed the employer's operations for eight years, plaintiff: (1) was demoted from his management position; (2) received a salary reduction; and (3) was stripped of certain benefits, such as use of the company car. Id. at 971-72.

(8) Rochlis v. Walt Disney Co., 19 Cal. App. 4th 201, 23 Cal. Rptr. 2d 793 (1993) -- Senior executive alleged that he was constructively discharged based on claims that: (1) his job

was more difficult than he had understood when he accepted the position; (2) he was not given sufficient authority to carry out his responsibilities; and (3) he did not receive as much compensation as he thought he deserved. Id. at 212. The Court of Appeal held that even assuming these allegations were true, they did not meet the "intolerable conditions" standard; the court therefore concluded that the employee voluntarily quit and was not constructively discharged. "Criticism of job performance and inadequate compensation, even a demotion or reduction in pay . . . are not grounds for a constructive discharge." Id.

5. Wrongful conduct short of termination (e.g., suspension, demotion or discipline).

a. A tort action may be brought for wrongful suspension. Garcia v. Rockwell Int'l Corp., 187 Cal. App. 3d 1556, 1561-62, 232 Cal. Rptr. 490 (1986), disapproved in part on other grounds, Gantt v. Sentry Ins., 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874 (1992) -- The court held that an allegedly wrongful suspension could be attacked in a tort lawsuit. The court acknowledged that it was a case of first impression, but stated: "we see no reason why the rationale of Tameny should not be applicable in a case where an employee is wrongfully (tortiously) disciplined and suffers damage . . . ."

b. No reported California decision had followed Garcia in the nine years since it was decided. However, in Scott v. Pacific Gas & Elec. Co., 11 Cal. 4th 454, 46 Cal. Rptr. 2d 427 (1995), the California Supreme Court unanimously held that employees can sue for "wrongful demotion" in breach of implied contract cases:

> [C]ourts will not confine themselves to examining the express agreements between the employer and individual employees, but will also look to the employer's policies, practices, and communications in order to discover the contents of an employment contract.

In this case, PG&E had adopted a detailed system of progressive, "positive discipline" which was to apply to all employees, and which "had as its basic premise the disciplining of its employees only for good cause." Plaintiffs, two supervisorial engineers, each of whom had been employed at PG&E for over twenty years, claimed that PG&E had not followed its own personnel policies when it

summarily demoted them without cause. Plaintiffs maintained that they were suspended with only a brief explanation of the charges against them (namely, negligent supervision and according favoritism toward certain PG&E employees). Although Plaintiffs subsequently responded to these charges with extensive documentary support, PG&E nonetheless relieved Plaintiffs from all supervisory responsibilities and reduced their salaries and benefits by approximately 25 percent.

Based on the "positive discipline" policy and PG&E managers' testimony about it, the Court sustained the jury's finding of an implied contract and award in favor of the two demoted managers for $1.3 million in past and future lost earnings.

6. Limitations on wrongful discharge actions.

a. Contractual limitations.

(1) Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613 (1984) (stock option agreement, which provided for at will employment, precludes wrongful discharge suit; "[t]here cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results").

(2) Gerdlund v. Electronic Dispensers Int'l, 190 Cal. App. 3d 263, 276-78, 235 Cal. Rptr. 279 (1987) (as a matter of law, a written at will agreement bars claims for both breach of contract and breach of the covenant of good faith and fair dealing).

(3) Slivinsky v. Watkins-Johnson Co., 221 Cal. App. 3d 799, 806, 270 Cal. Rptr. 585 (1990) (evidence of an implied agreement which contradicted the terms of at will agreements contained in an employment application held inadmissible; summary judgment for employer affirmed in wrongful termination action).

(4) Rochlis v. Walt Disney Co., 19 Cal. App. 4th 201, 210-12, 23 Cal. Rptr. 2d 793, (1993) (affirming summary judgment for employer where at will language in agreement signed by plaintiff was inconsistent with a claimed implied agreement).

(5) Malmstrom v. Kaiser Aluminum & Chem. Corp., 187 Cal. App. 3d 299, 315-16, 320-21, 231 Cal. Rptr. 820 (1986) (claim for breach of contract and breach of covenant of good faith and fair dealing precluded by written agreement stating that employment would continue "'for such a length of time as shall be mutually agreeable'").

(6) Haggard v. Kimberly Quality Care, Inc., 39 Cal. App. 4th 508, 46 Cal. Rptr. 2d 16 (1995) (the court overturned a jury verdict in favor of a terminated employee and entered judgment for the company based on an employment and confidentiality agreement which the employee had signed which contained explicit at will language and language that it could not be changed except by written agreement as well as the company's published employment handbook with similarly explicit at will language).

(7) See also Camp v. Jeffer, Mangels, Butler & Marmaro, 35 Cal. App. 4th 620, 41 Cal. Rptr. 2d 329 (1995) (acknowledgment of at will employment signed shortly after the employees were hired barred any implied contract or implied covenant claim at least in the absence of strong evidence of a contrary agreement).

b. Length-of-service limitations.

(1) Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 478, 199 Cal. Rptr. 613 (1984) (three-and-one-half-year employee cannot overcome employment at will).

(2) Miller v. Pepsi-Cola Bottling Co., 210 Cal. App. 3d 1554, 1559, 259 Cal. Rptr. 56 (1989) (as a matter of law, no implied contract arises and at-will status not rebutted by two promotions and regular salary increases during 11 years of employment).

(3) But see Sheppard v. Morgan Keegan & Co., 218 Cal. App. 3d 61, 67, 266 Cal. Rptr. 784 (1990) (court allowed breach of implied covenant claim to go to a jury where individual's employment was terminated before his first day of work).

(4) Haycock v. Hughes Aircraft Co., 22 Cal. App. 4th 1473, 1489-95, 28 Cal. Rptr. 2d 248 (1994) (holding that an implied-in-fact contract to terminate only for cause cannot be

established as a matter of law by longevity of employment alone; instead, whether plaintiff has overcome the presumption of at will employment and established an implied agreement to the contrary must be determined by the trier of fact).

(5) Hoy v. Sears, Roebuck & Co., 861 F. Supp. 881, 886 (N.D. Cal. 1994) (holding that an implied contract to terminate for good cause only cannot be established as a matter of law by longevity of employment -- 26 years -- alone).

(6) Davis v. Consolidated Freightways, 29 Cal. App. 4th 354, 368, 34 Cal. Rptr. 2d 438 (1994) (holding that longevity of service is only one factor in determining whether an implied contract exists and that 9 years of service accompanied by regular promotions and raises do not change an at will employee to one dischargeable only for cause).

c. Substantive limitations on the meaning of "good cause."

A requirement of "good cause" means only that the employer must have some legitimate reason and may not discharge the employee for reasons that are "trivial, capricious, unrelated to business needs or goals, or pretextual." Pugh v. See's Candies, Inc., 203 Cal. App. 3d 743, 769-70, 250 Cal. Rptr. 195 (1988); see also Crosier v. United Parcel Serv., 150 Cal. App. 3d 1132, 1139-40, 198 Cal. Rptr. 361 (1983) (company "must be permitted ample latitude in disciplining its personnel"; legitimacy of employer's business reasons for discharging employee may be considered in determining whether employee has been dismissed for just cause), disapproved on other grounds, Newman v. Emerson Radio Corp., 48 Cal. 3d 973, 258 Cal. Rptr. 592 (1989).

Termination for misconduct: In order to justify termination for misconduct, an employer must only show that it had a reasonable and good faith belief that the employee committed the misconduct.

Cotran v. Rollins Hudig Hall Int'l, Inc., 17 Cal. 4th 93, 69 Cal. Rptr. 2d 900 (1998) -- Plaintiff was terminated when, following an investigation, his employer concluded that allegations he had sexually harassed two female employees were true. The Court held that, to show good cause under such circumstances, an employer need not prove that the employee actually engaged in alleged misconduct. Rather, it is enough for the employer to show that it reasonably

believed the misconduct took place and that it otherwise acted in good faith in terminating the employee. An employer is not required to have perfect certainty of the facts underlying its decision to terminate an employee. An employer need only have a reasonable and good faith belief that the employee committed the acts that gave rise to the employee's termination.

Silva v. Lucky Stores, Inc., 65 Cal. App. 4th 256, 76 Cal. Rptr. 2d 382 (1998) -- in applying the California Supreme Court's decision in Cotran, the Court dismissed a wrongful termination lawsuit brought by a former supervisor who was terminated for engaging in sexually inappropriate conduct. The Court held that the company acted in good faith, conducted an appropriate investigation, and had reasonable grounds for believing the worker had engaged in misconduct. After Cotran, three factual determinations now are relevant to the question of employer liability in these cases: (1) Did the employer act with good faith in making the decision to terminate the worker; (2) Did the decision follow an investigation that was appropriate under the circumstances; and (3) Did the employer have reasonable grounds for believing that the employee had engaged in the misconduct.

But see Wilkerson v. Wells Fargo Bank, 212 Cal. App. 3d 1217, 1230-31, 261 Cal. Rptr. 185 (1989) (where an employee is discharged for misconduct, and the employee denies the misconduct, the employer will have to prove to a jury that the misconduct actually occurred before good cause can be found).

Courts have held terminations to be for "good cause" under various circumstances, including when the employee has:

(1) Broken a company rule. E.g., Moore v. May Dep't Stores Co., 222 Cal. App. 3d 836, 83-40, 271 Cal. Rptr. 841 (1990) (violation of company's handbook rule resulted in summary judgment for the employer).

(2) Demonstrated a lack of loyalty. E.g., Fowler v. Varian Assocs., Inc., 196 Cal. App. 3d 34, 42-43, 241 Cal. Rptr. 539 (1987) (summary judgment granted when an employee displayed lack of loyalty to the company by placing himself in a conflict of interest while still employed by the employer).

(3) Demonstrated poor performance. E.g., Knights v. Hewlett Packard, 230 Cal. App. 3d 775, 779 81, 281 Cal. Rptr. 295

(1991) (short-term employment combined with unacceptable performance supported summary judgment, even if employee was on disability when terminated); Kohler v. Ericsson, Inc., 847 F. 2d 499, 501 (9th Cir. 1988) (series of poor evaluations and warnings over six years was sufficient to show good cause).

(4) Been laid off. E.g., Clutterham v. Coachmen Indus., 169 Cal. App. 3d 1223, 1227, 215 Cal. Rptr. 795 (1985) ("[T]he employer] made a business judgment to reorganize . . . with the result that [plaintiff's] services were no longer needed. This constituted good cause to terminate [plaintiff]."); Cox v. Resilient Flooring Div. of Congoleum Corp., 638 F. Supp. 726, 731 (C.D. Cal. 1986) (even if employee had a contract for continued employment, a reduction in force provided sufficient cause for the discharge of the 15-year managerial employee even though there may have been other factors which contributed to the company's decision to terminate the plaintiff's employment); Selby v. Pepsico, Inc., 784 F. Supp. 750, 759 (N.D. Cal. 1991), aff'd, 994 F.2d 703 (1993) (granting summary judgment for employer under California law, the court observed: "Assuming that implied-in-fact contracts did exist, they would serve only to limit termination to cases where 'good cause' existed. A decision to reduce the size of the work force constitutes good cause."), aff'd sub nom. Nesbit v. Pepsico, 994 F.2d 703 (9th Cir. 1993).

(5) Planned to go into competition with the employer. E.g., Stokes v. Dole Nut Co., 41 Cal. App. 4th 285, 296, 48 Cal. Rptr. 2d 673 (1995) (affirming summary judgment for employer where plaintiffs, managerial or supervisorial level employees, had access to confidential company information and had engaged in "[e]xtensive acts" toward establishing a competing business).

d. Statute of limitations issues.

In Romano v. Rockwell Int'l, Inc., 14 Cal. 4th 479, 59 Cal. Rptr. 2d 20, 26, 34 (1996), the California Supreme Court held that the statute of limitations for contract and tort claims in the wrongful termination context begin to run at the time the employee is actually discharged, not at the time the employee is given notice that he or she will be discharged.

Where an employee is given notice of his or her termination, the court stated that the employee may elect to pursue a cause of action for anticipatory breach of contract before he or she is terminated, or the employee may elect to rely on the contract and continue to perform his or her obligations under the contract until he or she is terminated. At which time the employee may sue for breach of contract. Id. at 25-26.

The rule in federal discrimination cases is different. The United States Supreme Court in Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498 (1980), held that in discrimination cases under federal law, the statute of limitations begins to run at the time the employee is given notice of his or her termination, not at the time the employee actually stops working. Id. at 258.

D. Remedies For Wrongful Termination.

1. Jury trial.

In 1998, California employers prevailed in the majority of jury trials (approximately 54% of reported verdicts), but the average amounts awarded to plaintiffs by juries are the largest in the last six years. The average verdict awarded to plaintiffs in 1998 was $2,506,132, $992,774 in 1997, and $1,409,793 in 1996. The average awarded to plaintiffs in the last five years was $1,473,708. Sonnenschein Nath & Rosenthal, Employment Law, "1998 Employment Law Jury Verdicts" (January 1999).

2. Lost wages and benefits.

a. Back pay -- lost wages and benefits from termination to time of trial, less earnings from other comparable employment.

b. Front pay -- lost wages and benefits from trial to some unspecified point in the future. Plaintiffs' attorneys argue that such damages should be calculated through retirement age.

c. Limitation on front and back pay awards for plaintiff's wrongful on-the-job conduct -- the "after acquired evidence" doctrine.

The after-acquired evidence doctrine bars awards of front pay and limits awards of back pay where an employer discovers during the course of litigation that the plaintiff engaged in wrongful on-the-job conduct for which the employee would have been terminated had the misconduct been discovered. The Supreme Court upheld this

doctrine in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 115 S. Ct. 879 (1995). There the plaintiff alleged she was discharged because of her age. In her deposition, the plaintiff admitted that during her final year of employment, she had copied several company documents containing confidential information about her former employer's financial condition. The employer did not learn of her actions until after she was laid off. The United States Supreme Court held that such "after acquired evidence" of employee wrongdoing was not a complete bar to liability, but did limit the remedies available to the plaintiff:

> In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern "for the relative moral worth of the parties," but to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing. . . . We do conclude that . . . as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy.

Id. at 886 (citation omitted) (emphasis added).

As to back pay in such cases, the Court held that no relief should be available for damages incurred after the discovery of the misconduct by the employer:

> The beginning point in the trial court's formulation of a remedy should be calculation of back pay from the date of the unlawful discharge to the date the new information was discovered.

Id.

California courts have followed McKennon's lead in applying the after-acquired evidence doctrine. See, e.g., Camp v. Jeffer, Mangels, Butler & Marmaro, 35 Cal. App. 4th 620, 632, 41 Cal. Rptr. 2d 329 (1995) ("In general, the after-acquired evidence doctrine . . . limits available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. Employee wrongdoing in after-acquired evidence cases generally falls into one of two categories: (1) misrepresentations on a resume or job application; or (2) post-hire, on-the-job misconduct."); Gonzalez v. Superior Court, 33

Cal. App. 4th 1539, 1547, 39 Cal. Rptr. 2d 896 (1995) (stating that "evidence of [the plaintiff's] misconduct . . . would be admissible to limit the kind and quantity of damages recoverable in this action. (McKennon v. Nashville Banner Pub. Co. [although an employee's wrongdoing will not bar her action when her suit 'serves important public purposes,' her wrongdoing does bear on the specific remedy to be ordered and the amount of damages she may recover]." . . .) (parenthetical in original) (internal citation omitted) (emphasis added).

3. "Emotional distress" damages, recoverable under public policy and tort claims, but not contract claims. There is no limit put on such damages. It is left to the jury's discretion.

4. Punitive damages (also known as "exemplary damages").

In order to collect punitive damages (available under tort claims only), the plaintiff must show by clear and convincing evidence that the defendant engaged in conduct that was malicious, oppressive or fraudulent. In order to collect punitive damages against a defendant employer, a plaintiff must show that employer had advance knowledge of the unfitness of the employee who committed the tort (i.e., tortfeasor) and employed that tortfeasor with a conscious disregard of the rights and safety of others or otherwise authorized or ratified the wrongful conduct. Cal. Civil Code § 3294.

a. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 17678, 164 Cal. Rptr. 839, 840 (1980) (punitive damages are available at least where discharge violates "fundamental principles of public policy").

5. Prejudgment interest.

6. Possible attorneys' fees if the discharge violates a discrimination or other statute providing for reasonable attorneys' fees to the prevailing party.

E. Other Tort Claims.

1. Foley made clear that the only viable common-law tort claim arising from an employee's termination is where the termination violates a fundamental public policy. 47 Cal. 3d at 665-71.

Thus, common law claims -- however styled -- that arise out of an employee's termination arguably are barred by Foley (and perhaps also by the exclusive remedy of workers' compensation).

a. Fraud: Hunter v. Up-Right, Inc., 6 Cal. 4th 1174, 1183-85, 26 Cal. Rptr. 2d 8 (1993) ("no independent fraud claim arises from a misrepresentation aimed at termination of employment").

b. Negligence: E.g., Hine v. Dittrich, 228 Cal. App. 3d 59, 64, 278 Cal. Rptr. 330 (1991) ("[Plaintiff] can no more turn a contractual wrongful discharge action into a negligent supervision tort claim than could a terminated employee plead negligence simply because the employer negligently failed to follow prescribed procedures before the firing.").

c. Emotional distress: E.g., Summers v. City of Cathedral City, 225 Cal. App. 3d 1047, 1059, 275 Cal. Rptr. 594 (1990) (Foley bars emotional distress claims arising out of terminations).

d. Defamation: Soules v. Cadam. Inc., 2 Cal. App. 4th 390, 404, 3 Cal. Rptr. 2d 6 (1991) (Foley bars a defamation claim that was inextricably bound to the termination), overruled in part on other grounds, Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223 (1994).

e. Other claims: E.g., Soules, 2 Cal App. 4th at 404 (dismissing as a matter of law claims for negligent interference with contractual relations, prima facie tort, conspiracy, and others).

2. However, Foley does not necessarily bar tort claims that are independent of an employee's termination. Some of the tort theories possibly available to plaintiffs include:

a. Fraud: Lazar v. Superior Court, 12 Cal. 4th 631, 49 Cal. Rptr. 2d 377 (1996) (holding that neither Hunter nor Foley barred plaintiff's fraud and misrepresentation claims. According to the Court, Hunter only bars the limited category of fraud claims arising from employer misrepresentations which are made to effect termination; here, the alleged misrepresentations were not intended to induce plaintiff to resign, but were instead aimed at persuading plaintiff to relocate); Hunter, 6 Cal. 4th at 1185 ("We note, however, that a misrepresentation not aimed at effecting termination of employment, but instead designed to induce the employee to alter detrimentally his or her position in some other respect, might form a basis for a valid fraud claim . . . .") (emphasis in original) (dictum); Meade v. Cedarapids, Inc., 164 F.3d 1218 (9th Cir. 1999) (employee and employee's spouse could sue for fraudulent inducement where triable issue existed as to whether decision to close employer's facility was made prior to employment offer to employee to move to accept

employment); but see Magpali v. Farmers Group, Inc., 48 Cal. App. 4th 471, 55 Cal. Rptr. 2d 225, 231 (1996) (where plaintiff alleged that he was fraudulently induced to leave his prior employment to work for Farmers, court held that plaintiff had no evidence that the promises made to plaintiff that allegedly induced him to leave his prior employment were false when made); Jhingan v. Roche Molecular Sys., 11 I.E.R. BNA Cases 1471, 1476 (N.D. Cal. 1996) (California Labor Code Section 970 misrepresentation claim dismissed where there was no evidence that the company induced the plaintiff to move from Iowa to California with no intention of fulfilling alleged promises: "An unfulfilled promise is not fraud . . . .").

b. Invasion of privacy: E.g., Hill v. National Collegiate Athletic Ass'n, 7 Cal. 4th 1, 15-20, 26 Cal. Rptr. 2d 834 (1994) (the California Constitution's guarantee of a right to privacy, contained in Article I, Section 1, applies to private employers); Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F. 3d 1260 (9th Cir. 1998) (employees stated a valid claim for violation of state and federal constitutional rights to privacy when employer tested employees for syphilis, sickle-cell trait, and pregnancy, without their consent); Pilkington Barnes Hind v. Superior Court, 66 Cal. App. 4th 28, 77 Cal. Rptr. 2d 596 (1998) (an applicant who causes a delay in submitting to a drug test until after the start of his employment may not evade the required test on the ground that he has now become an employee).

c. Defamation: Davaris v. Cubaleski, 12 Cal. App. 4th 1583, 1590-92, 16 Cal. Rptr. 2d 330 (1993) (defamation is not a "risk of employment" or personal injury and, thus, not covered by the exclusivity provisions of the Workers' Compensation Act).

The parties in Davaris did not raise, and the court did not consider, the Foley doctrine, or the Soules case applying it to bar a defamation claim. It would appear that the law should be, as in Soules, that defamation claims are barred by Foley if inextricably bound to a termination of employment.

(1) Compelled self-defamation.

E.g., McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 795-98, 168 Cal. Rptr. 89 (1980) (plaintiff alleged that his employer had made false and defamatory statements to him in reviewing his performance, that these statements

formed the basis for dismissal and that he had been compelled to repeat these defamatory statements when he applied for further employment; court held that the employee stated a cognizable claim for defamation because it was foreseeable that the employee would be under a strong compulsion to republish the defamatory statements to others).

Some states have enacted legislation barring recovery for defamation which is based on a theory of compelled self-publication. See e.g. Colo. Rev. Stat. § 13-25-125.5.

d. Intentional or negligent infliction of emotional distress: E.g., Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 617-18, 262 Cal. Rptr. 842 (1989) (intentional infliction of emotional distress can be claimed when sexual harassment creates a hostile work environment).

e. False imprisonment: E.g., Fermino v. Fedco, Inc., 7 Cal. 4th 701, 30 Cal. Rptr. 2d 18 (1994) (employee's claim of false imprisonment, based on allegations that she was kept against her will in a windowless room for over an hour, accused of stealing, threatened with arrest until she confessed, falsely told witnesses were in the next room, and released only when she became hysterical, is not barred by the exclusive remedy provisions of the Workers' Compensation Act).

f. Negligent hiring and retention: E.g., Evan F. v Hughson United Methodist Church, 8 Cal. App. 4th 828, 843, 10 Cal. Rptr. 2d 748 (1992) (child parishioner sexually molested by a pastor filed suit against the pastor's church; court held that the plaintiff stated a cause of action for negligent hiring, noting that the church hired the pastor without any investigation or inquiry into his fitness); Doe v. Capital Cities, 50 Cal. App. 4th 1038, 1054-55, 58 Cal. Rptr. 2d 122 (1996) (employer's knowledge of its casting director's use of serious, mind-altering illegal drugs, together with employer's knowledge of casting director's practice of using his position to gain sexual favors is not enough to impute employer with knowledge that casting director might first drug and then sexually assault a potential employee-actor).

g. Negligent supervision: E.g., Chamberlain v. Bissell Inc., 547 F. Supp. 1067, 1080-81 (W.D. Mich. 1982) (employer failed to inform the plaintiff that his discharge was being considered; court found the employer liable for negligence, even though the plaintiff had been discharged for good cause).

h. Claims based on both positive and negative job references:

(1) Negative references which are in any way false may give rise to a defamation claim (and if intentionally false, a misdemeanor under Cal. Labor Code § 1050).

(2) A positive reference which omits key facts also may give rise to liability. Randi W. v. Muroc Joint Unified School Dist., 14 Cal. 4th 1066, 60 Cal. Rptr. 2d 263 (1997). In this case, the California Supreme Court held that defendant school districts could be held liable for failing to disclose to another school district a former employee's alleged past record of sexual misbehavior. The defendant school districts had written glowing letters of recommendation on behalf of the former employee, who subsequently obtained the position he sought and thereafter was charged with unlawfully touching a minor, a misdemeanor. The Court held that although generally employers do not have a duty to provide information to prospective employers regarding former employees, where they undertake to do so, they must disclose all material information otherwise the information provided is deemed to be false. More importantly, failure to disclose all material facts will subject employers to liability to a third party -- i.e., a non-recipient of the false information -- where the absence of full disclosure caused the third party physical harm.

(3) Providing inaccurate information in a job reference or other report also may give rise to liability. E.g., Bulkin v. Western Kraft E., Inc., 422 F. Supp. 437, 442-45 (E.D. Pa. 1976) (employee alleged that he had suffered embarrassment and an adverse credit rating because the employer had disclosed inaccurate personnel file information; court held that an employee could state a cause of action for negligence under both Pennsylvania and New Jersey law).

i. Note, however, that even if Foley does not bar a particular tort claim, there may be other defenses. For example, there may be an argument that the claim is subject to workers' compensation laws and may only be brought in that forum. E.g., Accardi v. Superior Court, 17 Cal. App. 4th 341, 351, 21 Cal. Rptr. 2d 292 (1993) (if the type of activity which caused the emotional distress is activity that is a normal part of the employment environment -- e.g., promotions, demotions, criticism of work practices, negotiations as to grievances -- then workers' compensation is plaintiff's exclusive remedy); Shoemaker v.

Myers, 52 Cal. 3d 1, 16-17, 25, 276 Cal. Rptr. 303 (1990) (Workers' Compensation Act preempts infliction of emotional distress claims, other than emotional distress arising out of discrimination or harassment).

F. Individual Liability Of Supervisors And Managers.

1. Managerial immunity.

The doctrine of managerial immunity protects an employer's managers, agents and representatives from liability for personnel decisions they make in the course and scope of their employment. See, e.g., Aalgaard v. Merchants Nat'l Bank, 224 Cal. App. 3d 674, 684-86, 274 Cal. Rptr. 81 (1990) (employees' use of even unlawful means to replace a high-paid employee with lower-paid workers was deemed protected by the "manager's privilege"); Becket v. Welton Becket & Assoc., 39 Cal. App. 3d 815, 823, 114 Cal. Rptr. 531 (1974) (tort claim for interference with contractual relations dismissed; managerial employees cannot be held liable for acts taken within the course and scope of their authority because such acts are those of the company); see also West Am. Ins. Co. v. California Mut. Ins. Co., 195 Cal. App. 3d 314, 323, 240 Cal. Rptr. 540 (1987) (managerial employee is not personally liable for an act committed in the course and scope of his employment). This principle is based upon the reality that without such immunity, the threat of lawsuits would keep managers and supervisors from making decisions that are in the best interest of their employers, for fear that such decisions might potentially subject the individual managers to personal liability. Los Angeles Airways Inc. v. Davis, 687 F.2d 321, 328 (9th Cir. 1982) (applying California law; managerial immunity "is designed to further certain societal interest by fostering uninhibited advice by agents to their principals."); Kacludis v. GTE Sprint Communications Corp., 806 F. Supp. 866, 872 (N.D. Cal. 1992) (dismissing tort claims including intentional infliction of emotional distress and misrepresentation: "If [the manager's] privilege protects nothing else, it protects a manager's right to manage personnel (including firing and hiring) without fear of independent liability"); Janken v. GM Hughes Elec., 46 Cal. App. 4th 55, 73, 53 Cal. Rptr. 2d 741 (1996) (holding supervisors individually liable for actions taken on behalf of their employers would "seriously affect the management of industrial enterprises and other economic organizations").

Thus, as long as agents' decisions were motivated even in part by a desire to further and protect their employers' interests, they cannot be held liable for resulting damages or claims. See McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987) (dismissing claims for wrongful discharge, fraud and deceit against two managers; "On the basis of the complaint alone, the

district court could rightly conclude that no cause of action had been stated against [the individual defendants]. . . . [I]t is clear that 'if an advisor is motivated in part by a desire to benefit his principal,' his conduct is, under California law, privileged.") (emphasis added).

2. Specific immunity from contract claims.

Because a managerial employee is generally not a party to an employment contract and does not assume obligations under that contract, he or she cannot be held liable for breach of that contract. Gold v. Gibbons, 178 Cal. App. 2d 517, 519, 3 Cal. Rptr. 117 (1960).

Thus, where managerial employees act on behalf of their employer with respect to any alleged employment contract between their employer and an aggrieved employee, they cannot be held liable for breaching that express or implied employment contract. See e.g., Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 581, 108 Cal. Rptr. 480 (1973) (agents and employees of a corporate defendant cannot be held liable for the employer's breach of an employment contract); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722 (1980) (employees who are not parties to initial employment relationship or employment contract cannot be held liable for breach of the implied covenant of good faith and fair dealing), disapproved on other grounds, Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988).

3. Specific immunity from public policy claims.

Applying the notion of managerial immunity to public policy claims, the court in Weinbaum v. Goldfarb, Whitman & Cohen, 46 Cal. App. 4th 1310, 1315, 54 Cal. Rptr. 2d 462 (1996), found that a public policy claim cannot lie against third parties that did not employ the plaintiff.

The plaintiff in Weinbaum alleged that nonemployer companies and individual employees of those companies conspired with his employer to cause his discharge in violation of public policy. Id. at 1312-13. In rejecting the plaintiff's claim, the court stated

> There is nothing in Foley or in any other case we have found to suggest that [the tort of wrongful discharge in violation of public policy] imposes a duty of any kind on anyone other than the employer. Certainly, there is no law we know of to support the notion that anyone other than the employer can discharge an employee.

Id. at 1315.

MISCELLANEOUS

MISCELLANEOUS

THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: NATURE, COVERAGE, AND STATUTORY STRUCTURE

A. Nature And Purpose Of ERISA.

On September 2, 1974, Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA was designed to achieve four major goals.

1. Protect Benefit Plan Beneficiaries: Congress sought to protect the interest of participants in employee benefit plans and their beneficiaries by creating individual statutory rights to enforce benefit plan obligations and by providing for appropriate remedies, sanctions, and ready access to the federal courts.

2. Inform Plan Beneficiaries And Codify Fiduciary Duties: Congress also sought to protect the interest of participants and beneficiaries and improve the equitable character and the soundness of employer benefit plans by regulating their design and operation. To further this purpose, ERISA required the disclosure and reporting to participants and beneficiaries and government agencies of financial and other information, established obligations and standards of conduct and responsibility for fiduciaries of employee benefit plans, and imposed minimum standards of participation, vesting, and funding standards in pension plans.

3. Develop A Mechanism For Enforcing Rights Under ERISA: ERISA created a system of governmental enforcement of ERISA rights. Under ERISA, the Secretary of Labor is authorized to sue, in federal court, to recover damages for the plan from fiduciaries who breach their fiduciary duties, and to enforce ERISA, including, in certain situations, the minimum standards regarding participation, vesting, and funding. The Secretary of Labor is further empowered to file suit to enjoin any act in violation of ERISA, and to collect civil penalties for certain ERISA violations.

4. Establish Insurance System For Protecting Investments: Finally, in a purported effort to provide greater security to participants and beneficiaries, and to improve soundness of private pension plans, Congress created a system of federal pension insurance administered by the Pension Benefit Guarantee Corporation ("PBGC"). Generally, most private defined benefit plans are covered by the PBGC, which partially insures the benefit commitment of and collects premiums from the covered plans.

B. Statutory Structure.

ERISA is divided into four titles that divide jurisdictions of administration and enforcement in an overlapping manner among the Department of Labor, the Treasury Department, and the PBGC.

1. Title I:

Title I is administered by the Department of Labor and contains reporting and disclosure requirements; minimum standards for participation, vesting, and funding; fiduciary responsibility requirements; provisions governing administration and enforcement; and group health care continuation coverage requirements ("COBRA").

2. Title II:

Title II amended the Internal Revenue Code using substantial identical language to that used in parts of Title I to require, among other things, minimum standards for participation, vesting, and funding for plan qualification purposes.

3. Title III:

Title III governs the coordination of jurisdiction of the federal agencies empowered to administer and enforce ERISA.

4. Title IV:

Title IV created the PBGC, provides for plan termination insurance, and imposes withdrawal liability on certain employers who are obligated to contribute to multi-employer plans.

C. Coverage.

1. Types of Plans.

ERISA applies to an expansive range of employee benefit plans. Generally, ERISA applies to any pension or welfare plan, fund, or program established by an employer, union, or both, that covers employees. ERISA does not apply to certain payroll practices, informal arrangements, and certain one-time payments.

A plan covering only partners or sole proprietors or covering only an individual and his or her spouse with respect to a trade or business (whether

or not incorporated) that is wholly owned by the individual or by the individual and the spouse is not subject to Title I of ERISA.

2. Qualified Retirement Plans -- Tax Breaks.

The Internal Revenue Code, as amended by Title II of ERISA, imposes complex requirements, which, if satisfied, enable both employers and employees to enjoy significant tax advantages as to retirement plans. The primary tax benefits associated with the establishment of a tax-qualified plan and its accompanying trust are:

a. Employer contributions to the plan are deductible in the year they are made;

b. Plan earnings accumulate on a tax-deferred basis; and

c. Employees only are required to pay taxes on plan benefits when ultimately distributed to them.

3. Non-qualified Plans.

Generally, non-qualified plans are intended to be exempt from the funding, participation, and vesting requirements of ERISA. Title I exempts excess benefits plans and plans that are maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees (colloquially referred to as "top-hat" plans).

4. Changes to Plans.

If an employer's pension plan has a surplus of funds, the employer may reduce or suspend contributions to the fund and amend it to include a non-contributory benefit structure. A member of a plan is generally entitled to fixed, periodic payments based on his contributions to the deferred benefit plan. He does not, however, have an interest in the surplus. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999).

COBRA

A. Overview.

What is COBRA? COBRA is an acronym for the Consolidated Omnibus Budget Reconciliation Act of 1985. The Act grants employees, their dependents, and certain others (also referred to as "qualified beneficiaries") the right to continue receiving coverage under the employer's health care plan(s) at the employer's group rate upon the occurrence of certain "qualifying events." The law requires employers to make the extended coverage available on a uniform basis, without regard to the health status of the employee or dependent who is availing himself or herself of the opportunity.

B. Basics.

1. Employers Subject To COBRA.

COBRA's continuing coverage rules apply to all businesses that:

a. Employ 20 or more individuals on at least 50 percent of the working days in the year; and

b. Have a group health insurance plan.

2. The 20-Employee Test.

In determining whether an employer qualifies for the under-20-employee exclusion in a given year, (i.e., has fewer than 20 employees on at least 50 percent of the working days in the year), the employer may be allowed to count weekend days as typical business days if the business regularly operates on those days, even if there is usually a smaller work force on the weekend.

3. Employers Exempt From COBRA.

Exempt from COBRA are church plans and plans maintained by the federal government (there are requirements similar to COBRA's that apply to the federal government).

4. Covered Employees.

Any individual who is or was covered by a group health plan provided by the employer on the basis of the performance of services for the employer. Specifically included in this definition are self-employed individuals, agents, independent contractors, and directors.

5. Covered Plans.

COBRA is aimed solely at group health care plans. Health care for this purpose includes dental, vision, in-house medical facilities (but not first-aid facilities), and health care spending accounts, along with indemnity, HMO, and PPO medical plans. EAPs that provide only resource and referral services are probably not group health plans, but EAPs that provide a specified number of visits probably are.

Specifically not included for this purpose are plans maintained solely for purposes of complying with workers' compensation laws or disability insurance laws. Long-term care plans are also excluded.

6. Amount Of Employee's Contribution.

Employees can be charged 102% of the applicable premium.

7. Qualifying Events.

Qualifying events include:

a. Death of the covered employee;

b. Termination of employment for any reason other than gross misconduct;

c. Reduction of work hours below the level necessary to have coverage;

d. Divorce or legal separation of a covered employee;

e. A dependent child losing dependent status under the plan; and

f. A covered employee becoming entitled to Medicare benefits.

8. Gross Misconduct.

Employers may refuse to offer continuation coverage under COBRA if an employee has been terminated for "gross misconduct. "Unfortunately, a clear definition of what constitutes gross misconduct is not available. While gross misconduct is not defined by COBRA or in the proposed regulations implementing the law, it presumably involves outrageous, malicious, or egregious conduct by an employee and actions more serious than the kind of ordinary neglect of duties or lack of efficiency that can result in termination.

9. Length of Coverage.

The period of time during which a qualified beneficiary may continue their coverage under the employer's plan depends on the qualifying event that caused the employee's coverage to cease. The maximum continuation period resulting from termination of employment or a reduction of work hours is 18 months. For all other qualifying events (e.g., death of employee, divorce, etc.), the maximum period is 36 months.[4]

a. Multiple qualifying events: In the event of multiple qualifying events, the length of coverage is measured from the date of the initial event. For example, an employee is terminated, thereby triggering an 18-month continuation period. Then, a second qualifying event occurs (before the expiration of the 18 months), such as the death of the employee. The second continuation period (the 36 months resulting from the death of the employee) will be measured from the date or termination, not the date of death.

10. Employer's Notice Duties Under COBRA.

Employers are required to inform employees (or qualified beneficiaries) of their COBRA rights on two occasions:

a. Initial Notice: The first occasion, the Initial Notice, is when the employee first becomes covered under a group health plan. There is no specific timing requirements for provision of the Initial Notice other than the law's wording, "at the time of commencement of coverage under the plan."

b. Exit Notice: Notice of an employees' COBRA rights must be given upon an employee's exit from the plan's coverage (i.e., upon the occurrence of a qualifying event). Notice following the occurrence of a qualifying event must be provided within 14 days of the occurrence of one of the following:

(1) Death of the covered employee;

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[4] Special rules apply to: (1) disabled employees (29 month maximum); (2) employees who are eligible for Medicare (36 months from the date of eligibility); (3) retirees of bankrupt employers (life time coverage); and (4) survivors of retirees of bankrupt employers where the retiree dies after the bankruptcy (36 months from time of retiree's death).

(2) Termination of employment of the covered employee;

(3) Reduction of hours of the covered employee sufficient to cause loss of medical coverage;

(4) Divorce or separation (employee or spouses/dependents bear the burden of notifying the employer of this event within 60 days);

(5) A child ceasing to be a dependent; and

(6) The employee becoming entitled to Medicare.

11. Notice Period Extended For Multi-Employer Plans.

Where the employer's plan is administered by someone other than the employer, the notification period is 44 days. In these cases the employer must notify the plan administrator of the qualifying event within 30 days. The plan administrator then has 14 days to notify the qualified beneficiary regarding his or her COBRA rights.

12. Election Period.

Employees, their spouses and/or dependents have a 60-day time frame within which to decide whether they wish to accept continuation of coverage under COBRA. The 60 days run from the date the beneficiary is sent notice of his or her COBRA rights or the loss of coverage date, whichever occurs later.

a. Revocation of rejection: A decision to reject coverage may be revoked by or on behalf of a qualified beneficiary if the decision to continue coverage is made prior to the end of the 60-day election period. In other words, an employee can change his or her mind if that employee had turned down coverage and the "election period" has not expired. However, if the employee revokes a waiver of coverage, the insurance coverage need not be provided retroactively.

13. Early Termination Of COBRA Coverage.

The COBRA period can be cut off before the end of the continuation period if:

a. The employer ceases to provide any medical plans and no longer covers any employee;

b. The qualified beneficiary fails to make timely payment of any required premium (a premium payment is considered timely if made within 30 days after the date due or within such longer period as applies to or under the plan);

c. The qualified beneficiary becomes covered by any other group health plan (as an employee or otherwise) that does not contain any exclusion or limitation with respect to a preexisting condition of the beneficiary. If the new plan does contain such a limit or exclusion, the beneficiary is entitled to a full COBRA continuation coverage period while also being covered under the other plan; or

d. The qualified beneficiary (except if eligible for continuation coverage on account of a bankruptcy proceeding) becomes entitled to Medicare benefits.

14. Penalties For Noncompliance.

Penalties for failing to comply with COBRA include:

a. Ordering employer to provide coverage, including retroactive coverage;

b. A $100 per day penalty for failure to satisfy COBRA's notice requirements; and

c. Nondeductible excise tax penalties assessed against employer for up to $200 per day during noncompliance period with a $500,000 cap.

C. COBRA And Other Laws.

COBRA is a federal law dealing with continuation of group health coverage. There are also many state laws which contain continuation coverage provisions.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT ("WARN"), 29 U.S.C. § 2101 et seq.

A. The Basic Provisions.

1. Employers must give 60 days' advance written notice of a domestic "plant closing" or "mass layoff" to each affected non-bargaining unit employee (i.e., non-union employee), the bargaining representative of affected bargaining unit employees or the state dislocated worker unit (these units were

designated or created under Title III of the Job Training Partnership Act) and the chief elected official of the unit of local government within which the closing or layoff is to occur. 29 U.S.C. § 2102(a).

2. Affected employees, their representatives or government entities who do not receive such notice may sue the employer. 29 U.S.C. § 2104.

B. Employers Covered By This Law.

1. Though commonly referred to as the plant closing bill, this law applies to any type of business enterprise that employs 100 or more full-time or part-time employees, who in the aggregate work at least 4,000 hours per week excluding overtime hours. The business enterprise may be an office, a factory, a bank, etc. 29 U.S.C. § 2101.

   a. For the purpose of calculating the requisite number of employees, the Secretary of Labor has determined that workers on temporary layoff or on leave who have a reasonable expectation of recall should be counted.

   b. An employee has a "reasonable expectation of recall" when he/she understands, through notification or industry practice, that his/her employment has been temporarily interrupted and that he/she will be recalled to the same or a similar job. 29 C.F.R. § 639.3(a)(1).

2. The 100-employee test applies to an employer's entire operation, not to each separate site. For example, a company with 85 full-time employees in a manufacturing facility and 20 full-time employees in an office at another location has 105 employees for the purposes of this law and therefore is a covered employer. Additionally, U.S. workers at foreign sites of employment are counted to determine whether the employer is covered under the Act, but the foreign sites themselves are not subject to the Act.

3. Independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. In making this determination the courts will consider the following factors: common ownership, common directors and/or officers, de facto exercise of control, unity of personnel policies emanating from a common source and dependency of operations. 20 C.F.R. § 639.3(a)(2).

C. Employer Actions Which Trigger The 60-Day Notification Requirements.

1. Plant closings.

a. A permanent or temporary shut down of a single plant or other employment site,[5] or one or more of the facilities or operating units (such as departments) within a single plant or employment site; and

b. During a 30-day period, 50 or more full-time employees suffer an employment loss.[6]

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[5] Groups of structures which form a campus of industrial park or buildings in reasonable geographic proximity may be considered a single site if they are used for the same purpose and share the same staff and equipment. See 20 C.F.R. § 639.3(i)(3).

[6] An "employment loss" is (a) an employment termination other than a discharge for cause, voluntary departure or retirement; (b) a layoff exceeding six months; or (c) a reduction in hours of work of more than 50 percent during each month of any six-month period. 20 C.F.R. § 639.3(f).

An employment loss occurs upon the loss of full employment status: full pay, benefits and

2. Mass layoffs.

A mass layoff is a reduction in force which, although it does not result in a shutdown of a plant or an operating unit within a plant, results in:

Any layoff during any 30-day period of at least 50 full-time employees (who must constitute at least 1/3 of the total work force at a location) for more than six months; or

a. Any layoff during any 30-day period of at least 500 full-time employees at a location for more than six months.

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other employment entitlements. An employment loss occurs even if the employee is eligible for severance or supplemental unemployment compensation.

In the case of sale of a facility or operating unit, an employee of the seller who accepts employment with the buyer has not suffered an employment loss. Such employee of the seller is considered an employee of the purchaser immediately after the effective date of the sale. 29 U.S.C. § 2101(b)(1).

An employee has not suffered an employment loss where the loss results from the relocation or consolidation of part or all of the employer's business if, prior to the closing or layoff, the employer either: (a) offers to transfer the employee to a different work site within reasonable commuting distance with no more than a six-month break in employment; or (b) offers to transfer the employee to another work site regardless of distance with no more than a six-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later. 29 U.S.C. §2010(b)(2).

3. 90-day override provision.

a. Employment losses, which in the aggregate exceed the minimum number set forth in paragraphs 1 or 2 above and which occur within any 90-day period, shall be considered a single plant closing or mass layoff unless the employer can demonstrate that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of the Act. 29 U.S.C. § 2102(d).

D. Employer Notification Requirements.

1. An employer facing a plant closing or mass layoff must give at least 60 days' advance written notice of that fact to affected employees (or their union representative, where applicable), state government authorities and local government authorities. The required contents of a WARN Act notice depend on the recipient.

a. Notice to the employees.

(1) The employer must provide written notice to each employee who would reasonably expect to be laid off for more than six months[7] or face a reduction in hours worked of more than 50 percent per month.

[7] The employer also must notify employees who reasonably may be expected to suffer an employment loss as a result of "bumping rights."

(2) The notice must be specific, written in understandable language and contain at least the following: the name and telephone number of a company official from whom further information may be obtained; the nature of the planned action (plant closing or layoff); the expected date when the action will commence and the expected date when the individual will be separated or set forth a two-week window in which the terminations are to occur;[8] and a statement as to the existence of any applicable bumping rights.

b. Notice to the union.

(1) If a union represents affected employees, the written notice must go to the union, but need not go to the individual employees.

(2) The notice to the union must contain: the name and address of the employment site where the plant closing or mass layoff will occur; the nature of the planned action (plant closing or layoff); the expected date of the first separation and the anticipated schedule for making separations or set forth a two week window in which the terminations are to occur; job titles of positions to be affected, the number of employees in each classification and the names of employees currently holding those jobs; and the name, address and telephone number of a company official to contact for additional information.

c. Notice to local government agencies.

(1) The employer also must give written notice to the appropriate state dislocated worker unit and the chief elected official of the government unit in which the plant closing or mass layoff will occur.

(2) The notice must contain the same information as the notice to the union, except that this notice also must contain an indication of whether bumping rights exist and the name of

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[8] OCAW v. American Home Prods. Corp., 790 F. Supp. 1441, 1451 (N.D. Ind. 1992) (holding that an employer was required by the WARN Act to give notice of either the exact termination date or a 14-day termination window).

each union representing affected employees and the name and address of the chief elected officer of each union.

20 C.F.R. § 639.7

2. The Act does not require employers to give advance notice of layoffs that will not exceed six months.

   a. However, if short-term layoffs extend beyond six months, employees are deemed to have suffered an "employment loss" on the date their layoffs commenced unless:

      (1) The layoff extension resulted from unforeseeable business circumstances (including unforeseeable changes in price or cost); and

      (2) The employer provided WARN Act notice at the time the need for the extension became reasonably foreseeable. 20 C.F.R. § 639.4(6).

   b. Moreover, one court has held that employees may institute an action under WARN when no notice is given for a layoff which "is reasonably expected to last more than six months" and the employees "may reasonably be expected to experience employment loss as a consequence." Finkler v. Elsinore Shore Assoc., 725 F. Supp. 828, 831 (D.N.J. 1989).

3. In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice of any plant closing or mass layoff up to and including the effective date of the sale. 20 C.F.R. § 639.4(c).

E. Exceptions To The 60-Day Notice Requirements.

1. No notice required.

   a. The work site was a temporary or project-specific facility, and the affected employees were hired with the understanding that their work at this facility would end when the project was completed. (This exemption will apply most often in the construction industry.)

   b. The plant closing or mass layoff is part of a strike or a lockout. (Note: Other federal and state labor laws which may restrict the right of an employer to shut down a facility during a strike or Lockout are not affected by WARN.)

29 U.S.C. § 2103(2); 20 C.F.R. §§ 739.3(c)(2), 639.5 (c)(1)(4).

2. Notice requirement partially waived: The following are examples that require only "reasonable notice," which may be less than 60 days:

   a. The employer is seeking business or capitalization which would have made the notice unnecessary, and the employer reasonably believes that giving the notice would preclude it from getting the business or capitalization sought.

   b. The plant closing or mass layoff is based upon "sudden, dramatic, and unexpected" business circumstances outside the employer's control and which were not reasonably foreseeable as of the time that notice would have been required.

   c. The plant closing or mass layoff results from a "natural disaster."

   d. In each of the above situations, although a full 60 days' notice is not required, the employer must still give as much notice as it can under the circumstances and the employer must include in that notice justification for the shortened notice period.

   29 U.S. C. § 2102.

F. Employer Penalties For Non-Compliance With The Notification Requirements.

1. Lawsuit by employees.

   a. Employees affected by a plant closing or mass layoff may sue in federal court for:

      (1) Back pay for a maximum of 60 days;

      (2) Costs of any employee benefits programs (including medical expenses incurred by employees which would have been covered by a group insurance plan) to a maximum of 60 days; and

      (3) Employees' attorneys' fees if their suit is successful.[9]

[9] Prevailing defendants may recover attorneys' fees only where the plaintiff's suit was frivolous, unreasonable or without foundation. See, e.g., Solberg v. Inline Corp., 740 F. Supp. 680, 687 (D. Minn. 1990).

b. The Act does not contain a statute of limitations. It is likely, though, that a court will apply the most closely analogous state statute of limitations. See North Star Steel Co. v. Thomas, 115 S. Ct. 1927, 1930 (1995).

c. Employees may file suit wherever the employer does business.

d. According to one court, employees who are on temporary layoff at the time of plant closure are also entitled to damages for WARN violations. 29 U.S.C. § 2104(a)(l)-(7).

2. Lawsuit by local government units.

a. A local government unit which does not receive the 60-day notice may pursue a civil action for a penalty of up to $500 for each day the employer violated the notice requirements.

b. The amount of the penalty can be reduced if the employer establishes that it had a good faith, reasonable belief that its conduct did not violate the Act.

3. Unavailability of injunctive relief.

a. The Act expressly prohibits a federal court from issuing an injunction to stop a plant closing or mass layoff because of non-compliance with the notification requirements. 29 U.S.C. § 2104(b).

b. Employers should be aware, however, that other state or federal laws may allow employees or unions to obtain court injunctions against an employer's shutdown under certain circumstances.

G. Special Considerations For Employers Involved In Asset Sales, Stock Sales And Mergers.

1. Although the WARN Act's special sale-of-business provision is not explicitly limited only to certain types of sale transactions, it seems reasonably clear that it does not apply to all types of sale transactions. In fact, of the three basic types of sale transactions -- asset sales, stock sales, and mergers -- only asset sales normally qualify for the special sale-of-business provision. Asset sales, after all, are the only kind of business sale transaction in connection with which employees normally are laid off by the seller for possible rehire by the buyer. Thus, assets sales are the only type of sale transaction that needs the special provision.

2. In connection with the sale of business, WARN Act notice apparently is required only if enough employees experience a genuine employment loss, rather than a merely technical one. A number of cases have applied a functional approach toward employment loss determinations, concluding that if employees are still doing the same job, a change in employer identity is irrelevant.

   a. An "employment loss" requiring the 60-day notification is <u>not</u> triggered if:

      (1) The employee is covered at the time of sale by a written rehire agreement between buyer and seller, to which the employee is made a third party beneficiary with rights against the purchaser under applicable state law; or

      (2) The buyer offers employment to the seller's former employees within 6 months of the sale.

3. <u>What buyers and sellers should do</u>:

   a. Sellers: A seller seeking to avoid WARN Act liabilities, generally speaking, should lay off employees only after the effective date of the asset sale. Moreover, the seller should notify employees who are laid off that their layoffs are temporary (i.e., less than six months) if the buyer is expected to rehire some or all of them. This should not trigger notice requirements, unless the buyer fails to rehire a sufficient number of the seller's employees, in which case the buyer should be responsible for giving WARN Act notices.

      (1) Indemnity Clause In Sales Agreement: The above approach should be backed up by a sales contract provision assigning WARN Act obligations to the buyer, which also would indemnify the seller for any WARN Act liabilities.

   b. Buyers: A buyer seeking to avoid WARN Act liabilities should require the seller to permanently lay off its employees before the effective date of the sale, in which case the seller should not assume that the sale-of-business provision will prevent WARN Act obligations from being triggered.

      (1) Indemnity Clause In Sales Agreement: Similarly to sellers in the approach discussed above, buyers should negotiate a sales contract that will require seller to hold the buyer harmless

from any WARN Act liabilities that result from the seller's layoff or the buyer's failure to rehire the laid-off employees.

4. An employer is not required to give notification to an employee who has transferred to another facility under specified circumstances. If the employer makes such a transfer offer to an employee who otherwise would be laid off, the employer should document each offer and response.

H. Miscellaneous Issues.

1. WARN does not preempt state plant closing laws. Accordingly, employers must comply both with WARN and with any applicable state and local requirements.

2. One of the greatest concerns employers have about this 60-day notice requirement is that employees who receive notice will leave early or be disruptive.

   a. "Incentive to Stay" agreements designed to prevent or defer such actions should be considered in these situations.

   b. Such agreements may be drafted to include a provision stating that the notice requirements have been satisfied, and that the employee who accepts such an agreement waives all rights against the employer under WARN.

3. An employer relying on an exemption from the notice requirements should fully and carefully document all factors upon which the exemption is based.

4. The fact that a company policy or a union contract may provide severance pay in cases of layoff does not in itself excuse the employer from complying with the 60 days' advance written notice of a plant closing or mass layoff. Thus, employees covered by a severance pay policy or provision are entitled to both 60 days' notice and their benefits under the severance pay policy or provision.

   a. "Voluntary" Severance Pay: An employer may pay an employee severance "in-lieu-of-notice" as long as the severance is not part of a pre-existing obligation. This strategy may be useful where, for example, an employer does not want to give employees advance notice of a mass layoff because it is concerned that its soon-to-be-laid-off employees may engage in sabotage or suddenly allege a rash of on-the-job injuries.

WORKERS' COMPENSATION

A. Overview.

The workers' compensation laws reflect a compromise; they protect the workers by making it easier to file, establish and recover for workplace injuries, but they also protect the employer from endless costly litigation and exorbitant jury verdicts.

Today these laws have developed into a "no-fault" and exclusive type of system for workplace injury. Through a no-fault concept, the issue of liability for the injury becomes moot, provided the injury is work-related. With few exceptions, this area is governed by state law, and its application varies dramatically by state.

B. Compensable Injuries.

The definition of "injury" usually includes physical injuries and both mental and physical diseases. However, not every injury that an employee suffers is covered under workers' compensation. To recover, the employee must show that the injury "arose out of employment." Whether a particular injury arose out of employment is an issue that is very heavily litigated in the courts.

1. Arising Out of Employment.

   The words "arising out of" convey the idea of a causal relationship between the employment and the worker's injury. Thus, the injury of a worker who suffers a heart attack while on the job has its onset in the course of employment, but whether it arises out of the employment depends on the existence of some causal relationship between the work and the heart attack.

   An injury arises out of the employment if it occurs by reason of a condition or incident of the employment, or if it had its origin in the risk connected with the employment and is a rational consequence of that risk. The employment and the injury must be linked in some causal fashion.

   This "arising out of" concept centers around the nature of the risk, and generally consists of three categories: (1) occupational; (2) neutral; and (3) personal.

   a. Occupational: Occupational risks are those specifically related and foreseeable to the job. They are generally unique to the workplace. For example, injury as a result of exposure to toxic chemicals at the workplace is generally considered to be an occupational risk.

   b. Neutral: Neutral risks are those which are completely unknown or a mixture of personal and occupational risks, for example, where a

worker takes flu medication, suffers an allergic reaction, loses consciousness and falls onto a sharp piece of machinery. The states vary drastically as to whether a neutral risk satisfies the "arose out of" prong of the test for a compensable work injury. Generally, occupational risks always satisfy the requirement and personal risks do not.

c. Personal: Personal risks are those where the risk encountered in the work-place is only coincidental. For example, an employee, while at work, eats food from his brown bag lunch that is spoiled and suffers a bout of food poisoning.

2. Place or Activity Connected with Injury.

Determinations of compensable injuries also focus on the location or activity where the injury occurred. Of course, injuries that take place at the workplace and during working time satisfy this element of the test. However, problems arise in situations where employees are engaged in horseplay on the job and are injured as a result. Other questionable cases involve employee injury while involved in mixed social and business activities, like company-sponsored picnics or sporting activities. In addition, some problems also arise where an employee is injured while traveling to or from work. Again, the outcome of these cases varies by state.

C. **Benefits.**

There are basically three types of benefits an employee may obtain under a workers' compensation program. They are: (1) reimbursement for medical expenses, (2) cash payments to compensate for a permanent or temporary disability, and (3) death benefits. As mentioned above, workers' compensation laws also serve to protect the employer from excessive damage claims; therefore an employee filing for workers' compensation benefits is not entitled to other damages.

EMPLOYEE SELECTION:
HIRING AND INTERVIEWING EMPLOYEES

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HOW TO AVOID COSTLY HIRING MISTAKES

Employers must balance the need/desire for detailed information about each job applicant against the risk of asking improper and/or discriminatory questions from which the applicant may raise discrimination claims for failure to hire.

A. Applicant Inquiries.

1. Under the Americans with Disabilities Act ("ADA" or the "Act") of 1990, an employer may not ask an applicant whether he is disabled or about the nature or severity of any disabilities he may have. 42 U.S. C. § 12112(d)(2)(A) (1998). However, Title II of the ADA, which regulates government entities, does not prohibit pre-employment questions about disabilities. See Doe v. Judicial Nominating Comm'n, 906 F. Supp. 1534, 1541-42 (S.D. Fla. 1995) ("' [T]he ADA does not prevent inquiry into a[] [judicial] applicant's status, i.e., diagnosis or treatment for severe mental illness'" because the "necessity exception [in Title II of the ADA justifies] utilizing reasonable, narrowly-drawn eligibility criteria which screen out, or tend to screen out, individuals with a disability."); Medical Soc'y of New Jersey v. Jacobs, 2 AD Cases 1318, 1324 (D.N.J. 1993) ("the Board may, in fact, ask applicants [for medical licenses] anything it wants. It may not, however, place the burden of extra investigations on an applicant who answers in the affirmative to questions about [his/her] status [regarding disabilities].").

2. An employer may inquire about the applicant's ability to perform job-related functions. 42 U.S.C. § 12112(d)(2)(B); E.E.O.C. v. Texas Bus Lines, 923 F. Supp. 965, 981 (S.D. Tex. 1996) (plaintiff's motion for summary judgment denied with respect to pre-offer inquiries; "Physical defects such as eyesight, hearing, limb impairment, diabetes, back or heart trouble, high blood pressure, fits, convulsions, fainting, etc., in light of the requirements of the bus driver position, are relevant job related inquiries and are consistent with business necessity."); Lowe v. Angelo's Italian Foods, Inc., 2 AD Cases 1796, 1978 (D. Kan. 1993) ("The ADA and the KAAD [Kansas Act Against Discrimination] do not prohibit employers from making inquiries into an applicant's ability to perform the job," such as lifting and shelving all incoming goods).

3. An employer may make inquiries of third parties as long as the employer could properly ask the applicant directly. Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 676-78 (1st Cir. 1995) (employer may require medical

certification, which does not necessitate new tests, from treating psychiatrist as to former employee's ability to function effectively and get along with co-workers, as prerequisite to rehiring); see also Harris v. Harris & Hart, Inc., 206 F.3d 838 (9th Cir. 2000) (employer did not violate ADA when it required medical release from job applicant before making an employment offer, where applicant had worked for same employer previously and had resigned when employer failed to accommodate carpal tunnel syndrome).

4. Examples of permissible questions:

   a. Do you possess the necessary qualifications for this position, including licenses, degrees, skills, knowledge, and experience required for the job?

   b. Are you able to perform job-related functions, with or without "reasonable accommodation?" E.g. "Can you use a computer?"

   c. Overtime is required. Are you able to work overtime?

   d. Do you currently use illegal drugs?

   e. Weekend shifts are required. Are you able to work weekends?

   f. This position requires the ability to lift 50 pounds on a frequent basis. Are you able to meet that requirement?

   g. Exposure to extreme temperatures is required. Do you have any problem with that?

   h. Do you drink alcohol?

5. Examples of impermissible questions (pre-offer):

   a. What is your race, sex, age, national origin, and/or religion? (In some states), what is your sexual preference, sexual orientation and/or marital status?

   b. Do you have any children, plan to have children, have child care arrangements?

   c. Are you disabled? What is the nature of your disability?

   d. Have you ever suffered an on-the-job injury or filed a workers' compensation claim?

e. Have you ever been treated for drug addiction?

f. Describe your past illegal drug use.

g. Have you ever sought or undergone mental-health counseling?

h. Are you currently undergoing mental-health counseling?

i. How much alcohol do you consume?

j. Are you taking any prescription drugs? What are they?

k. Do you have any physical impairments that may be adversely affected by the stress of this examination? (A permissible way to avoid a potential problem is to obtain a written release from any liability caused by the stress of the exam).

l. (In some states) Have you ever been arrested? For what?

B. Medical Exams.

1. The ADA prohibits pre-offer medical examinations.

a. Under the ADA, an employer may not conduct a medical examination of a job applicant until the employer has determined that the applicant is qualified for the job in question and has made a conditional offer of employment to the applicant. 42 U.S.C. § 12112(d)(2)(A); 29 C.F.R. §§ 1630.13(a), 1630.14(b) (1998).

b. The purpose of this rule is to prevent discrimination against applicants with hidden disabilities by isolating an employer's consideration of the applicant's qualifications from a consideration of his or her medical condition. This closely tracks the ADA's limitations on the types of inquiries an employer may make of an applicant regarding whether the applicant is disabled.

c. A violation of the ADA's restrictions on medical inquiries and examinations may subject the employer to damages, even if the information obtained is not used to discriminate against an individual with a disability.

2. The EEOC has defined a "medical examination" as "a procedure or test that seeks information about an individual's physical or mental impairments or

health." EEOC Guidance On Pre-Employment Inquiries Under Americans With Disabilities Act, No. 196, Daily Labor Report (BNA) E-7 (Oct. 11, 1995) (hereinafter Guidance Manual). In determining whether a particular test or procedure is a prohibited medical exam, EEOC investigators are instructed to consider the following factors:

a. Whether the procedure or test is administered by, or whether the test results were interpreted by, a health care professional or someone trained by a health care professional;

b. Whether the procedure has been designed to reveal an impairment, or physical or mental health;

c. Whether the procedure is invasive (e.g., whether it requires the drawing of blood, urine, breath, etc.);

d. Whether the procedure or test measures performance of a task as opposed to the applicant's physiological responses to performing the task; and

e. Whether the procedure or test would normally be administered in a medical setting, and whether medical equipment is used to administer the test. Guidance Manual at E-7.

3. Tests that measure a candidate's ability to perform a discrete task, such as a physical fitness test or a simulated task test, are not improper pre-offer tests under the ADA.

4. Examples of permissible physical examinations:

a. A police department requires all applicants to run through an obstacle course designed to simulate a suspect chase.

b. A messenger service tests applicants' ability to run one mile in 15 minutes.

c. A construction company requires all applicants to lift 50-pound bags of concrete.

5. Examples of impermissible physical examinations:

a. At the conclusion of the obstacle course, the police department measures the applicants' blood pressure and heart rate. See Doe v. City of Chicago, 883 F. Supp. 1126, 1135 (N.D. Ill. 1994) (employer's motion to dismiss denied where rejected applicants for police officer position alleged that subjection to HIV testing violated Rehabilitation Act, which has similar language to EEOC guidelines interpreting the ADA).

C. **Applicants With Known Disabilities.**

1. When an employer requests a candidate with a known disability either to describe or demonstrate how he or she will perform job-related tasks, the employer does not automatically violate the Act by singling out the disabled candidate for such a demonstration, so long as the employer "could reasonably believe" the applicant's disability would interfere with his or her job performance. Guidance Manual at E-5.

2. However, if the employer could not reasonably believe that the applicant's disability would interfere with job-related functions, the employer may request a disabled applicant to describe or demonstrate performance only if the same request is made of all applicants in the same job category.

D. Vision Tests.

The only types of vision tests that are permissible at the pre-offer stage are those that are demonstrations of actual job performance (e.g., requiring a pharmacist to read labels on bottles). Asking an applicant to read an eye chart is a prohibited pre-offer medical exam. Guidance Manual at E-8.

E. Post-Offer Examinations.

1. Although the ADA prohibits pre-employment inquiries and tests to the extent they are likely to elicit information about an applicant's disability, the Act permits an employer to engage in those inquiries and tests once the employer makes a bona fide conditional offer of employment to a candidate, even if the inquiries and tests are not related to the job. See Buchanan v. City of San Antonio, 85 F.3d 196, 199 (5th Cir. 1996) (court held that a job offer is not bona fide conditional offer when conditioned on the successful completion of an entire screening process, including physical and psychological exams, polygraph exam, physical fitness test, assessment board, and extensive background investigation.). Thus, at the post-offer stage, the employer may inquire into the candidate's physical and mental health, sick leave history and workers' compensation history, so long as all candidates in the same job category are subjected to the same examination or inquiry. Guidance Manual

at E-8; 29 C.F.R. § 1630.14(b) (1995); see Owens v. United States Postal Serv., 37 F.3d 1326, 1328 (8th Cir. 1994) (fourth physical exam, to update six-month old test results, upheld where Postal Service applicant failed to show exam resulted in differential treatment under the Rehabilitation Act, which has language similar to the ADA).

2. Furthermore, to exclude a post-offer candidate from employment based on the results of the inquiry or test, the employer must establish that its exclusionary criteria are both job-related and consistent with business necessity. To do so, the employer must show that the excluded candidate could not perform the essential functions of the job in question, even with reasonable accommodation, or that the candidate poses a significant risk of substantial harm to him/herself or to others, which risk cannot be reduced below the level of a "direct threat" even with reasonable accommodation. 29 C.F.R. §§ 1630.14(b)(3), 1630.15(b)(1), 1630.15(b)(2), 1630.2(r), 1630 app. at 409 (1995).

3. However, if the employer determines that the candidate is able to perform the essential functions of the job with reasonable accommodation and therefore hires the candidate, the employer is entitled to documentation of the candidate's disability and his or her need for reasonable accommodation from an appropriate health care professional. Guidance Manual at E-9.

F. **Polygraph Testing.**

1. The Federal Employee Polygraph Protection Act of 1988.

The Act, 29 U.S. C. § 2001 et seq., applies to all employers engaged in or affecting commerce (some exemptions for government employers, security firms and drug companies). Employers must post notices informing employees and applicants of the Act.

a. The Employee Polygraph Protection Act prohibits most private employers from using polygraph tests to screen applicants or to test current employees. The Act recognizes three limited exceptions, but even if one of the exemptions applies, the results of the polygraph test may not be the sole basis for the employer's decision regarding the applicant or employee.

(1) Investigations conducted by employers who are authorized to manufacture, distribute, or dispense certain controlled substances where there has been a loss of the controlled substances or to test prospective employees who will have access to the substances;

(2) Security services for certain industries whose business could pose a public safety risk (e.g., distributor of nuclear or electrical power), public transportation facilities and currency, negotiable securities, precious commodities or instruments, and proprietary information services;

(3) Ongoing investigations of thefts or other incidents which caused economic loss to employers, provided the employer has a reasonable suspicion that the employee was involved in the incident and gives the employee written notice that complies with the statute. See, e.g., Long v. Mango's Tropical Café, 13 I.E.R. 310 (S.D. Fl. 1997) (granting employer summary judgment on bartender's EPPA claim where employer's request that employee take polygraph test was based on reasonable suspicion bartender was stealing liquor and improperly keeping payments as tips); Mennen v. Easter Stores, 12 IER Cases 701 (N.D. Ia. 1997) (following bench trial, court concludes that employer violated the EPPA when it demoted -- and subsequently constructively discharged -- grocery store manager based on the results of a police-administered polygraph test; while employer could have conducted its own polygraph test under the "ongoing investigation of thefts" exception, it cannot substitute the police test for its own because the procedural guidelines and safeguards set forth in the exception were not followed).

b. The Act contains detailed procedures for test administration and the use of results.

c. Remedies for violations include civil penalties of up to $10,000 assessed by the Secretary of Labor who, for each violation, may also seek an injunction. Job applicants and current employees may sue in federal or state court.

d. The Polygraph Protection Act is preempted by any state or local law which is more restrictive. Collective bargaining agreements also will control under similar circumstances. Note that the California law is less restrictive; therefore, if the employer is engaged in interstate commerce, the federal Act will apply.

2. California law.

A private sector employer may not require an applicant or employee to submit to a polygraph test as a condition of employment. Cal. Labor Code § 432.2. This provision permits an employer to request such a test so long as the individual is advised in writing of the provisions of the Act. However, because the provisions of the federal law are more restrictive than California law, the federal statute controls if the employer is engaged in interstate commerce.

G. **Prior Arrests and Convictions.**

1. The Fair Credit Reporting Act.

The provisions of the Act apply to an employer's use of criminal background checks in all phases of the employment relationship.

For example, the 1997 amendments prohibit reporting, as to an applicant or employee whose annual salary is, or may reasonably be expected to be, less than $75,000 a year, "[r]ecords of arrest, indictment, or conviction" which, from the date of disposition, release or parole, antedate the report by more than seven years. 15 U.S.C. §1681c(a)(5) & c(b)(3).

2. Potential for adverse impact

Deciding whether to inquire into an applicant's arrest or conviction record can be problematic for employers. On the one hand, employers must consider the potentially adverse impact upon protected grounds from such inquiries. On the other hand, employers must consider potential common law liability for negligent hiring if such inquiries are not made, particularly if the applied-for position can pose a risk to the public -- e.g., child-care workers or truck drivers.

a. Arrest records.

Courts scrutinize arrest inquiries closely in view of their proven adverse racial impact. See, e.g. Reynolds v. Sheet Metal Workers, Local 102, 498 F. Supp. 952, 960 (D. D.C. 1980) ("According to the FBI's 1978 Uniform Crimes Report, 26.4% of persons arrested nationwide were black, while blacks comprised only 12.5 % of the population."), aff'd, 702 F. 2d 221 (D.C. Cir. 1981). As illustrated in Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) aff'd and vacated in part on other grounds, 472 F.2d 631 (9th Cir. 1972), courts repeatedly have disapproved the use of arrest records that absolutely bar an arrestee from further employment consideration. There, the employer withdrew its job offer to the

plaintiff, an African-American, when the employer learned (from the plaintiff) that the plaintiff previously had been arrested fourteen times, although never convicted of a criminal offense. Declaring that there was "no evidence . . . that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees," and in light of the adverse impact of such a policy, the court held that the employer's policy unlawfully discriminated against African-American applicants. But cf. Dozier v. Chupka, 395 F. Supp. 836, 850 (S.D. Ohio 1975) (although arrest records cannot be used across-the-board to bar employment, an employer may consider individual arrest records if it can demonstrate a sufficient degree of job-relatedness to overcome the adverse impact).

It is important to distinguish between the fact of an arrest and the underlying circumstances that led to it. Thus, when an arrest has occurred, the facts that brought about the arrest can be investigated by the employer (subject to the FCRA provisions) and (if job-related) considered in making its decisions. E.g., Kinoshita v. Canadian Pac. Airlines, 803 F.2d 471, 475 (9th Cir. 1986) (the employer, which terminated two employees who had been arrested for trafficking in cocaine, did not violate public policy since the employees were terminated based on the underlying facts of arrest, not the arrest itself); State Div. of Human Rights v. Xerox Corp., 370 N.Y.S.2d 962 (App. Div. 1975) (upholding the employer's suspension of an arrested employee where it was shown that the suspension was not automatic upon arrest but that such decisions were made on a case-by-case-basis after any inquiry triggered by the arrest), aff'd, 352 N.E.2d 139 (N.Y. 1976).

b. Convictions.

In many instances, inquiries into criminal convictions are considered more probative of job-related characteristics than arrest records and, thus, receive more favorable consideration by courts in employment discrimination cases.

Green v. Missouri Pacific R.R. Co., 523 F.2d 1290 amended, 11 FEP 658 (8th Cir. 1975) is the leading case on an employer's use of a criminal conviction in the application process. Green involves an employer's absolute policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense. Id. at 1292. The plaintiff, an African-American who had a prior

conviction for refusing military induction, applied and was rejected for a clerk's position solely on the basis of that conviction. Id. The court held, first, that the plaintiff's statistics (5.3% of African-American applicants, compared to 2.2% of white applicants, were rejected under the policy) sufficed to make out a prima facie case of adverse impact. Id. at 1300. The court then held that, although criminal convictions lawfully may be considered, "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. " Id. at 1298. Accordingly, the court struck down the employer's policy.

Although blanket rejection rules like the one in Green have been found unlawful, more narrowly tailored selection criteria relating to convictions have been upheld. See, e.g., EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 752 (S.D. Fla. 1989) (the employer's policy of not hiring employees with theft convictions was justified as a legitimate means to reduce the risk of employee theft); cf. Carter v. Maloney Trucking & Storage, Inc., 631 F.2d 40, 43 (5th Cir. 1980) (the employer's refusal to re-employ a former worker who had murdered one of its employees was held to be a legitimate nondiscriminatory reason).

3. State law.

a. In California, the Pre-Employment Inquiry Guidelines of the Department of Fair Employment and Housing provide that the only lawful inquiry is whether the applicant was convicted of a felony, and this question must be accompanied by a statement that a conviction will not necessarily disqualify an applicant from employment.

b. Some cases have held that disclosure of an individual's arrest is not an infringement of the right to privacy if the individual could not be said to have a reasonable expectation of privacy in the information. Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990) (interpreting the U.S. Constitution's right to privacy, court held that employee had no expectation of privacy in past arrests of members of her family since it was part of the public record and as a member of the police department, she had access to criminal records); Alarcon v. Murphy, 201 Cal. App. 3d 1, 5, 248 Cal. Rptr. 26 (1988) (city's disclosure that police suspected the individual they arrested of murder was not an infringement on his right to privacy).

c. Hawaii.

The state may not give out information of arrests that are not followed by convictions in connection with applications for employment. Haw. Rev. Stat. § 831-3.1(b).

d. Illinois.

It is a civil rights violation for any employer to inquire on an employment application whether a job applicant has ever been arrested. Ill. Rev. Stat. ch. 68, ¶ 2-103.

H. **Fingerprints and Photographs.**

1. California law.

a. An employer may not condition employment on the provision of fingerprints or photographs, if the fingerprints or photographs are then given to a third party, and if the information to be obtained could be detrimental to the applicant. Cal. Labor Code § 1051. However, this section does not apply to employees who are required to be fingerprinted under federal law. Cal. Labor Code § 1057.

b. Regulations do allow banks and savings institutions to use fingerprints to obtain criminal records and determine fitness for employment based on the criminal records, if the applicant or employee has so consented. Cal. Fin. Code § 777.5 (banks), § 6525.5 (associations), § 8012 (savings and loan).

c. Fingerprinting has been held to be only a slight intrusion on the constitutional right to privacy. Miller v. Murphy, 143 Cal. App. 3d 337, 191 Cal. Rptr- 740 (1983) (ordinance requiring pawnbrokers to fingerprint upheld).

I. Personality & Honesty Testing.

1. In recent years there has been a rapid increase in the use of pencil and paper personality tests as a selection device.

a. Some tests purport to assess a variety of attitudes and personality traits, while others purport to assess only honesty and integrity.

b. Some tests are intended to be used for employee selection, whereas others were developed for clinical use and have been imported, perhaps inappropriately, as an applicant screening device.

c. A few tests have been validated according to standards developed by the American Psychological Association which includes neutral review of validation studies; however, many of these tests have not been subjected to rigorous validation or, indeed, any validation at all.

2. Challenges to paper and pencil tests historically have been brought under employment discrimination laws under an adverse impact theory. Albemarle Paper Co. v. Moody, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 15 8, 91 S. Ct. 849 (197 1). If the use of such a selection device adversely affects a protected class, the EEOC requires that the device must be validated in accordance with the "Uniform Guidelines on Employee Selection Procedures."

3. A California Supreme Court case includes language which might be used to challenge personality and honesty tests. In Long Beach City Employees, 41 Cal. 3d 937, 227 Cal. Rptr. 90 (1986) in declaring unconstitutional the former California polygraph statute (which exempted public employees from coverage), the Court found that the polygraph exam's control and pretest questions inquired into areas that ventured beyond their permissible scope, because they did not "specifically, directly, and narrowly relate to the performance of [an employee's] official duties." Id. at 947.

4. Personality tests have been attacked as a violation of an applicant's right to privacy. In Soroka v. Dayton Hudson Corp. dba Target Store, 18 Cal. App. 4th 1200, 1 Cal. Rptr. 2d 77 (1991), which has subsequently been de-published for unrelated reasons, the appellants filed a class action challenging their employer's practice of requiring Target Store security officer applicants to pass a psychological screening. The appellants claimed that the test used for psychological screening was violative of the California constitutional right to privacy as well as other grounds. Some of the questions in the screening included:

Q. I am very strongly attracted to members of my own sex.
Q. I believe in the second coming of Christ.
Q. I have no difficulty in starting or holding my urine.

In addressing the right to privacy claims the Court held that the employer's inquiries into the religious beliefs and sexual orientation of applicants during the screening unjustifiably violated their state constitutional right to privacy. Id. at 1214.

5. In September 1990, the Office of Technology Assessment released a report, The Use of Integrity Tests for Pre-Employment Screening, which assesses

written honesty tests for potential interpretive errors, discriminatory effects, and privacy violations. The report identifies the following deficiencies: (i) most of the validation research has been conducted by people who sell the tests; (ii) the tests' ability to predict future behavior is unsubstantiated; (iii) the tests do not reflect changes in an individual's character; (iv) the tests---particularly "veiled purpose" tests where it is not apparent what is being tested -- contain potentially invasive questions; and (v) access to test results raise confidentiality and privacy issues.

J. Employee References.

Although it is well-settled that negative references may be subject to claims for defamation and other tort claims, overly positive references may also be problematic. See Randi W. v. Muroc Joint Unified School Dist., 14 Cal. 41 1066, 1070, 60 Cal. Rptr. 2d 263 (1997) (prior employers who provided job recommendations which were strictly positive and failed to mention that potential employee had a known history of sexual misconduct may be held liable to third-party plaintiffs under theories of negligent misrepresentation and fraud; liability may result where a recommendation "amounts to an affirmative misrepresentation presenting a foreseeable and substantial risk of physical harm to a third person").

I. MEDICAL EXAMINATIONS OF CURRENT EMPLOYEES

A. Family Medical Leave Act.[10]

(See FMLA discussion in Labor Standards Laws section)

1. Certification. The Family Medical Leave Act ("FMLA") entitles employers to a certification supporting the request for medical leave issued by the employee's health care provider. The Department of Labor ("DOL") has published Form WE-380 "Certification of Physician or Practitioner" (revised 12/94), and indicated that only the information requested on that form may be required. If paid leave runs concurrently, the employer may not ask for more information under FMLA leave than is generally required for paid sick leave. 29 C.F.R. § 825.306(b)(c) (1995). Any certification is sufficient if it states:

   a. The date on which the serious health condition commenced;

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[10] This outline deals only with leave requested under 29 U.S.C. § 2612(a)(1)(C) (to care for a spouse, child or parent with a serious health condition) and § 2612(a)(1)(D) (because of the employee's own serious health condition that makes the employee unable to perform his/her job functions).

b. The probable duration of the condition;

c. The appropriate medical facts within the knowledge of the health care provider regarding the condition;

d. That the employee is needed to care for the family member and an estimate of the amount of time the employee will be needed, if the request for leave is made under 29 U.S.C. § 2612(a)(1)(C);

e. That the employee is unable to perform his or her job functions, if the request for leave is made under 29 U.S.C. § 2612(a)(1)(D); and

f. The medical necessity for intermittent leave and the expected duration of the intermittent leave, if that is being requested. 29 U.S.C. § 2613(b)(5).

2. Ambiguous certification. If the medical certification is ambiguous or unintelligible, the employer can have its health care provider call the employee's health care provider if the employee consents.

3. Second medical opinion. If the employer has reason to doubt the validity of the certification, it can require, at its own expense, that the employee obtain the opinion of a second health care provider designated or approved by the employer, so long as that health care provider is not also employed on a regular basis by the employer. 29 U.S.C. §2613(c)-(e).

a. If the two opinions differ, the employer may require, again at its own expense, that the employee obtain an opinion from a third health care provider, to be approved jointly by the employer and the employee, whose opinion shall be final and binding on both the employer and employee.

b. Once an employee has been deemed eligible for leave, the employer may require that an employee obtain subsequent recertifications on a reasonable basis.

4. Return to work certification. The Regulations also provide that as a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition, an employer may have a uniformly applied policy that requires all "similarly situated employees" to present a health care provider report that the serious health condition no longer incapacitates the employee.

a. The certification may be merely a statement of an employee's ability to return to work.

b. The requirement of a fitness for duty certification must be reflected in any general notice given to employees who request FMLA leave.

c. If prior notice of the fitness for duty certification has been given, an employer may delay reinstatement until the certification is received.

B. ADA.

(See Employment Discrimination Laws section (further discussion of the ADA).

1. The ADA limits examinations of current employees. An employer cannot require an employee to undergo a medical examination or ask about a disability or its nature or severity unless the examination/inquiry is job-related and consistent with business necessity. However, just as with applicants, an employer may ask about, or require a demonstration of, an employee's ability to perform job-related functions. 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. §1630.14(c); Roe v. Cheyenne Mountain Conference Resort, 920 F. Supp. 1153, 1155 (D. Colo. 1996) (summary judgment granted to employee where employer did not show "that its policy requiring employees to disclose legal, prescription medication is job-related and consistent with business necessity"), aff'd in relevant part, 124 F.3d 1221 (10th Cir. 1997).

2. Thus, examinations may be required of current employees if the business necessity requirement can be met. For example, in Yin v. State, 95 F. 3d 864 (9th Cir. 1996), cert. denied, 117 S. Ct. 955 (1997), the court ruled that when health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability. The court further held that because the employee's excessive absenteeism had taken a serious toll on her productivity, the employer's requested examination was job-related and, in any event, covered by the ADA's business necessity exception.

MANAGING, TRAINING AND SUPERVISING EMPLOYEES

MANAGING, TRAINING AND SUPERVISING EMPLOYEES

SEXUAL HARASSMENT IN THE WORKPLACE

A. **Insights From Jurors and the Judiciary on Investigation and Resolution of Harassment Claims.**

The message from judges and juries across America is clear: faulty investigation of sexual harassment claims can lead to judgments in favor of sexual harassment victims and alleged harassers whose terminations are based upon insufficient evidence. Prompt and thorough investigations, followed by appropriate corrective action, position a defendant employer for summary judgment if a legal challenge ensues.

1. Verdicts reached over the years underscore the nightmares caused by inadequate harassment complaint procedures and investigations.

   a. 1993: A male employee claimed he had been harassed by his female superior who forced him to have intercourse with her, continued to sexually harass him on the job and demoted him after he married another woman. The employee allegedly complained to the company's owner and senior managers but no action was taken. The first jury awarded him more than one million dollars. Gutierrez v. California Acrylics Inc., No. BC 055641 (Super. Ct. Cal. May 1993). The company's motion for a new trial was granted on the issue of damages only. As a result, the punitive damages award was reduced from $560,000 to $100,000, the emotional distress award was cut from $375,000 to $225,000 and the economic damages award fell from $82,000 to $14,000.

   b. 1994: A legal secretary alleged that during the 25 days she worked for one of the firm's partners, he once put M & M's in her breast shirt pocket, touched her breast through her blouse, pulled her arms back from behind and said, "Let's see which one [breast] is bigger." The attorney allegedly made other sexually suggestive remarks, grabbed the secretary's hips while she was loading file cabinets and pressed himself against her. The firm investigated after the secretary complained, but determined that it did not have sufficient evidence to reach a conclusion that harassment had occurred. Even so, the alleged harasser was required to attend two sensitivity training sessions at his home. The secretary quit her job with the firm to become a preschool teacher and suffered no economic damage.

But far from satisfied with the law firm's response to her complaint, the former secretary filed suit. At trial she was able to show that different persons at the law firm had received complaints about the attorney's behavior from several women in different offices over a period of four years. However, no single source within the firm knew the extent of the harassment, nor did anyone conduct a thorough investigation of his conduct. The firm's failure to investigate adequately and curtail the attorney's harassing behavior was deemed ratification by the firm of the hostile work environment the attorney had created. The jury awarded the plaintiff $50,000 in emotional distress damages. Punitive damages of $6.9 million against the firm and $225,000 against the perpetrator were awarded as well. The court added another $1.85 million in attorneys' fees for plaintiff's counsel. (However, the court reduced the $6.9 million to $3.5 million.) Weeks v. Baker & McKenzie, 66 FEP 581, 1994 WL 774633 (Super. Ct. Cal. 1994) (not certified for publication), aff'd, 63 Cal. App. 4th 1128 (1998).

c. 1995: A female employee of Wal-Mart complained that her supervisor and store manager made jokes, commented about her breasts getting in her way when she moved merchandise and made reference to her "rear-end." Her supervisor referred to women as "goddamn dummies" and "fat bitches" and once unsuccessfully attempted to kiss her. The employee claimed that she complained to the company about the alleged harassment but that her complaints "fell on deaf ears." The jury awarded her $35,000 for her pain and suffering, $1 for lost wages and $50 million in punitive damages. Kimzey v. Wal-Mart Stores Inc., No. 94-4195CV-C-9 (W.D. Mo. June 28, 1995), reported in Jury Awards Former Wal-Mart Employee $50 Million in Sexual Harassment Suit, Daily Lab. Rep. (BNA) No. 128, at A-13 (July 5, 1995).

d. 1998 & 2002: Female employees of Ralph's Grocery were initially awarded $3.8 million against the grocery for sexual harassment committed by one of its Store Directors. The women voiced complaints over a period of 12 years, but Ralph's response was to promote the manager and ignore the complaints. Even after complaints were voiced to the corporate headquarters, Ralph's failed to conduct an investigation. After the initial jury verdict, Ralph's appealed and was granted a new trial. In 2002, the jury returned a verdict against Ralph's for $30.6 million. Ralph's has once again sought and has been granted a new trial.

e. Even accused harassers occasionally have won large sums for terminations based upon sloppy investigations. E.g., Cotran v. Rollins Hudig Hall Int'l, 49 Cal. App. 4th 903, 911, 57 Cal. Rptr. 2d 129 (1996) (jury awarded $1.7 million for wrongful termination to employee who was fired for harassment), aff'd, 17 Cal. 4th 93 (1998). In Kestenbaum v. Pennzoil Co., the New Mexico Supreme Court affirmed a judgment of $1 million in contract damages to a vice president who claimed that he had been discharged on the basis of false sexual harassment charges and that those who terminated him based upon a summary investigation report did not know the facts. 108 N.M. 20, 4 IER 67 (1988), cert. denied, 490 U.S. 1109 (1989).

f. The *"Seinfeld"* case: A Milwaukee jury awarded $26.6 million to a former Miller Brewing executive who sued the company for firing him after he discussed a racy episode of television's *Seinfeld* with a female co-worker. The executive was fired from his $95,000 a year job after he told a female colleague about the episode in which Jerry forgets the name of the woman he is dating but remembers that it rhymes with a part of the female anatomy. Her name was Dolores. The award included a $24.5 million verdict against Miller Brewing, $1.5 million against the woman who complained, and $600,000 against the official who decided to fire the executive. The case is currently on appeal.

g. Others tagged with "harasser" labels have brought defamation suits, sometimes with great success. Compare Clowers v. Willis, No. 92-CV-1107 (E.D. Tex. 1993) (federal jury awarded $3 million to Houston law enforcement officer who sued for defamation alleging that he was falsely accused of sexual harassment by a female subordinate); Tischmann v. ITT/Sheraton Corp., 882 F. Supp. 1358, 1363-64 (S.D.N.Y. 1995) (former employee sued for defamation based on disclosure to other employees that he had committed sexual harassment), cert. denied, 119 S. Ct. 406 (1998); Bell v. Evening Post Pub'g Co., 459 S.E.2d 315 (S.C. Ct. App. 1995) (former employee alleged he was defamed by his supervisors during a sexual harassment investigation) with Duffy v. Leading Edge Prods., Inc., 44 F.3d 308 (5th Cir. 1995) (conditional privilege bars defamation claim brought by plaintiff who was fired for sexual harassment; absent proof that investigating supervisor did not believe the claims of harassment, plaintiff cannot establish malice even if the employer made a hasty or mistaken decision); Vackar v. Package Mach. Co., 841 F. Supp. 310 (N.D. Cal. 1993) (conditional privilege covers repetition to plaintiff's employer of hearsay reports of sexual harassment by customer that employed alleged victims; employer has

legitimate business interest in keeping workplace free of harassment and avoiding liability); Lambert v. Morehouse, 68 Wash. App. 500, 61 FEP 50, 53 (Wash. 1993) (complaints of sexual harassment made in context of workplace investigations conditionally privileged); Hines v. Arkansas La. Gas Co., 613 So. 2d 646 (La. Ct. App.) (employer's defamatory statements during sexual harassment investigation fell under qualified privilege), cert. denied, 617 So. 2d 932 (La. 1993).

2. Can a proper investigation of a harassment claim shield an employer from liability in actions by the alleged harassee and harasser?

The answer is "yes" in some but not all cases.

a. The EEOC's Policy Guidance on Current Issues of Sexual Harassment ("Policy Guidance") explains that an employer is strictly liable for a supervisor's acts of quid pro quo sexual harassment. EEOC Policy Guidance on Current Issues of Sexual Harassment, in 8 Fair Employment Practices, Labor Relations Reporter (BNA), at 405:6700. Quid pro quo harassment occurs when submission to or rejection of unwelcome sexual advances is used as the basis for an employment decision affecting the individual. E.g., "Spend the night with me and I'll promote you," or "If you don't go out with me, you'll be fired."

b. However, under federal law, an employer is not liable for hostile environment sexual harassment by the plaintiff's co-workers if the plaintiff cannot show that the employer both (1) knew or should have known that harassment was occurring, and (2) failed to take immediate and appropriate corrective action once it learned. Hostile environment sexual harassment generally is defined as unwelcome verbal, visual or physical conduct of a sexual nature which alters the claimant's conditions of employment and which creates an environment that both the claimant and a reasonable person would find intimidating, hostile, abusive or offensive. Harris v. Forklift Sys., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). See also Meritor Sav. Bank v. Vinson, Inc., 477 U.S. 57 (1986); Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991) (in adopting a "reasonable woman" standard for assessing claims of hostile environment the court commented that "[c]onduct that many men may consider unobjectionable may offend many women," and a "sex-blind reasonable person standard tends to be male biased and tends to systematically ignore the experiences of women."). Whether an environment is " hostile, " " abusive " or offensive is determined

by looking at all the circumstances, including: the frequency and severity of the conduct; whether the conduct is physically threatening as opposed to merely an offensive utterance; and whether it unreasonably interferes with an employee's work performance. Harris, 126 L. Ed. 2d at 302-03.

c. An employer is liable for hostile environment sexual harassment by an immediate supervisor or those higher in the chain of command, unless (1) the harassment does not culminate in a "tangible employment action," and (2) the employer proves "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2292-93, 141 L. Ed. 2d 662 (1998) (holding that where there is no tangible employment action, employer must prove affirmative defense to avoid liability); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 77 Fair Empl. Prac. Cas. (BNA) 1 (1998) (articulating same standard).

In Ellerth, the Court explicitly added the "severe or pervasive" requirement to any harassment claim if the employee has not suffered a tangible employment action due to his or her refusal to submit to a supervisor's sexual demands. "For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive." Id. at 2265. Unfulfilled threats require a showing of severe or pervasive conduct. Id. Likewise, the Court in Faragher reaffirmed that "conduct must be extreme to amount to a change in the terms and conditions of employment." Faragher , 118 S.Ct. at 2284."'[O]rdinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'" are not sufficient. Id. (citations omitted).

Under California law, employers may be strictly liable for hostile environment harassment by supervisors. E. g., Bihun v. AT&T Info. Sys., Inc., 13 Cal. App. 4th 976, 988, 16 Cal. Rptr. 2d 787 (1993).

d. The Policy Guidance instructs:

When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The 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. Disciplinary 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. Policy Guidance, supra at 405:6700.

e. Several courts have granted summary judgment to employers as a result of their prompt investigation and appropriate remedial action, even though hostile environment harassment had occurred. See, e.g., Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992) (summary judgment upheld because of company's prompt and adequate response to plaintiff's complaints including a prompt investigation and suspension of the harasser); Toliver v. Sequoyah Fuels Corp., 931 F.2d 900 (10th Cir. 1991) (summary judgment affirmed for employer that promptly and adequately responded by investigating immediately, suspending the harasser a month after the investigation and later terminating him); Kolnicki v. Ford Motor Co., 1995 WL 431185 (N.D. Ill. July 17, 1995) (summary judgment for employer granted where employer implemented and distributed policies prohibiting harassment and its complaint procedure, and investigated promptly after each separate incident of which plaintiff complained).

f. Those that fail to do so typically suffer the consequences. E.g., Hall v. Gus Constr. Co., Inc., 842 F.2d 1010, 1012, 1016 (8th Cir. 1988) (employer liable for sexual harassment where, notwithstanding plaintiffs' complaints, no investigation or remedial steps were taken and the abuse did not end until the women quit their jobs); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784-85 (E.D. Wis. 1984) (defendant who was aware of harassment suffered by plaintiff but failed to investigate or take effective corrective measures is liable for the acts of plaintiff's co-workers).

g. While individual judges purport to know a "prompt" and "thorough" investigation and "appropriate corrective action" when they see them, neither the EEOC nor any court has delineated with meaningful specificity what these terms mean. This section reviews the sketchy guidance available on these issues and outlines practical tips for conducting investigations. Several other published articles give guidance to employers on investigating sexual harassment complaints. E.g., Mark S. Dichter & Mark E. Gamba, Investigating Complaints of Sexual Harassment, 1995 Sexual Harassment 129 (Practicing Law Institute); Valerie J. Hoffman & Angela M. Marotto,

Conducting a Sexual Harassment Investigation, 9 Chi. Bar Ass'n Rec. 16 (Jan. 1995); Hope A. Cominsky, Prompt and Effective Remedial Action? What Must an Employer Do to Avoid Liability for Hostile Work Environmental Sexual Harassment?, 8 Lab. L.J. 181 (1992).

3. After the decisions in Faragher and Ellerth, are a policy and complaint procedure required to grove the employer's affirmative defense?

   a. Although not required, an employer should implement a sexual harassment policy and complaint procedure because it is highly relevant and generally essential to an employer's affirmative defense – whether the employer provided corrective opportunities that the complaining employee failed to take advantage of.

   b. The Supreme Court noted in Faragher: "While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." Id. at 2293.

4. What is a tangible employment action?

   In Ellerth, the majority opinion by Justice Kennedy defines a "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." Id. at 2268. In "most cases" such an action "inflicts direct economic harm," and "is documented in official company records, and may be subject to review by higher level supervisors." Ellerth, 118 S. Ct. at 2269.

5. What proof suffices to establish that one is a supervisor?

   The Supreme Court did not articulate a bright-line test. However, it found that several indicia of such authority here were sufficient: (1) two of the supervisors who engaged in harassing behavior "'were granted virtually unchecked authority' over their subordinates" and "'directly controll[ed] and supervis[ed] all aspects of [Faragher's] day-to-day activities;'" and (2) plaintiff was "'completely isolated from the City's higher management.'" Faragher, 118 S. Ct. at 2293 (citations omitted.)

6. What triggers an employer's obligation to investigate?

a. Gary v. Long illustrates the value of internal complaint procedures designed to encourage victims of sexual harassment to come forward. 59 F.3d 1391, 1394, 1397-98 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 569, 133 L.Ed 2d 493 (1995). In that case, the Plaintiff claimed she was harassed by her supervisor who made repeated sexual advances which she refused as well as other verbally harassing comments. After she rebuffed her supervisor's advances, he allegedly threatened to fire her, drove her to a secluded storage facility and raped her. Six months later, plaintiff complained to her employer and filed a formal grievance. The appellate court noted that plaintiff's allegations, if true, constituted a hostile work environment. However, the employer could not be held liable for such harassment because it established "policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences."

Note: Had Gary been decided after the Faragher and Ellerth decisions, the employer, in all likelihood, also would prevail under the affirmative defense test.

b. Compare Anspach v. Tomkins Indus., Inc., 817 F. Supp. 1499, 1507 (D. Kan. 1993) (defendant not liable for intentional infliction of emotional distress because it did not condone sexual harassment and took steps, albeit unsuccessful, to remedy plaintiff's situation including investigating incidents of harassment, issuing verbal reprimands and distributing literature designed to increase awareness concerning sexual harassment), aff'd, 51 F.3d 285 (1995); Trotta v. Mobil Oil Corp., 788 F. Supp. 1336, 135 1 (S. D. N. Y. 1992) (defendant not liable for hostile work environment sexual harassment where it promulgated a sexual harassment policy, made managers responsible for communicating the company's refusal to tolerate sexual harassment, established complaint procedures, insulated employees from retaliation if they complained of sexual harassment and conducted seminars on sexual harassment for employees) with Sanchez v. City of Miami Beach, 720 F. Supp. 974, 977, 979 (S.D. Fla. 1989) (city liable for hostile environment sexual harassment where, although the city instituted a policy against sexual harassment, the policy was insufficient and no meaningful steps were taken to disseminate it or instruct employees regarding its purpose, terms and objectives); Hansel v. Public Serv. Co. of Colo., 778 F. Supp. 1126 (D. Colo. 1991) (sexual harassment policies implemented years after plaintiff's complaint did not absolve employer from liability for harassment).

c. Complaints filed thereunder or with a government agency must be investigated. So, too, must informal reports of harassment or indications from an aggrieved or third person that inappropriate conduct is occurring, even if the term "harassment" is not used. The employer's investigation obligation thus is triggered by such warning signs as a supervisor's observations of inappropriate commentary or conduct, general office knowledge of harassing behavior or a request that inappropriate conduct cease. E. g., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1530 (M.D. Fla. 1991) (supervisory personnel's knowledge of complaints and sexually-oriented pictures throughout the workplace should have triggered a more thorough investigation).

d. Complaints from one alleged victim may be deemed sufficient to trigger an investigation of whether others are affected as well. Rauh v. Coyne, 744 F. Supp. 1186, 1189 (D.D.C. 1990).

e. In most cases, an employer has a duty to investigate reported instances of sexual harassment even where the alleged victim does not request or consent to the investigation. E. g., Hollis v. Fleetgard, Inc., 668 F. Supp. 631, 632, 637 (M.D. Tenn. 1987) (Plaintiff failed to establish a hostile work environment where a co-worker invited her to have drinks and suggested that they have an affair. The court faulted plaintiff for waiting three to four months to inform supervisors of the co-worker's advances, providing only vague allegations and declining to supply names of other women the co-worker had propositioned. However, the court noted that in most cases an employer has a duty to investigate reported instances of sexual harassment, with or without an employee's consent.), aff'd, 848 F.2d 191 (6th Cir. 1988).

7. How quickly must the employer respond?

The employer's investigation should commence and conclude promptly.

a. See, e. g., Nash v. Electrospace Sys., Inc., 9 F. 3d 401, 404 (5th Cir. 1994) (employer not liable for alleged harassment by supervisor where director of human resources immediately began an investigation upon receipt of the employee's complaint and transferred the employee to another department even though the investigation did not confirm that harassment had occurred); Kraft v. EKCO Housewares Co., 16 F.3d 1225 (7th Cir. 1994) (unpublished) (Plaintiff claimed that she was sexually harassed on two occasions by

a co-worker who allegedly placed his hand in plaintiff's pants and about a month later attempted to fondle her breasts. She claimed that she reported both incidents to a supervisor at the time that they occurred and that in retaliation for her complaints, she was denied assistance in her job duties and suffered a disabling injury. The employer argued that plaintiff only reported the second incident and that its investigation occurred promptly, three days later. The appellate court concluded that the district court properly ruled the employer was not liable if the employer did not know until the second incident occurred).

b. No instructive definition of "prompt" has emerged or is possible given the variables that impact each investigation such as the number and availability of witnesses, the length of time the complainant takes to recount the wrongdoing alleged and the complexity of the corrective action required in response.

c. Investigations deemed sufficiently prompt and appropriate.

(1) Certainly investigations begun the day of an employee's complaint have been held timely. E.g., Foster v. Township of Hillside, 780 F. Supp. 1026, 1039-40 (D.N.J.) (police department's investigation of sexual harassment complaint which began the same day as complaint was adequate and timely although, through no fault of department, it took seven months for the arbitrator to complete the investigation), aff'd, 977 F.2d 567 (3d Cir. 1992). Similarly, those which commenced a few days or a week after the initial complaint have also been held timely. E.g., Carrero v. New York City Hous. Auth., 668 F. Supp. 196, 199, 203 (S.D.N.Y. 1987) (investigation within a week of plaintiff's complaint sufficiently prompt), aff'd in relevant part, 890 F.2d 569 (2d Cir. 1989). Of course, a speedy but inadequate investigation is no substitute for a complete and thorough one. E.g., Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (employer liable for violation of Title VII where its response was improperly based solely on the interviews of plaintiff and supervisor instead of waiting for the investigator's complete report).

(2) In Saxton v. American Tel. and Tel. Co., plaintiff alleged she had been sexually harassed by a supervisor who placed his hand on her knee, rubbed his hand along her thigh, kissed her during a meeting at a jazz club and "lurched" at her when they

both got out of a car to take a walk. After plaintiff told the supervisor that his conduct was inappropriate, he made no further sexual advances towards her. However, the working relationship between the two deteriorated and plaintiff filed a formal internal complaint.

The day after plaintiff complained, the employer's investigation began. Although the evidence of sexual harassment was inconclusive, the department head determined that plaintiff and her supervisor should be separated, and that the supervisor as well as the entire department should take a refresher course on the company's sexual harassment policy. He also offered plaintiff a transfer, which she declined, so he arranged for the supervisor to be transferred.

Upholding the district court's summary judgment in favor of the employer, the court of appeals noted that plaintiff did not demonstrate that the employer failed to take prompt and appropriate remedial action. In particular, the employer began an investigation the day after plaintiff complained, completed a detailed report two weeks later, and transferred the supervisor to another department within five weeks after learning that plaintiff was not interested in a transfer. The court also noted that the employer acted with considerable alacrity given that nearly a year had elapsed since the principal events underlying the plaintiff's claim allegedly had occurred. 10 F.3d 526, 536 (7th Cir. 1993).

(3) In Carmon v. Lubrizol Corp., plaintiff became engaged in an argument wherein vulgar insults were exchanged with a co-worker during work hours. Plaintiff subsequently complained to her supervisor about the co-worker's language. The same day plaintiff complained, several supervisors and the personnel manager met with plaintiff and informed her that they appreciated her bringing the incident to their attention, they did not condone or tolerate sexual harassment and a prompt investigation would ensue. The employer's investigation was completed within three days. During the investigation, defendant interviewed the co-worker and several witnesses, none of whom corroborated plaintiff's assertions. Nonetheless, defendant reprimanded the co-worker in writing and transferred him to another shift. Plaintiff complained a second time at which time the

employer conducted another prompt and thorough investigation.

When plaintiff's claim for hostile work environment sexual harassment was dismissed with prejudice, she appealed. The Fifth Circuit dismissed plaintiff's appeal as frivolous, imposing sanctions against plaintiff and holding that defendant made a prompt and proper response to the co-worker's behavior. 17 F.3d 791, 795-96 (5th Cir. 1994).

(4) Other examples of prompt employer investigations include Callahan v. Runyun, 75 F.3d 1293 (8th Cir. 1996) (summary judgment for defendant upheld); Waymire v. Harris County, 86 F.3d 424 (5th Cir. 1996) (fact that county's investigation took three months does not fail promptness test as actor was reprimanded on the day of the act and any delay was attributable to the organizational format of the investigation); Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984) (judgment for defendant affirmed where upon receiving plaintiff's complaint of sexual harassment during a business trip, the employer conducted an immediate four-day investigation and reprimanded the harasser).

d. Insufficiently prompt investigations.

Delay in commencing an investigation likely will be viewed as acquiescence on the employer's part to a hostile work environment.

(1) See, e.g., Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) (summary judgment for employer reversed where employee complained two or three times of verbal harassment by her supervisor, and employer simply instructed supervisor to apologize but did not formally investigate until plaintiff filed a complaint with the Nevada Equal Rights Commission), cert. denied, 115 S. Ct. 733 (1995); Katz v. Dole, 709 F.2d 251, 254, 256 (4th Cir. 1983) (air traffic controller was the object of verbal sexual harassment; despite the fact that plaintiff's employer knew about the harassment, supervisory personnel did nothing to investigate or stop it, thereby manifesting "unmistakable acquiescence in or approval of the conduct").

(2) There is a dispute as to whether failure to investigate a sexual harassment complaint, in and of itself, is actionable.

Compare Downer v. Detroit Receiving Hosp., 191 Mich. App. 232, 477 N.W. 2d 146 (1991) (under Michigan law, failure to investigate is not, in and of itself, a civil rights violation); Beardsley v. Isom, 828 F. Supp. 397 (E.D. Va. 1993) (former female lieutenant did not show that employer's failure to investigate violated her equal protection rights where employer took appropriate corrective action), aff'd, 30 F.3d 524 (4th Cir. 1994) with Bator v. State of Hawaii, 39 F.3d 1021, 1029 (9th Cir. 1994) ("A supervisor who has been apprised of unlawful harassment . . . should know that her failure to investigate and stop the harassment is itself unlawful.") (citations omitted).

(3) A four-week delay in speaking with a complainant after she submitted a written complaint was one factor in a court's decision to deny summary judgment to the employer. Bennett v. New York City Dep't of Corrections, 705 F. Supp. 979, 987-88 (S.D.N.Y. 1989) (Plaintiff alleged several incidents of sexual harassment by co-workers over a period of time. The court, denying summary judgment, noted that although defendants reacted swiftly and decisively on many occasions, certain responses by the employer were not swift and effective. In particular, the court noted that the employer did not speak with plaintiff until four weeks after she submitted one of her written complaints, and only one person was spoken to and reprimanded for his harassing conduct.).

(4) Moreover, tardy investigations are more likely to be substantively insufficient than prompt ones. As time passes, memories fade, evidence may disappear, the ability to put a prompt end to inappropriate conduct is lost and complainants are less likely to be satisfied with employer responses to their complaints.

E.g., Coley v. Consolidated Rail Corp., 561 F. Supp 645, 649-51 (E.D. Mich. 1982) (Plaintiff complained to her supervisor's boss of sexual harassment by her immediate supervisor. He promised to investigate. The following day, plaintiff again experienced sexually harassing comments from the perpetrator and resigned, claiming a constructive discharge. The supervisor did not conduct a formal investigation of the original complaint and did not take steps to investigate the second incident since he did not know how serious it was. Furthermore, he did not call plaintiff until ten

days to two weeks after her departure to persuade her to come back to work. Defendant's failure to investigate promptly plaintiff's complaint of sexual harassment gave rise to an offensive work environment and was as much a contributing factor to plaintiff's constructive discharge as was the ten-day to two-week delay in contacting her after she walked out.).

(5) The employer is obligated to complete an investigation and take appropriate corrective action, even if it has no evidence that harassment is continuing. See, e.g., Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995) (Police officer was sexually harassed by her immediate supervisor with whom she had previously had a romantic relationship. The department's internal affairs investigation was inadequate because it failed to question the alleged harasser and witnesses who would corroborate plaintiff's complaints. The investigation was subsequently closed, partly because the harassment stopped after the harasser learned that the investigation was underway. The Ninth Circuit reversed the district court's judgment in favor of defendant and remanded for determination of the proper remedy, holding that mere investigation, even if the harasser's knowledge of the investigation persuades him to stop, does not relieve defendant of its liability to complete its investigation and take remedial measures to stop further harassment.).

8. What response is required if the employer concludes that harassment likely has occurred?

The 1980 EEOC Guidelines require that a prompt investigation must be accompanied by "immediate and appropriate corrective action" if the facts warrant. See Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1048-49 (3d Cir. 1977) (Title VII is violated when a supervisor makes sexual advances toward a subordinate employee, conditioning her employment on her acquiescing to his advances, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge). Corrective action consists of three elements: (1) immediately halting ongoing harassment; (2) taking appropriate disciplinary action against the harasser; and (3) taking any other actions appropriate to minimize the risk of a reoccurrence. 29 C. F. R. § 1604. 11 (d). Such actions may include reaffirmation of the harassment policy and complaint procedure, harassment training and periodic follow-up with complaints.

a. Prompt cessation of harassment.

(1) Dornhecker v. Malibu Grand Prix Corp. illustrates the benefits of a swift response by the employer. Within 12 hours after plaintiff complained she was being harassed, defendant employer assured her that she would not have to work with the co-worker after the current project ended one and a half days later. Reversing the district court's ruling in favor of plaintiff, the Fifth Circuit court found that the employer's response was unusually prompt and decisive. In fact, the court noted that it would have been reasonable for the employer to have taken more time than it did to consider plaintiff's complaint and decide what remedial actions to take, and that the company's remedy to a complaint may be addressed proportionately to the seriousness of the offense. 828 F.2d 307 (5th Cir. 1987).

(2) While the 12-hour period in Dornhecker was unusually prompt, waiting 24 hours to halt ongoing harassment may be too slow. In Bennett v. Corroon & Black Corp., plaintiff learned that obscene cartoons depicting her engaged in sexual activities had been posted in the public men's room of the office building in which she worked. Embarrassed and upset, plaintiff left her job permanently on the day she learned of the cartoons from a fellow employee. The company's chief executive officer saw the cartoons the same day that plaintiff departed but did not remove them until the following day when he learned of plaintiff's reaction to them. Finding clearly erroneous the trial court's decision that the employer took prompt corrective action, the Fifth Circuit affirmed summary judgment for the employer on other grounds. 845 F.2d 104 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989).

(3) Quick responses also may relieve the employer from liability for constructive discharge. See, e. g., Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992) (even if the sexual harassment she complained of was the reason for plaintiff's resignation, defendant's corrective actions taken immediately before plaintiff resigned made the level of harassment insufficient to support a finding of constructive discharge), aff'd on other grounds, 511 U.S. 244 (1994). To prove constructive discharge, a "plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment." Mattern v.

Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), cert. denied, 118 S. Ct. 336 (1997).

b. "Appropriate" corrective action often means disciplinary in nature.

Is a simple instruction to refrain from future harassment enough or must an employer formally discipline the perpetrator when it concludes harassment has occurred?

(1) A cease-and-desist instruction to a perpetrator has been deemed sufficient in some cases. E.g., Steele v. Offshore Shipbldg., Inc., 867 F.2d 1311, 1313-14 (11th Cir. 1989) (Vice-president and general manager of defendant company engaged in sexually-oriented joking with employees, jokingly requested sexual favors from plaintiffs, commented on their attire and invited them to visit him on the couch in his office. Plaintiffs complained to the harasser's superiors that his repeated offensive comments created a hostile work environment. In response, the company's equal employment opportunity officer interviewed plaintiffs, summoned the manager from a trip abroad, and verbally reprimanded him, instructing him "that his offensive conduct must stop immediately." The Eleventh Circuit affirmed the district court's conclusion that the corporate employer was not liable for the manager's sexual harassment of the plaintiff.).

(2) A threat of termination or other discipline in the event of a reoccurrence has been found sufficient to constitute appropriate corrective action in others. E.g., Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988) (acts by plaintiff's co-salespersons such as calling her a bitch and a whore in front of customers, ridiculing her appearance, expelling gas during her sales presentations and threatening to conspire to prevent her from meeting customers did not amount to constructive discharge because manager's warning to the harasser that he would be fired if plaintiff complained again was prompt remedial action); Talanda. v. KFC Nat'l Management Co., 863 F. Supp. 664, 668 (N.D. Ill. 1994) ("[A]n employer, in order to avoid liability for the discriminatory conduct of an employee, does not have to necessarily discipline or terminate the offending employee as long as the employer takes corrective action reasonably likely to prevent the offending conduct from reoccurring."), aff'd, 140 F.3d 1090, cert. denied, 119 S. Ct. 164 (1998).

(3) But several recent cases indicate that these words may not be enough. Certainly, when instructions to stop, warnings or threats of discipline do not end the harassment, or the harasser's actions are egregious, formal discipline or termination must be imposed.

E.g., Guess v. Bethlehem Steel Corp., 913 F.2d 463 (7th Cir. 1990) (upholding the district court's finding that plaintiff failed to show the ineffectiveness of the employer's response after misbehaving foreman "was responsive to discipline" and the misconduct was not repeated); Swentek v. USAIR, Inc., 830 F.2d 552, 558 (4th Cir. 1987) (employer properly remedied a sexual harassment claim by: (1) investigating the allegations; (2) giving written warnings to refrain from harassing behavior; and (3) warning that subsequent behavior would result in suspension; no further complaints were lodged by the complainant after the employer's actions).

(4) The Ninth Circuit's analysis of the remedy issue is instructive. In Ellison v. Brady, plaintiff complained that a co-worker sexually harassed her by repeatedly propositioning her and sending her a note and lengthy letter declaring his desire to be with her. The employer told the co-worker to stop harassing plaintiff and transferred him to another office. Three weeks after he was transferred, the harasser challenged his transfer through the employer's grievance procedure and won. After learning that the harasser would return to the office in which she worked, plaintiff filed a formal complaint of sexual harassment. The district court granted summary judgment for the employer on the ground that plaintiff had failed to state a cause of action for hostile work environment sexual harassment. The Ninth Circuit reversed, noting that:

"[T]he reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment. In evaluating the adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct."

The court found that the temporary transfer of the perpetrator was not reasonably calculated to end the harassment or assessed proportionately to the seriousness of his conduct. It

faulted the employer for not expressing strong disapproval of the harasser's conduct and for failing to reprimand him, place him on probation or inform him that repeated harassment would result in suspension or termination. 924 F.2d 872, 882 (9th Cir. 1991). The Court also commented that the appropriate inquiry is not what a "reasonable employer" would do to remedy the sexual harassment. While employers are statutorily obligated to provide a workplace free from sexual harassment, for business reasons they may be reluctant to punish high ranking or highly efficient employees. As a result, asking what a reasonable employer would do runs the risk of reinforcing any prevailing level of discrimination by employers and fails to focus directly on the best way to rid the work place of sexual harassment.

(5) Other courts have found employer responses insufficient as well. E.g., Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 879-80, 887-88 (D. Minn. 1993) (Plaintiffs testified that verbal and visual references to sex permeated the work place and that they sometimes were subjected to physical acts such as touching and presentation of sexual objects – the court entered judgment for plaintiffs, finding that the company failed to take sufficient remedial measures because it did not take steps to: a) determine whether individual incidents were indicative of a larger problem requiring a company-wide response; b) establish a system for creating or processing records of complaints; c) assign responsibility for controlling sexual and anti-female materials or otherwise address the situation; d) identify or discipline the persons responsible for displaying the offending material; and e) communicate with the male employees concerning the "nature and the need to show respect to female employees.").

(6) Intlekofer v. Turnage calls more explicitly for corrective action that is disciplinary in nature when the perpetrator fails to curtail his behavior after being informed that further complaints will result in disciplinary action. Plaintiff filed several reports with her employer alleging inappropriate conduct by a co-worker. The alleged harassing behavior included touching, propositions to engage in a relationship, a telephone call to plaintiff's home during which the co-worker asked her personal questions and asked permission to visit her at her home, screaming at her over a shift schedule she prepared, monitoring her telephone calls, chasing her while

yelling at her at work, referring negatively to plaintiff to other co-workers and threatening her. In response, the employer informed the co-worker, more than once, that further complaints would result in disciplinary action.

The Ninth Circuit reversed the district court's finding that the employer took "prompt and appropriate remedial action designed to end" the sexual harassment by the co-worker. Relying on Ellison v. Brady, the court stated that remedies must be both "reasonably calculated to end the harassment" and "be of a disciplinary nature." Because neither counseling nor the initial warnings prevented further harassment, more severe disciplinary action was necessary for the employer to avoid liability. 973 F.2d 773, 780-81 (9th Cir. 1992).

(7) See also Davis v. Tri-State Mack Distribs., Inc., 981 F.2d 340 (8th Cir. 1992) (Plaintiff complained to her supervisor on two occasions that the employee for whom she was a secretary made unwelcome sexual comments and contacts. Plaintiff complained to the harasser's immediate supervisor, who called the harasser into his office to apologize to plaintiff for his behavior. Each time plaintiff complained, the supervisor directed the harasser to apologize, but the harassment continued. Plaintiff then complained to the company comptroller who took action. The court stressed that directing the employee to apologize was not sufficient, particularly because the harassment became more offensive each time the supervisor met with the co-worker.).

(8) Intlekofer explained that "the appropriateness of the remedy depends on the seriousness of the offense, the employer's ability to stop the harassment, the likelihood that the remedy will end the harassment, and the 'remedy's ability to persuade the potential harassers to refrain from unlawful conduct.'" Although employers may choose a variety of available disciplinary alternatives to meet these goals, they seriously jeopardize their ability to win summary judgment in these cases if they decline to impose formal discipline, documented in writing, for the first offense and the harassment reoccurs.

c. Discharging the harasser is not automatically required.

(1) Terminating the alleged harasser's employment may be an appropriate employer response. E. g., Downer v. Detroit

Receiving Hosp., 61 FEP 1092 (Mich. Ct. App. 1991) (employer not liable for hostile work environment sexual harassment when, upon receiving plaintiff's complaint, defendant terminated the alleged harasser's employment).

(2) However, not all alleged acts of harassment, even if proven, necessarily require termination. See Ellison v. Brady, 924 F.2d 872 at 882 ("We do not believe that all harassment warrants dismissal . . . .") (citing Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984)). The facts of each case must be considered carefully. Terminated harassers may, in fact, turn the tables and sue the employer. Discharged harassers have brought lawsuits alleging wrongful termination and defamation (see discussion, supra); breach of contract (Scherer v. Rockwell Int'l Corp., 766 F. Supp. 593 (N.D. Ill. 1991) (defendant's summary judgment motion granted; plaintiff who was discharged for sexual harassment unsuccessfully argued that although he could be terminated for "misconduct," that term did not encompass sexual harassment), aff'd, 975 F.2d 356 (7th Cir. 1992)); breach of the covenant of good faith and fair dealing (Manning v. Cigna Corp., 807 F. Supp. 889 (D. Conn. 1991) (employer's motion for summary judgment granted where employer did not breach implied covenant of good faith and fair dealing by discharging employee for sexual harassment)); and even Title VII (Balazs v. Liebenthal, 32 F.3d 151 (4th Cir. 1994) (employee who alleged he was falsely accused of sexual harassment failed to state a claim under Title VII because action was not based on his sex)).

d. Separating the harasser from the complainant is appropriate in some circumstances.

(1) In some cases, it may be appropriate to separate the harasser and the complainant where both remain employed by the same entity. The complainant's terms and conditions of employment should not be adversely affected by any transfer.

(2) In Steiner v. Showboat Operating Co., plaintiff, a casino dealer, was sexually harassed by her immediate supervisor. The next day she complained to the casino manager, who required the harasser to apologize. The apology, however, was offered in a rude and sarcastic manner. Dissatisfied with this response, plaintiff filed a complaint with the Nevada

Equal Rights Commission (the "NERC"). Once aware of her NERC complaint, the casino conducted a more serious investigation, as a result of which the harasser was reprimanded and told that he would be fired if he ever again used sexual or derogatory language to plaintiff or any other employee. The harasser's shift also was changed so that he and plaintiff no longer would work the same hours. However, the harasser continued to harass plaintiff by showing up to work early and giving her intimidating stares, glares and snickers. Plaintiff again complained to management. The casino did not terminate the harasser, but instead asked plaintiff to transfer to the day shift. Plaintiff declined but nevertheless was transferred.

The Ninth Circuit reversed the district court's entry of summary judgment for the employer and noted that "on remand Steiner herself may be entitled to summary judgment on her claim of sexual harassment." The appellate court was disturbed by the fact that the employer twice transferred plaintiff to a new shift, "rather than changing [perpetrator's] shift or work area . . . or, indeed, firing him outright and early on." Citing Intlekofer, the Steiner court indicated that a victim of sexual harassment should not have to work in a less desirable location as a result of the employer's remedial plan. 25 F.3d 1459 (9th Cir. 1994), cert. denied, 115 S. Ct. 733 (1995).

(3) The Seventh Circuit reached the same conclusion in Guess v. Bethlehem Steel Corp., 913 F.2d at 465 (7th Cir. 1990). Employer transferred employee out of the department in which the alleged harassment occurred. Plaintiff argued that such a response unduly punished plaintiff, in that she was transferred to another location and the offender was allowed to stay. The appellate court agreed. Cautioning employers, the court wrote:

> A remedial measure that makes the victim of sexual harassment worse off is ineffective per se. A transfer that reduces the victim's wage or other remuneration, increases the disamenities [sic] of work, or impairs the prospects for promotion makes the victim worse off. Therefore such a transfer is an inadequate discharge of the employer's duty of correction.

(4) A transfer of the perpetrator is not always required. Of course, a transfer will not help an employer avoid liability if it is not designed to remedy a hostile environment. In Cronin v. United Service Stations, Inc., 809 F. Supp. 922, 925-26, 930 (M.D. Ala. 1992), a manager of a convenience store complained that her assistant manager sexually harassed her verbally and physically and undermined her managerial authority. When she complained to the company's general manager, he simply laughed about the harasser's conduct. The general manager temporarily transferred the harasser but reassigned him to the same store a few weeks later. The court concluded that the company was indirectly liable for hostile environment sexual harassment, noting that the general manager only transferred the employee to avoid further problems, not because he believed plaintiff's version of events or to remedy a hostile environment.

(5) In Sparks v. Regional Medical Ctr. Bd., plaintiff complained of sexual harassment to hospital administrators who investigated her complaint, discussed their findings with plaintiff and her supervisor, instructed the supervisor to stop the harassment and made adjustments in plaintiffs work schedule to prevent future harassment. The harassment ceased. Two months later plaintiff again complained, charging her supervisor with threatening retaliation. The administrator investigated the complaint and informed the supervisor that any future retaliation or harassment would result in termination. The court rejected plaintiff's claim that the remedial action taken by the employer was ineffective because the employer did not transfer plaintiff to another floor. Rather, it described the employer's response as appropriate, prompt and effective in preventing any retaliation or future harassment. 792 F. Supp. 735 (N.D. Ala. 1992).

(6) In Watts v. New York City Police Dep't, plaintiff claimed that she was sexually harassed during police training. She filed a complaint against the instructor with the NYPD's equal employment opportunity office. After returning from a sick leave, plaintiff twice requested a change in her class schedule but both requests were denied. She continued to be ostracized and subjected to verbal attacks. Plaintiff later learned that, prior to her return, the harassers had admitted to the conduct, had their pay docked and been warned to stay away from her. In denying defendant's motion for judgment on the pleadings,

the court acknowledged the department's response, but found that plaintiff's other allegations "might well establish that the NYPD did not come close to I exhausting the field of reasonable and feasible actions' it might have taken to cleanse [the plaintiff's] working environment." The court pointed out that the department agreed to permit plaintiff to change her class schedule only after she tendered her resignation. 724 F.Supp. 99 (S.D. N.Y. 1989).

B. **Navigating Your Way Through An Investigation.**

While promptness and thoroughness are critical, the law does not prescribe any particular method for investigating a harassment claim. Nor is the same process appropriate or best suited for each situation. This section outlines techniques which an investigator would be well advised to consider but not necessarily adopt in any given case.

1. Who is the appropriate investigator?

Employers should choose the most appropriate investigator available for a specific case with full knowledge that the investigator later may be called as a witness. The following are among the types of investigators typically considered:

a. Member of the human resources department.

b. In-house attorney.

c. Member of line management.

d. Member of the internal audit, ethics or securities department.

e. Private investigator or other outside consultant.

f. Regular outside counsel.

g. Special outside counsel.

If it is possible or desirable to cover the investigation by the attorney-client privilege or the attorney work-product doctrine, the investigator should be an attorney or one acting at the direction of an attorney.

In making a final selection, employers may find it helpful to consider the attributes required by the case. These may include:

- Competence and ability to understand the purpose and the issues such that the interviewer can formulate appropriate follow-up questions when new facts or issues arise during the interview.

- Knowledge of company policies, procedures, practices and rules.

- Interviewing skills.

- Effectiveness as an interviewer in view of the personalities and background of the potential interviewees (e.g., ability to develop rapport, to press for admissions, to understand interviewees).

- Credibility (e.g., no conviction record, no history of termination for misconduct or incompetence, no history of moral turpitude).

- Objectivity and impartiality (e.g., no bias or grudge).

- Ability to take thorough, accurate notes which can be used as evidence.

- Ability to maintain confidentiality to the extent appropriate.

- Ability to instill confidence in and work with the complainant.

2. Is it possible or desirable to cover the investigation by the attorney- client privilege or attorney work-product doctrine?

   Employers often prefer to cover sensitive investigations by the attorney-client privilege.

   a. Yet, if sexual harassment litigation ensues, the defendant employer typically will be forced to waive the privilege so it can demonstrate that upon learning of alleged harassment, it properly investigated the allegations, considered the facts and took the appropriate action to prevent a reoccurrence. If the terminated perpetrator challenges his or her discharge, the defendant employer likewise often will find it necessary to waive the privilege to establish good cause or a legitimate nondiscriminatory reason for its decision.

   b. Accordingly, the employer may need to disclose the investigation process, notes and report, and possibly the legal advice rendered by counsel even if they constitute or contain privileged communications or work-product.

See, e.g., Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) (waiver of the privilege with respect to counsel's opinion as to the lawfulness of the seniority practices at issue was critical to the defense of willfulness; court specifically found that since TWA had in good faith relied on an opinion of counsel as to the lawfulness of its practice, it could not be held liable for a willful violation of the ADEA); EEOC v. Fox Point-Bayside Sch. Dist., 31 Empl. Prac. Dec. ¶ 33,609 at pp. 29,864-65 (E.D. Wis. 1983) (if a defendant is going to claim it did not knowingly violate the law, relied on advice of counsel and thus did not willfully violate the ADEA, the opposing party must have access to the attorney-client communication and advice relied upon), rev'd on other grounds, 772 F.2d 1294 (7th Cir. 1985).

Consultation with counsel prior to conducting the investigation is recommended in order to determine whether the investigation can and/or should be protected from disclosure under the attorney-client privilege.

3. Before commencing the investigation, what matters should the investigator consider?

a. Discuss the parameters of the investigation with the appropriate management representative(s) and counsel.

(1) Why is investigation required?

(2) Should all or part of the investigation be protected under the attorney-client privilege and/or attorney work-product doctrine?

(3) What are the potential objectives of the investigation?

(4) Who should be part of the investigation team?

(5) Through whom and how should contacts with interviewees be made?

b. Determine the appropriate deadline for completing the investigation.

c. Identify documents to be reviewed.

(1) Complaint and notes regarding it.

(2) Relevant rules, policies, procedures and instructions.

(3) Memoranda or notes about the incident(s).

(4) Managers' notes and files.

(5) Prior investigation files.

(6) Records of prior complaints against the alleged perpetrator.

(7) Records of prior complaints by the complainant.

(8) Personnel files of individuals involved.

(9) Statements written by or obtained from witnesses.

(10) Relevant business records, such as time cards, calendars, diaries, tape recordings, photographs, logs, etc.

(11) Physical evidence, such as samples.

d. Identify potential interviewees and their relationship to the matter under investigation.

(1) Person(s) who raised the issue(s).

(2) Persons identified by person(s) who raised the issue(s).

(3) Persons identified by person(s) being investigated.

(4) Supervisors of persons involved.

(5) Observers of the incident(s).

(6) Others with relevant information.

(7) Authors of relevant documents.

(8) Co-workers of persons involved.

(9) If appropriate, other persons who reportedly have been subjected to similar activity.

e. Decide order of interviews.

(1) Is there any reason not to interview the complainant(s) first?

(2) Should the alleged wrongdoer(s) be interviewed second, last or in some other order?

f. Determine the format for recording information from witnesses.

(1) Contemporaneous handwritten notes of key points obtained from each witness.

(2) Dictated, typed write-up of key points obtained from each witness, prepared based upon the contemporaneous handwritten notes referenced above.

(3) Signed declaration under penalty of perjury.

(4) Statement written out by witness in his/her own words.

(5) Contemporaneous shorthand/virtually verbatim notes of words spoken by each witness.

(6) Transcript of interview prepared by a court reporter.

(7) Tape-recorded interview.

(8) Videotaped interview.

g. Establish a system for organizing and maintaining files.

h. Determine the format for and matters to be addressed in the investigator's report, if any.

i. Identify other investigatory steps.

j. Review the investigation plan periodically to ensure that it is comprehensive.

4. What are some of the techniques investigators find helpful for recording information obtained during witness interviews?

a. Start a new page for each interview.

b. At the top, place the names of those present at an interview, and the date, time and place of the interview. Sign and date the notes.

c. Typically it is appropriate to take detailed notes, as close to verbatim as possible, during each interview.

d. Report matters asked of the interviewee as well as words spoken and facts provided by the interviewee.

e. Do not include your interpretations, beliefs, assumptions, conclusions, etc., about the facts stated. Rather than guess at reasons or intentions, ask the interviewee the reason and record the response.

f. In some investigations, the investigator may need to resolve conflicts in information by making determinations about the credibility of witnesses. Be careful. If you note things during an interview that impact a credibility determination, record these observations on a separate document pursuant to instructions you receive from counsel. Consider factors such as evasiveness, contradictions in statements, blushing, other facial expressions, potential signs of anxiety such as shaking or perspiration, defensiveness and other demeanor.

g. At the conclusion of an interview, review with the witness the points contained in your notes to confirm their accuracy and determine whether the interviewee has anything to add.

h. Review and finalize the notes immediately upon completion of the interview or other communication. The notes should be legible and provide enough information to understand, when reviewed later, what was asked and what information was provided. Although it is not necessary to write in complete sentences, the notes should be free from misspellings or grammatical errors so that the interviewer is not discredited in the course of litigation.

i. Generally, tape recording of interviews is not advisable. Tape recorders often frighten interviewees and make them hesitant to share the facts they have. The recordings arguably will not constitute work product and the interviewer's voice, tone and failure to ask specific questions will be easier to criticize.

j. If an interview is to be recorded, check applicable laws for restrictions. Place the recorder in plain view on the table in front of the witness and obtain the witness's consent to turn it on. As soon as the recorder is turned on, indicate the date, time, place and participants, and have the witness affirm on tape his/her knowledge of and consent to the recording.

5. What general interview techniques may be useful?

   a. Prepare thoroughly in advance of the interview.

      (1) Determine the issues that should be explored with the witness.

      (2) Have a full understanding of the law, policy or guideline that will be critical in reaching a resolution of the issue when the facts are ascertained.

      (3) Understand what facts are necessary to reach a conclusion.

      (4) Determine what written documents will assist in reaching a conclusion or in determining certain facts, and have copies available to review with the witness.

   b. Prepare a detailed outline of key questions.

      (1) All incident(s) or matters the witness should be asked about and all details regarding each.

      (2) Information the witness is believed to have.

      (3) Information from others the witness may be able to corroborate or refute.

   c. Make appropriate disclosures at the commencement of the interview and perhaps retain a written record indicating they were made (e.g., a signed memorandum from the interviewee acknowledging the disclosures were made or from two witnesses indicating the disclosures were made).

      (1) State what is being investigated, i.e., why the interview is taking place.

      (2) Advise what role the interviewee may play in the investigation.

      (3) Tell how the information received may be used.

      (4) Explain that information obtained during the interview will be reported to those within and possibly outside the company who have a "need to know" of it.

(5) Explain the seriousness of the investigation.

(6) Explain the importance of accurate information and the individual's obligation to provide truthful, thorough information.

(7) Caution that attempting to influence the investigation or to disclose confidential information by discussing it with others can be cause for disciplinary action. (However, legal counsel and government officials investigating compliance may be advised of facts the witness has and truthful testimony regarding those facts certainly can be given in a legal proceeding.)

(8) If a union employee requests union representation and has a reasonable belief that the interview may result in disciplinary action, do not proceed without a union representative.

(9) If a collective bargaining agreement covering the interviewee requires that the interviewee be offered union representation, offer it.

(10) If counsel/representative is conducting this investigatory interview as an attorney/representative for the company and is not acting as an attorney for the interviewee, so indicate.

(11) If applicable, indicate that the purpose of the communication is to allow counsel to formulate legal advice for the corporation, the interview is privileged and confidential, and the witness may not disclose any portion of it to anyone else; specify steps the individual must take to protect the privilege.

(12) Indicate whether the employee must, may or is encouraged to have his/her own lawyer present.

(13) Caution that discipline and possibly criminal prosecution (if applicable) could result. If an attorney is conducting the interview, consider whether it is appropriate to tell the "accused" that he or she may have private counsel present if desired. See ABA Model Rule 1.13(d) (1983 commentary).

d. If the interviewee refuses to participate in the interview or answer questions, explain the consequences.

(1) Indicate to the "accused" that the interview is designed to give the individual an opportunity to relate his/her version of the events and to advise management of any information it should consider before it finalizes its investigation. If the accused refuses to participate, management should tell the interviewee that the company will base its decision on the other information gathered during the investigation, the inferences drawn from that evidence and the accused's unwillingness to cooperate in the interview.

(2) Ask legal counsel whether you must or should advise uncooperative union employee witnesses that you would appreciate their talking with you on a voluntary basis, that they are not required to do so, that they may stop talking at any time, that you are only interested in the facts, that you do not care if they support or do not support the union, that you are not making any promises or threats and/or that their employment will not be impacted simply because they were or were not willing to participate.

e. <u>In investigations regarding specific events, cover all events which occurred during the relevant time frame in chronological blocks of time</u>.

(1) Do not leave the time block until all details necessary to recreate the scene have been established. For each block of time cover:

(2) Exactly what occurred?

(3) When did it happen?

(4) Where did it happen?

(5) Who was involved or otherwise present?

(6) Who else may know of relevant information?

(7) How did it happen?

(a) Who did or said what?

(b) In what order?

(8) Why did it happen?

(9) Who is to blame?

(10) Could it have been avoided?

(11) Was this an isolated event or part of a pattern? If there has been a pattern, cover each prior incident.

(12) What impact, if any, has the event had?

(13) With whom has the event been discussed?

(14) Are there are any notes, recordings, photographs, physical evidence or other documentation?

f. Pin the witness down to facts: specifically what the witness saw, heard, did, smelled or felt (if physical contact was made with or by the witness). Distinguish matters of which the witness has personal knowledge from hearsay. Avoid conclusions (e.g., he hurt her); focus on detailed facts (e.g., when I was looking directly at George and standing three feet in front of George, I saw him raise his right arm above his head, clench his fist, and punch Betty in the stomach with his right fist; Betty screamed, "Don't," and then she fell backwards, landing with her bottom on the floor.").

g. Follow up on answers given with appropriate additional questions.

(1) Develop questions to corroborate or refute information provided by other witnesses or evidence, typically without disclosing the source.

(2) If appropriate, develop questions such as: "If your position is accurate, then how can you explain _____?"

h. Ask the witness to list all individuals who may have knowledge of any of the events.

(1) What knowledge does the witness believe the individual possesses?

(2) From what source?

(3) Does the witness believe the individual was present when the incident took place? Heard about it from someone else?

i. Use appropriate question formats.

(1) Typically start with open-ended questions. Move to more narrow, focused and even leading questions after the witness has sketched the limits of the events as he/she recalls them.

(2) Do not ask compound questions; ask one question at a time.

(3) Typically ask questions which force the person to relate events chronologically to ensure thorough coverage. Comparing different witnesses' chronological versions will help assess credibility.

(4) Try to save unfriendly or embarrassing questions until the end; beginning with hostile or tough questions usually causes the interviewee to be defensive.

(5) Do not conclude the interview without asking the tough questions, even if the interviewee is getting uncomfortable.

(6) Neither give the impression that you disbelieve any witness nor express an opinion as to whether something inappropriate occurred during this fact gathering process.

(7) Ask additional questions based on the answers to the preplanned questions.

j. Obtain confirmation that the interviewer has a complete and accurate understanding of the interviewee's factual knowledge. Before excusing the interviewee, repeat to the interviewee the significant points obtained and ask him/her to confirm that the information is accurate and complete. Indicate that confirmation in the notes. If any information is not based on personal information, appropriately label it as rumor or conjecture.

(1) Review all significant information received with the person being questioned.

(2) Ask for all corrections the witness has.

(3) Ask if the witness has any other information which may be relevant.

(4) Ask if there are any questions which were not asked that the witness feels should have been asked.

(5) Let the witness know that if he/she has forgotten and later recalls any information or documents, the witness should call you immediately when additional information comes to mind.

(6) If you or counsel will be sending the witness a statement, declaration or memorandum for review and signature, explain what you will be doing and obtain a promise of cooperation. Alternatively, prepare and have the witness read, correct and sign the declaration before leaving the meeting.

(7) Confirm the interviewee's understanding that no threats or promises have been made.

(8) Stress the importance of not disclosing the questions asked, information given or other information about the interview to others to facilitate a thorough, impartial investigation.

(9) If appropriate, make a general comment about the process of the investigation from that point on.

(10) Listen to any questions the person may have and answer if appropriate.

(11) Be cautious in making statements to the witness because they could be discovered. Avoid discussing theories, strategy, assessment or other evidence.

6. What additional strategies may be appropriate in interviewing complainants or purported victims?

a. Explain the objective of the meeting.

(1) The company is committed to compliance with the law and its policies.

(2) The company will conduct a prompt and thorough investigation to determine whether inappropriate action has occurred.

(3) If so, it will be stopped and appropriate corrective action will be taken.

(4) There will be no retaliation against an individual for making an honestly believed complaint under the company's procedure or to a governmental agency or court.

(5) The interviewee is expected to provide a thorough, truthful accounting of what has occurred, and to identify all evidence and all individuals who may have knowledge.

b. Do not promise confidentiality. Confirm that information will be shared with those who have a need to know.

c. Make sure the employee feels comfortable with you as the investigator.

(1) Explain the fact you have been trained on how to conduct investigations and do so regularly as part of your job.

(2) Have the employee articulate her/his comfort level to you by asking the employee if there is any reason she/he feels you cannot be fair and objective.

(3) Consider the desirability of a female investigator for a female alleged victim because disclosure of information about sexual matters may be embarrassing.

d. Consider asking the complainant/victim to write down, either before or at the start of the interview, all incidents of improper conduct and all facts and witnesses which establish that they occurred. (A handwritten statement by the complainant/victim is desirable at this early stage before she/he has counsel who may recast the events in a more negative light.)

e. Obtain a complete list of each act and each statement that the individual construed as sexual harassment, offensive or constituting a hostile environment.

(1) For each act and for each statement determine:

(a) When did this occur?

(b) Where did this occur?

(c) Who was present when this occurred?

(d) Exactly what happened or exactly what was said? (Get a description of the scene, from the first word or gesture up through the end of the incident or conversation.)

(e) What conversation occurred with the harasser before the incident occurred or the offensive statement was made?

(f) What acts between you and the harasser occurred before the incident occurred or the offensive statement was made?

(g) What response did you make to the harasser when the offensive act was occurring and when it ended?

(h) What response did you make to the harasser when the offensive statement was concluded?

(i) What did you say to the harasser the next time you met him or her?

(j) Was anyone else present during any of these incidents or conversations? If so, who was present for each of them?

(k) Did you ever indicate that you were offended or somehow displeased by the act or offensive statement?

(l) What did you say to show your displeasure? What did you do to show your displeasure? What was the harasser's response to your act or statement? When did you indicate your displeasure? Did you ever specifically tell the harasser to stop? Did you ever specifically say that you found the conduct to be offensive or to constitute sexual harassment?

(m) Did you speak with anyone else about the offensive behavior or statement? With whom did you speak?

When did this conversation take place? What did you and he/she say?

(n) Did you ever make any notes or record of the incident? Did you tape record it? When? What do your notes or recordings say? Where is a copy? Can we obtain one?

(o) What did you do after the offensive incident or statement? (Find out whether the individual was able to continue with normal activities.)

(p) Did you ever seek any medical treatment or counseling as a result of the incident or offensive statement?

(2) Further ask:

(a) When did you first learn of our sexual harassment policy and complaint procedure? To whom did you first report the offensive incident or statement? If the individual did not use the complaint procedure promptly: why did you wait so long to use the complaint procedure to report the incident or statement?

(b) Did you ever do anything which you believe may have caused the harasser to believe you would welcome or at least not be offended by the incident or statement you have found to be offensive? (Although this may be a very sensitive issue, in some cases, you may need to ask about gifts or cards the individual has given to the harasser; social interaction, dating or sexual relations the individual has had with the harasser; any dirty jokes or profane language the individual has uttered in the presence of the harasser; and any invitations the individual has extended to the harasser.)

(c) What action do you want the company to take? Why have you identified this particular action?

(d) Do you believe you can work with the harasser? If so, is there anything we can do to assist you in resuming a

positive working relationship with the harasser? If not, why do you believe you cannot work with the harasser? Are you willing to try to work with the harasser if I meet jointly with the two of you to discuss the situation and your future working relationship? Do you have any other suggestions which may allow you and the harasser to work together successfully?

f. Review important points before concluding the interview.

(1) Thank the employee for raising the issue.

(2) Reaffirm to the employee that the company does not permit retaliation or reprisal for making an honestly believed complaint.

(3) Ask the employee to keep the investigation and information provided during the interview confidential (except, of course, that legal counsel and government officials responsible for investigating compliance may be advised, and the witness may testify in a legal proceeding regarding the alleged harassment).

(4) Tell the employee that you may be in contact from time to time and that the employee's continued cooperation is essential.

(5) You may want to ask the employee for suggestions on how the issue can best be resolved. You may also ask what the employee wants the company to do, but make no promises.

(6) Express the company's commitment to conclude the matter in a timely manner.

(7) Explain what follow-up documentation, if any, the employee likely will receive and what the employee should do with it.

(8) Confirm that all facts, evidence and persons with potential information have been disclosed to the best of the individual's ability.

g. Following the initial interview, consider whether it would be helpful to send a communication to the complainant/purported victim with a

memorandum or declaration setting forth the important facts provided. Ask the individual to read, review for accuracy and thoroughness, correct, make appropriate additions to and sign the document before returning it to you no later than a specified date. The signed document can be very useful in ensuring thorough investigation, discrediting later inconsistent claims and responding to legal claims.

7. What other matters should be covered with alleged wrongdoers?

   a. Identify and give the individual an opportunity to respond to each alleged improper statement or action.

      (1) You need not disclose the source of your information.

      (2) You should disclose the incidents/statements in full detail so that the accused has a full opportunity to refute and disprove them. If complicated, state them in writing to facilitate understanding by the accused.

   b. Ascertain the extent and nature of the interactions the accused has had with the alleged victim(s).

      (1) Have gifts, cards or notes been exchanged?

      (2) Has there been a dating, sexual, social or working relationship?

      (3) Has the alleged victim initiated or participated in any sexual discussions, jokes, gestures, etc.?

      (4) Has the alleged victim ever indicated any displeasure with anything the accused has said or done, or ever asked the accused to stop?

   c. Ask the accused for any facts which show anyone else may have a motive to fabricate the allegations against the accused.

   d. If the accused denies wrongdoing and claims that the person raising the issue is lying, explore possible reasons.

      (1) Ask why the accuser would make the claim.

(2) Ask if anything has happened between the two individuals which would explain why one would make a meritless complaint.

e. Give the accused an opportunity to provide any alibis or mitigating circumstances.

f. Ask the accused to identify all persons he/she believes should be interviewed as part of the investigation and what relevant information each is likely to have.

g. Request that the accused provide to you all relevant documents and other evidence.

h. Ask the accused what steps he/she believes should be taken to ensure a thorough investigation.

8. What documentation may be appropriate?

a. Each investigation should have a separate file. Because the investigator's file may not be protected by the attorney-client privilege or the company may choose to waive the privilege, accurate documentation should be carefully created and maintained.

b. Typical components of an investigation file include:

(1) Log of investigator's actions and calls by date.

(2) Contemporaneous and final interview notes for each witness.

(3) All communications to and from witnesses, including complainants.

(4) All draft and final witness statements.

(5) All complaints.

(6) All documents which establish or refute the issues investigated.

(7) Relevant physical evidence, such as tape recordings, product samples, etc.

(8) Investigator's report, if any.

(9) Documents reflecting notification of investigation results and any remedial action.

c. In creating notes, remember:

(1) Preserve the attorney-client privilege or attorney work-product privilege if available and desired. Label such documents as "privileged attorney-client communication" and/or "attorney work-product."

(2) Think before writing. Only place on paper facts received. Avoid investigator's opinions or conclusions (unless requested in a final report or required to assess credibility), doodles and notes on extraneous matters.

(3) Review all notes promptly after creation for factual, spelling and grammar errors. Correct errors to avoid embarrassment to the investigator and company.

(4) Documents, other than working drafts, should not be destroyed once an investigation has commenced. See Cappellupo v. FMC Corp., 126 F.R.D. 545 (D. Minn. 1989) (severe sanctions imposed for destruction of documents).

(5) Working drafts (of documents other than statements sent to witnesses) should be destroyed when the next version is prepared in accordance with the company's document retention policy.

(6) Inform persons who may have relevant documents to maintain them.

9. Is a summary report of the investigation required?

a. Some investigations require no written summary because the managers responsible for employment decisions interview the percipient witnesses and/or read the investigation file which is easy to follow.

b. In more complicated cases, a summary report is a useful introduction for the decision-makers. Such reports may include:

(1) Complaint or event that prompted the investigation, including name(s) and department(s) of any complainant(s) or victim(s).

(2) Issue(s) investigated.

(3) Factual findings on each issue.

(a) If conflicting factual information is obtained, identify the conflict and factors which may help resolve the conflict and seek advice from counsel before commenting on credibility.

(b) Key facts supporting findings made.

(4) Investigation timetable from inception, by date, including interviews conducted and other investigatory steps taken.

(5) Summary of critical information contained in each witness interview, relevant policy and other evidence.

(6) Identification of any injury apparently sustained.

(7) Any action taken.

(8) Recommendations, if the investigator has been asked to make them.

The investigator's objective is to be neutral, objective, precise and thorough. Avoid mention of the content of any communication with counsel.

C. **Concluding the Investigation with a Report of the Findings and Implementation of Appropriate Action.**

1. Once the facts have been gathered as accurately as possible from the appropriate persons, the investigator should meet with the human resources department, the appropriate line management representative, and perhaps with legal counsel, to discuss the facts which are already known and any additional questions which should be asked or facts which should be obtained. This group should consider not only the evidence and actual statements of the witnesses but also their reputation, motive to fabricate, and other conduct as reported by eyewitnesses. See Martin v. Norbar, Inc., 537 F. Supp. 1260, 1262, 30 FEP 103 (S.D. Ohio 1982) (court held that it would be reasonable for the employer to credit the alleged harasser's version over

plaintiff's version only if it could demonstrate that it considered factors such as the parties' motives to lie and the alleged harasser's reputation for sexual harassment in reaching its conclusion).

2. All decision-makers would be well-advised to read the actual interview notes, declarations or other statements, other important documents gathered during the investigation and personnel files of critical witnesses if credibility is at issue.

The importance of this review is illustrated by Kestenbaum v. Pennzoil. Pennzoil had received an anonymous letter claiming that the plaintiff engaged in sexual harassment, illegal conduct and mismanagement of one of its resort ranches. A company investigator initiated an internal investigation. The investigator interviewed several employees and prepared a written summary report to Pennzoil officials. Pennzoil confronted the plaintiff with the allegations and allowed him to respond, to comment about each of the persons interviewed, and to name witnesses who would speak on his behalf. The plaintiff was terminated based upon the summary report. He then sued for wrongful termination, claiming "that without fair investigation and consideration of the allegations and his response, he was terminated on the grounds of sexual harassment for which he was innocent." A seven figure judgment for the plaintiff was affirmed by the New Mexico Supreme Court. 4 IER 67, 74, 108 N.M. 20, cert. denied, 490 U.S. 1109 (1989).

The quality of the investigation and the extent of the decision-makers' knowledge were critical factors in the case. The Court stated:

> [T]here was substantial evidence to support the jury finding that Pennzoil did not act upon reasonable grounds. In her deposition, Pennzoil's investigator admitted on cross-examination that her summary was not intended to stand alone, that it failed to differentiate between first-hand knowledge, attributed hearsay or mere gossip or rumor, and no attempt was made to evaluate the credibility of the persons interviewed. Nevertheless, the only document reviewed by vice-president Rundle before he fired Kestenbaum was his investigator's summary of interviews.
>
> Moreover, he did not take a close look at the way the investigation had been handled, but relied upon the professionalism of his investigators. At trial, Kestenbaum presented an expert who testified that Pennzoil's investigators did not observe the standards of good investigative practice and who identified numerous deficiencies in the investigation.

3. Determine the most appropriate action to be taken in light of the facts available, which may of course be inconclusive. The employer must "exercise reasonable care to prevent and correct promptly any sexually harassing behavior." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

   a. Discharge of the alleged harasser, if the investigation reveals that the activity in question occurred and violated federal or state law or company policy, and there are no mitigating circumstances.

   b. A strong written warning to the alleged harasser, making clear that bad judgment was used and any recurrence will not be tolerated.

   c. A written memo to the alleged harasser stating that the company has not been able to determine whether any unlawful action occurred, but reiterating the company's policy against whatever action was alleged, and making clear that any such activity in the future, if proven, will not be tolerated.

   d. Transferring one or both of the persons involved to a different job or facility in order to prevent any recurrence, keeping in mind, of course, that the determination of which of the two persons should be transferred is often a difficult and sensitive issue itself, with potential legal consequences if either person is transferred. Given the legal consequences of your decision, legal counsel often should give advice before this decision is made.

4. Once the tentative decision has been made in light of the available facts, make certain again that all of the relevant facts have been obtained and thoroughly considered, that any person who is to be adversely affected by the decision has been given a full opportunity to explain his or her position on the events in question, and that the facts which support the decision have been documented appropriately in writing.

5. Communicate the decision to all of the persons in question in a discreet and confidential manner, accompanied by a written statement to each person indicating the conclusion reached and the company's opposition to the kind of activity which was alleged to have occurred (whether or not the investigation concluded that it did or did not occur). Advise the complainant and the accused of any disciplinary action or other corrective steps to be taken, and urge the complainant to come forward immediately if there is any recurrence of the activity or retaliation. It typically is advisable to have a designated representative contact the alleged harassee periodically for at least two months to ensure the absence of harassment and retaliation. If the results of

the investigation are inconclusive, do not indicate that the company concludes that no harassment occurred because that is tantamount to accusing the complainant of lying (unless such dishonesty has been established by clear and convincing evidence).

6. Consider a written and/or oral communication to all management and/or non-management personnel, or other persons who may have had some involvement in the particular incident or activity in question, again reiterating in writing the importance of compliance with the company's harassment policy. If refresher training is needed, present it.

7. Remember that decisions regarding sexual harassment claims must be made carefully by officials (e.g., senior human resource personnel) familiar with past cases and employer policy. Resolution of these claims should not be left solely to operational personnel who may not be familiar with employer resolution of other cases and other known incidents involving the same harasser.

LEGAL UNDERPINNINGS TO EMPLOYEE PRIVACY CLAIMS

A. **Background.**

1. The notion of a legal right to privacy can be traced to a famous law review article defining the right to privacy as the "right to be let alone." Warren & Brandeis, "The Right To Privacy," 4 Harv. L. Rev. 193 (1890).

2. Privacy rights are an amorphous, elusive, and evolving area of law, making it fertile ground for litigation. Other factors, as well, have contributed to the rapid expansion of privacy claims, including:

   a. A heightened sense of employee rights;

   b. Increased productivity demands and accompanying need to reduce costs, such as losses from employee theft; and

   c. Technological advances permitting more careful scrutiny of employee performance and activities.

B. **Constitutional Law.**

1. U.S. Constitution.

   The U.S. Constitution does not apply to private sector actions unless the employer is acting as an agent of the government. The federal courts are in

disagreement as to whether the U.S. Constitution embodies a right to privacy in the non-disclosure of personal information. Compare United States v. Westinghouse Electric Corp., 638 F.2d 570, 577-80 (3d Cir. 1980) (holding that there is a constitutional right to privacy of medical records kept by an employer, but that the government's interest in protecting the safety of employees was sufficient to permit their examination) and Plante v. Gonzalez, 575 F.2d 1119, 1132-34 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979) (identifying a "right to confidentiality" and holding that balancing is necessary to weigh intrusions) with J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981) (expressing strong reservations against recognizing "a general constitutional right to have disclosure of private information measured against the needs for disclosure") and Government Employees v. HUD, 13 IER Cases 1 (D.C. Cir. 1997) (same).

2. California State Constitution.

a. The California Constitution, Article I Section 1 guarantees a right to privacy. This right applies to private sector employees. Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834 (1994).

(1) A plaintiff alleging a constitutional invasion of privacy must establish:

(a) A legally protected privacy interest;

(b) A reasonable expectation of privacy; and

(c) A serious invasion of a privacy interest.

Id. at 35-37.

(2) A legally recognized privacy interest generally falls into two classes: (i) interest in precluding the dissemination or misuse of sensitive and confidential information; or (ii) interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference. Id. at 35.

(3) A "reasonable" expectation of privacy is an objective standard founded on widely-accepted community norms. The customs, practices, and settings surrounding particular activities may create or inhibit a reasonable expectation of privacy.

(4) Privacy concerns are not absolute; an "[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest." Id. at 38. Thus, in determining whether a violation has occurred, a court will balance an employee's privacy interest against the employer's business justification.

C. **State Common Law Privacy Claims.**

1. Breach of contract/covenant.

a. In Luck v. Southern Pac. Transp. Co., 218 Cal. App. 3d 1, 267 Cal. Rptr. 618, cert. denied, 498 U.S. 939 (1990), the court upheld a jury verdict that a computer operator's termination for refusal to submit to a random drug test was in breach of contract/covenant because it was "without good cause." Id. at 13.

b. In Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989), the court held that public policy supports the protection of employee privacy and that its violation by an employer may give rise to a breach of the implied covenant of good faith and fair dealing. However, the court held that there was a competing public concern for employee safety and that the employer's termination of the employee after his refusal to take an announced drug test did not breach the implied covenant. Cf. Luedtke v. Nabors Alaska Drilling, Inc., 834 P.2d 1220, 1226 (Alaska 1992) (on appeal after remand, holding that employer's suspension of employee following his failure of a surprise drug test did breach the implied covenant).

2. Termination in violation of public policy.

a. Assuming that an employer's action is deemed to violate an employee's constitutional right to privacy under Article 1, Section 1 of the California Constitution, California appellate courts are split on whether the employee can use the violation as the basis for bringing a claim for tortious wrongful discharge.

(1) In Luck, the court held that an employee terminated for refusal to submit to a random drug test could not state a claim for discharge in violation of public policy under the principles enunciated in Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988). The right to privacy is a private right, not a public one, according to the majority opinion.

Moreover, the parties could have lawfully agreed that the employee would submit to urinalysis without violating public interest.

(2) In contrast, in Semore v. Pool, 217 Cal. App. 3d 1087, 1097, 266 Cal. Rptr. 280 (1990), the court held that an employee terminated for refusal to submit to random pupillary-reaction test could state a claim for termination in violation of public policy; there is a public concern because "[plaintiff's right not to participate in the drug test is a right he shares with all other employees." Id. at 1097. See also Pettus v. Cole, 49 Cal. App. 4th 402, 460, 57 Cal Rptr. 2d 46 (1996) (upholding claim of termination in violation of public policy based on finding that employer invaded plaintiff's "informational and autonomy privacy rights" when it procured personal medical and psychiatric information without employee's knowledge or consent).

b. The court in Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982), held that wrongful termination in violation of public policy may be found where an employer' action amounts to an unreasonable, substantial, or serious interference with an employee's privacy. However, the court found no interference where three at-will employees were discharged for failing to answer questions on an employer questionnaire because the questions were relevant to the plaintiffs' job qualifications and represented no invasion of the plaintiffs' rights of privacy protected by law. See also Folmsbee v. Tech Tool Grinding & Supply, Inc., 417 Mass. 388, 630 N.E.2d 586 (1994) (affirming summary judgment on claim of wrongful discharge in violation of public policy; in light of evidence of employee drug use and procedural safeguards to guarantee privacy of drug tests, employer did not unreasonably interfere with employee's privacy by requiring her to take part in a company-wide, mandatory drug test).

c. The court in Slohoda v. U.P.S., 193 N.J. Super. 586, 594, 475 A.2d 618 (App. Div. 1984), reversed summary judgment for the employer where an employee contended that his discharge for engaging in adultery with a co-worker violated his right to privacy, and therefore was against public policy.

d. In Seta v. Reading Rock, Inc., 100 Ohio App. 3d 731, 654 N.E.2d 1061 (Ohio Ct. App. 1995), the court held that the employer's mandatory drug testing did not constitute an invasion of privacy and

that the employee's discharge for failing a company drug test did not violate public policy.

e. The court in Kroen v. Bedway Security Agency, Inc., 430 Pa. Super. 83, 633 A.2d 628 (1993) held that the employer's discharge of an at-will employee for his refusal to submit to a polygraph test violated public policy and that an action for wrongful discharge would lie.

f. In Roe v. Quality Trans. Services, 67 Wash. App. 604, 609, 838 P.2d 128 (1992), the employer's mandatory drug testing was held not to constitute an invasion of privacy and the employee's discharge for refusing to take a company drug test did not violate public policy.

3. The tort of invasion of privacy.

The right of privacy at common law is invaded by (i) unreasonable intrusion upon the seclusion of another, (ii) appropriation of a person's name or likeness, (iii) unreasonable publicity given to a person's private life, or (iv) publicity that unreasonably places a person in a false light before the public. The Restatement (Second) of Torts, § 652A. See, e.g., Miller v. National Broadcasting Co., 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (1986).

a. Several jurisdictions have held that an employer may be liable for employment practices which constitute an unreasonable intrusion upon an employee's private affairs or concerns. E.g., Cunningham v. Dabbs, 12 IER Cases 1066 (Ala. Ct. App. 1997) (discharged employee who alleges that former employer rubbed her shoulders and made sexually suggestive comments states viable claim for invasion of privacy based on unreasonable intrusion into her private affairs); O'Brien v. Papa Gino's of Am., Inc., 780 F.2d 1067 (1st Cir. 1986) (coerced polygraph testing concerning drug use); Phillips v. Smalley Maintenance Serv., Inc., 435 So. 2d 705 (Ala. 1983) (inquiries into plaintiff's sexual practices); Love v. Southern Bell Tel. & Tel. Co., 263 So. 2d 460 (La. App. 1972) (employer liable for breaking into employee's house trailer).

b. An employer could also be liable under a theory of public disclosure of private facts where information in the employee's personnel file, medical records or the like is communicated more broadly than can be justified by a "need to know" standard. E.g., Bratt v. IBM, Corp., 392 Mass. 508, 467 N.E.2d 126 (1984) (internal corporate memorandum regarding medical information allegedly distributed to 16 employees held to be a public disclosure); Beaumont v. Brown, 401 Mich. 80,

257 N.W. 2d 522, 52832 (1977) (letter by superior of lieutenant colonel in army reserve to "Personnel and Administration Center" alleged sufficient publicity to state a claim), overruled on other grounds, 455 Mich. 385, 565 N.W. 2d 650 (1997).

c. Also, a threat to reveal false information in order to coerce an individual to do some act may be considered extortion. See 18 U. S. C. § 195 1 (b)(2) (" extortion means the obtaining of property from another, without his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right"); Frederick v. Reed, Smith, Shaw & McClay, et al., 1994 U.S. Dist. LEXIS 1809, *31 32 (E.D. Pa. 1994) (after employee filed lawsuit for sexual harassment, employer made false statements to the media that employee "was disturbed" and "under psychiatric care" in order to convince employee to dismiss the lawsuit; court found such statements to be untrue and awarded employee compensatory and punitive damages).

4. Defamation.

a. An employer may be liable for defamation by communicating a false statement about an employee or applicant which injures the person's reputation.

b. Truth is a defense to a claim for defamation. Moreover, communications made by an employer without malice to those with a "need to know" are privileged if based on credible evidence. Cal. Civ. Code § 47(c). Deaile v. General Tel. Co., 40 Cal. App. 3d 841, 115 Cal. Rptr. 582 (1974) (alleged defamatory remarks about reasons for the forced retirement of former employee made by employer to other employees held privileged); Hooks v. McCall, 272 So. 2d 925 (Miss. 1973) (qualified privilege exists in communicating on employment matters to those who need to know); Jones v. J.C. Penny Co., Inc., 164 Ga. App. 432, 297 S.E.2d 339 (1982) ("In defamation cases involving an employer's disclosure to other employees of the reasons for plaintiff's discharge, the general rule is that a qualified privilege exists where the disclosure is limited to those employees who have a need to know by virtue of their duties...and those employees who are otherwise directly affected either by the discharged employee's termination or the investigation of the offense leading to his termination."). Compare Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990) (qualified privilege exists when the disclosure is made without malice and limited to those employees who have a need to know; advertising reason for employee's

discharge merely to set an example for other employees held not to be a privileged communication), modified, 461 N.W.2d 374 (Minn. 1990) with Hanton v. Gilbert, 486 S.E.2d 482 (Ga. Ct. App. 1997) (university biology department chairman's distribution to all department members of memo detailing reasons for termination of research analyst held to be a privileged communication, because chairman had an interest in the smooth running and morale of his department and therefore could take reasonable actions to put an end to misleading rumors and inaccurate accounts of the analyst's dismissal that were circulating in that department).

5. False imprisonment.

a. An employee could assert this claim if physically detained by the employer for a search or investigation.

b. Although merchants are generally protected from civil liability for false arrest or imprisonment when shoplifters are detained (See, e.g., Cal. Penal Code § 490.5, Mich. Comp. Laws § 600.2917(l), and Tex. Civ. Prac. & Rem. Code § 124.001), an employer should not be over-zealous in using privilege of detention without arrest. See Moffatt v. Buffums' Inc., 21 Cal. App. 2d 371, 69 P.2d 424 (1937) (employer could be liable for false imprisonment where employee suspected of theft was detained for five hours and forced to sign a confession before she could be released). See also Fermino v. Fedco, Inc., 7 Cal. 4th 701, 30 Cal. Rptr. 2d 18 (1994) (employee's claim of false imprisonment, based on allegations that she was kept against her will in a windowless room for over an hour, accused of stealing, threatened with arrest until she confessed, falsely told witnesses were in the next room, and released only when she became hysterical, is not barred by the exclusive remedy provisions of the Workers' Compensation Act); Kroger Co. v. Warren, 420 S.W.2d 218 (Texas Civ. App. 1967) (grocery store employee was within rights to detain checkout clerk for questioning about missing money, but was nevertheless liable for false imprisonment when detention was accomplished by assaulting the clerk); Luppo v. Waldbaum, Inc., 131 A.D.2d 443, 515 N.Y.S.2d 871 (1987) (employer who suspected employee had stolen merchandise not liable for false imprisonment when the manner and length of plaintiff's detention prior to the arrival of the police was reasonable).

PRIVACY ISSUES ARISING IN INVESTIGATIONS OF EMPLOYEES

A. **Overview.**

The nature and extent of any investigation will depend on the matter under investigation and the employer's goals. An employer needs to consider:

1. What ends are to be achieved? Monitoring practices to achieve deterrence? Catching violators in act? Inventory control?

2. Who is to conduct investigation? Private security firm? Police? Supervisor? Human Resources Manager?

3. What investigatory tools are to be used? Surveillance? Searches? Undercover agents? Interrogation?

4. Who is to be informed of investigation? Management only? All employees?

5. Will target employee be informed of investigation or interrogated? If so, care must be taken to avoid false imprisonment or related claims.

6. What punishment can be expected to be meted out if suspicions or fears are realized?

B. **Interrogation of Employees.**

Employers may interview employees as part of investigations related to legitimate business concern (e.g. theft or disclosure of trade secrets). Liability may result, however, if interrogation is conducted in an abusive manner or results in inappropriate confinement of individual.

1. Manner of conducting interviews.

   a. Where an employer is investigating suspected misconduct, including possible criminal misconduct, the courts generally allow the employer considerable latitude appropriate to the circumstances. However, juries will react unfavorably where the employer crosses the line from conducting a reasonable but aggressive investigation, to one that is overreaching and outrageous. In particular, the employer should avoid physical intimidation and coercion.

   b. Case examples.

(1) McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D. W. Va. 1986).

Telling employee to "cut the crap" and calling her a liar during investigation of shortage of approximately $17,000 did not constitute outrageous behavior.

(2) Kaminski v. United Parcel Serv., 501 N.Y.S. 2d 871, 120 A.D.2d 409 (N.Y. App. Div. 1986)

Three-hour interrogation related to alleged theft (accompanied by threats and loud and profane language) and intimation of possible criminal prosecution stated action for infliction of emotional distress.

2. False imprisonment.

False imprisonment requires (i) intent to confine individual, (ii) knowledge of confinement by individual, and (iii) lack of consent or privilege. Such a claim may arise during an employee interrogation. See Moffatt v. Buffums' Inc., supra; Fermino v. Fedco, Inc., supra; Cavanaugh v. Burlington Northern, 941 F. Supp. 872 (D. C. Minn. 1996) (group of employees who were confined to conference room for six hours while being questioned about harassment towards a fellow employee, and who were allowed to leave only for escorted bathroom breaks, stated a viable claim of false imprisonment).

C. **Searches of Employees, Their Property and Work Areas.**

1. Searches by public employers.

a. The Fourth Amendment

The Fourth Amendment to the U.S. Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."

The Fourth Amendment applies only to governmental actors, and only where there is a reasonable expectation of privacy.

b. Case Law

(1) The U.S. Supreme Court analyzed the applicability of the Fourth Amendment to workplace searches in O'Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987). A search was conducted of the office of a physician for a state hospital in response to an allegation of impropriety. Personal items (including photograph, Valentine's Day card, and book of poetry) were seized. The Court ruled that a public employee has a reasonable expectation of privacy in his or her office, desk, and file cabinets that contain only personal files. However, an employer may search such area, if it has "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file." Id. at 726. A warrant or probable cause is not required.

(2) See also Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1336 (91 Cir. 1987), cert. denied, 503 U.S. 951 (1992) (seizure of government employee's belongings is reasonable only if relevant to his employment; employer's actions must be least intrusive means available to attain its legitimate objective).

2. Searches by private employers.

a. Private employers are not bound by the U.S. Constitution. Consequently, searches of employer premises conducted in furtherance of a business purpose are normally lawful provided that they do not disturb employees' legitimate expectations of privacy.

b. The California State Constitution will apply to searches conducted by private employers. Hill v. Nat'l Collegiate Athletic Ass'n, supra; Luck v. Southern Pac. Trans. Co., supra. The privacy analysis by the Supreme Court in O'Connor v. Ortega, supra, while not directly binding on private sector employers, may be instructive.

c. Searches were found to be lawful in the following settings:

(1) Use of metal detector to uncover weapons or stolen goods. General Paint & Chemical, 80 Lab. Arb. (BNA) 413 (1983).

(2) Search of supervisor's locked credenza by secretary who had been given key. O'Donnell v. CBS, Inc., 782 F.2d 1414 (7th Cir. 1986).

(3) Search of union employee's locker for drugs, where done to enforce the employer's written safety policy. Presence of DEA officers did not make the employer subject to the Fourth Amendment; the employer acted for its own purposes and not to assist the government. Melton v. U.S. Steel Corp., 8 IER Cas. 687 (N.D. Ind. 1993).

d. Searches were found to be unlawful in the following settings:

(1) Search of locker accomplished by removing the employee's personal lock. K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. Civ. App. 1984).

(2) Strip search of retail store checker who was told to disrobe to her underwear in front of customer in public bathroom after the customer accused her of taking $20. Bodewig v. K-Mart. Inc., 54 Or. App. 480, 635 P.2d 657 (1981).

(3) Random strip searches and body-cavity searches of correctional officers. Sec. & Law Enforcement Employees v. Carey, 737 F.2d 187 (2d Cir. 1984).

(4) Failure to cooperate with lawful search constitutes legitimate grounds for termination. Simpson v. Commonwealth, Unemployment Compensation Bd. of Review, 69 Pa. Commw. 120, 450 A.2d 305 (1982), cert. denied 464 U.S. 822 (1983). However, where refusal to cooperate with an unlawful search leads to termination, the employee may have a claim for wrongful termination. E.g., Overby v. Chevron USA, Inc., No. SWC 89552 (Super. Ct. of Calif., Los Angeles County) ($550,000 jury verdict where employer insisted on searching an employee's wallet; employee had consented only to locker searches and searches at plant gate).

3. Preventive measures to minimize liability

a. Draft and circulate policy reserving right to enter or inspect all offices, lockers, desks, company vehicles, and other company property at any time without notice.

b. Prohibit use of personal locks on company property. Retain key or combination to any lock and let employees know that this is the case.

c. Notify employees that failure to comply with company search policy (e.g., by failing to allow an inspection) will result in discipline up to and including termination.

d. Require each employee to sign search policy, acknowledging his or her consent to workplace searches. Retain signed policy.

4. Procedures to follow in conducting searches.

a. Ensure that search is warranted as part of reasonable investigation or in compliance with established policy of random searches. Require authorization from human resources department or appropriate official before search is conducted.

b. Articulate particular purpose of the search (e.g., to retrieve stolen goods), and limit search to what is necessary to achieve that goal. For example, if searching for suspected stolen tools that are large, do not inspect small containers that may contain personal items.

c. Obtain prior consent from employee whenever possible. If employee refuses to consent to or cooperate with search, inform employee of possible consequences, including discipline or discharge for refusing to cooperate with investigation.

d. Have at least two management representatives present during a search.

e. In unionized work force, consider whether a union steward should be present during a search. Obey any representation requirement imposed by a collective bargaining agreement or past practice, and consider providing a representative in any event, to dispel any impression of overreaching. In nonunion workplace, consider allowing the employee to select a representative/witness.

f. Conduct search in responsible, non-confrontational manner (e.g., allow employee to empty his or her own pockets or bags), and in as private a setting as circumstances permit. Do not attempt forcibly to conduct a search, especially of the employee's person.

g. Use professional aids (e.g., metal detectors or trained dogs) where and only to extent appropriate.

h. Take possession of suspected contraband in plain view. If employee refuses to turn it over, inform employee that failure to do so will result in discipline or discharge. Carry out this threat in cases of unreasonable failure to cooperate.

i. Photographs of contraband seized should be taken, preferably before it is moved. Mark and retain contraband in secure location and preserve chain of custody. In case of illicit drugs or related materials, place contraband in sealed envelope, to be provided to police or laboratory as appropriate.

j. Interview employee regarding seized material and offer employee full opportunity to explain.

k. Police should be contacted before or after the search, as appropriate, if unlawful activity is involved, but only if employer is prepared to prosecute action through to conclusion. It is inadvisable to initiate, and then withdraw, prosecution. If police are contacted before search and there is reasonable basis for believing that unlawful activity has occurred, consider turning search over to police to conduct.

l. Participants in search should prepare memoranda to file.

D. **Telephone Monitoring and Audio Surveillance.**

1. Federal law.

a. Title I of the Electronic Communications Privacy Act of 1986 (formerly Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 2520 ("Title III")), makes it unlawful to intentionally intercept wire, oral, or electronic communications. Covered communications include any oral communications transmitted by aid of wire, cable, or like connection uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.

(1) Fourth Amendment standard for expectation of privacy is not required; reasonable subjective expectation that employee's conversations are free from interception is sufficient. Walker v. Darby, 911 F.2d 1573 (11th Cir. 1990).

(2) Title I generally prohibits employers from listening in on employee telephone or electronic communications if no party to the communication consents, unless an exception applies. It does not limit computer monitoring and telephone accounting, and has little effect on video monitoring or tape recording of in-person conversations.

b. Civil actions.

Adversely affected individuals may bring civil actions under Title I against any person who intercepts a covered communication or discloses or uses the contents of such communications. 18 U.S.C. § 2520. A non-employee whose telephone conversation with the employee was surreptitiously recorded by an employer also may maintain a civil action against the employer. Awbrey v. Great Atl. & Pac. Tea Co. Inc., 505 F. Supp. 604, 609 (N.D. Ga. 1980). Remedies include equitable or declaratory relief, reasonable attorneys' fees and costs, and greater of (1) actual damages suffered by plaintiff plus any profits made by violator or (2) statutory damages of $10,000 or $100 per day for each day of violation. 18 U.S. C. § 2520. At least one court has permitted recovery for emotional distress. Gerrard v. Blackman, 401 F. Supp. 1189, 1193 (N.D. Ill. 1975).

c. Three principal exemptions.

(1) Consent of one party to communication. 18 U.S.C. § 2511(2)(d); Lewellen v. Raff 843 F.2d 1103, 1115 (8th Cir. 1988), cert. denied, 489 U.S. 1033 (1989).

(2) "Business extension" exemption -- when employer uses a telephone extension to monitor employees in the ordinary course of business. 18 U.S.C. § 2510(5). Courts have interpreted the "extension" language broadly, including:

(a) Using an extension line to monitor telephone calls of a hospital's dispatch console used to receive emergency calls and dispatch emergency services. E.g., Epps v. St. Mary's Hosp. of Athens, Inc., 802 F.2d 412, 415-16 (11th Cir. 1986).

(b) A monitoring system installed by the telephone company at the employer's request to permit supervisors to monitor employees. E.g., James v.

Newspaper Agency Corp., 591 F.2d 579, 581 (10th Cir. 1979).

(c) Routine recording of emergency calls on a police station telephone system. E.g., Jandak v. Village of Brookfield, 520 F. Supp. 815, 822 (N.D. Ill. 1981). See also Royal Health Care Serv., Inc. v. Jefferson-Pilot Life Ins. Co., 924 F. 2d 215, 217 (11th Cir. 1991) (holding that under the Florida business-extension exception, which parallels the Title I exception, the telephone extension is the device that intercepts the call because it can intercept a call without recording the call); Epps, 802 F.2d at 415 (the dispatch console was the intercepting device rather than the double reel tape recorder used to record the telephone calls). But see Deal v. Spears, 980 F.2d 1153, 1157-58 (8th Cir. 1992) (recording device, not extension phone, was the intercepter, and the recording device does not fall within the exemption); Sanders v. Robert Bosch Corp., 38 F.3d 736, 740 n.8 (4th Cir. 1994) (agreeing with Deal and rejecting Epps; use of telephone voice logger does not fall within the business-use exception).

(d) Monitoring is in the "ordinary course of business" if it occurs:

i) To provide training on interacting with the general public. E.g., James v. Newspaper Agency Corp., 591 F.2d at 581.

ii) To determine whether an employee was discussing business matters with a competitor. E.g., Briggs v. American Air Filter Co., Inc., 630 F.2d 414, 420 (5th Cir. 1980).

iii) To determine whether an employee is making personal calls from a work phone. E. g., Simmons v. Southwestern Bell Tel. Co., 452 F. Supp. 392, 396 (W.D. Okla. 1978), aff'd, 611 F.2d 342 (10th Cir. 1979).

(e) However, an employer may listen only as long as necessary to determine that the call is personal.

Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983). See Deal v. Spears, 980 F.2d at 1155 (employee awarded $40,000 where employer, while investigating theft, listened to 22 hours of personal phone calls, including sexually provocative calls from employee's lover).

(3) "Provider" exemption -- permits providers of wire communication services (such as telephone companies) to monitor calls for mechanical or service checks. 18 U.S.C. § 2510(5).

d. Courts consistently have upheld state statutes which impose more restrictive provisions than those contained in Title I.

2. State law.

a. California.

California law differs from Title I in that consent of all parties is required for surveillance of a "confidential communication." Cal. Penal Code § 632.

b. What constitutes a confidential communication "turns on the reasonable expectations of the parties judged by an objective standard and not by the subjective assumptions of the parties." O'Laskey v. Sorting, 224 Cal. App. 3d 241, 248, 273 Cal. Rptr. 674 (1990). A communication is confidential even if one of the parties expects the subject matter to be disclosed to a third party so long as either party to the communication has a reasonable expectation that no one is "listening in" or overhearing the conversation. Coulter v. Bank of America Nat'l Trust & Sav. Ass'n, 28 Cal. App. 4th 923, 33 Cal. Rptr. 2d 766 (1994).

c. Employers may bring cross-claims against employees who have illegally taped conversations with their supervisors or co-workers. Coulter, 28 Cal. App. 4th 923, 33 Cal. Rptr. 2d 766 (employee suing his employer for wrongful termination was ordered to pay his former employer $132,000 because he secretly recorded his conversations with coworkers while preparing for litigation).

d. Exceptions to the consent requirement.

(1) Related to the commission of a crime against people.

A confidential communication does not exist where the communication is intercepted or recorded "for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, [or] any felony involving violence against the person. . . ." Cal. Penal Code § 633.5.

(2) The use of obscene language.

An exception exists when the party reporting the conversation reasonably believes that the conversation is in violation of Cal. Penal Code §653, which prohibits any person "who with the intent to annoy telephones another and addresses to or about such other person any obscene language. . . ." See, e.g., People v. Lampasona, 71 Cal. App. 3d 884, 888, 139 Cal. Rptr. 682 (1977) (to fall under the statute, the person using such offensive language must be the person who placed the call).

(a) Telephone extensions are not exempt. Ribas v. Clark, 38 Cal. 3d 355, 361-63, 212 Cal. Rptr. 143 (1985).

(3) Under rules of the California Public Utilities Commission, an employer must provide a beep-tone warning device audible to all parties to the conversation or an announcement to the parties that the conversation is being monitored. However, notice of surveillance placed on the telephone itself is sufficient if only the employee's side of the conversation can be heard. Air Transp. Ass'n of America v. Public Utilities Comm'n of Cal., 833 F.2d 200, 201-02 (9th Cir. 1987) (vacating district court's injunction against enforcing Cal. P.U.C. General Order 107-B), cert. denied, 487 U.S. 1236 (1988).

e. New York.

(1) Under New York law, "a person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication." N. Y. Penal Law § 250.05.

3. Recommendations for telephone monitoring.

a. If an employer only monitors the employee's side of conversation, give prior written notice to employees that such monitoring will occur periodically.

b. To monitor both the employee's and customer's side of the conversation, be knowledgeable about state law, both at your location and the customer's location:

(1) Give notice to the employee in writing.

(2) Give notice to customers with a preliminary recorded message that conversations are monitored to ensure a high level of service. Consider providing an alternate number for customers to call if they object to monitoring.

E. **Visual or Video Surveillance.**

Few statutory limitations exist on visual or video surveillance of employees, but employers should follow a rule of reasonableness and not intrude upon legitimate expectations of privacy.

1. Federal law.

a. In the Ninth Circuit, Title I has been interpreted not to prohibit silent video surveillance undertaken as part of a criminal investigation, although such surveillance is subject to the Fourth Amendment and special requirements for issuing warrants. United States v. Koyomejian, 970 F.2d 536 (9th Cir.), cert. denied, 506 U.S. 1005 (1992).

b. Thus, warrantless video surveillance of employees' semi-private office by an employer in conjunction with law enforcement personnel violates the employees' legitimate expectations of privacy. United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991). See also State v. Bonnell, 75 Haw. 124, 856 P.2d 1265 (1993), (Hawaii Supreme Court held that postal workers had a reasonable expectation of privacy regarding activities in their employee break room, and that the warrantless installation of a surveillance camera by the employer in conjunction with the Maui Police Department implicated their privacy rights under both the United States and Hawaii constitutions).

c. However, when a United States Postal Worker knew that his open workplace was under general video surveillance, the focusing of the

camera on him had no effect on his reasonable expectation of privacy because he already knew that he was under video surveillance, and the focusing of the camera on him merely created more footage of his activity. United States v. O'Reilly, 7 IER Cas. 665 (E. D. Pa. 1992); see also Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F. 3d 174 (11th Cir. 1997) (subjecting telephone company employees to continuous soundless surveillance of their work area does not violate Fourth Amendment; employees do not have objectively reasonable expectation of privacy in open work area that had no work stations for employees' exclusive use, employer had legitimate interest in efficient operation, and employer gave notice that surveillance would occur).

2. California law.

a. A video recorder is a "recording device" within the meaning of the California Penal Code (Invasion of Privacy Act); thus, the criminal penalties set forth in the Act apply to any person who records confidential communications on video without the consent of all parties unless the monitoring is for the purpose of gathering evidence of a crime. Cal. Penal Code §§ 632, 633.5.

(1) Sanders v. ABC, Inc., 85 Cal. Rptr. 2d 909 (1999). An ABC reporter went undercover as a tele-psychic and secretly videotaped two conversations with another tele-psychic which were broadcast on television. The California Supreme Court held that the reporter's actions constituted an invasion of privacy despite the fact that the conversations took place in an open work space divided only by cubicles. A person may reasonably expect privacy against the electronic recording of a communication, even though he has no reasonable expectation as to the confidentiality of the contents of the communication.

(2) Sacramento County Deputy Sheriff's Ass'n v. Sacramento County, 12 IER Cases 723 (Cal. App. 1996).

County officials placed a hidden video camera in the county jail's release office. The court held that this did not constitute a violation of the California constitutional right to privacy, nor a common-law invasion of privacy, since (i) the intrusion was minimal because it occurred in a non-private office where employees had a diminished expectation of privacy; (ii) any intrusion was further minimized by the absence of audio

capabilities; and (iii) the jail's objective of stopping suspected theft was lawful.

b. Labor Code § 435 prohibits an employer from making an audio or video recording of any employee in a restroom, locker room or room designated for changing clothes, unless authorized by court order.

F. **Monitoring Employees' Voice Mail and Electronic Mail Messages.**

The use of voice and electronic mail is widely used in the employment context. These forms of communication in the workplace expose employers to new forms of potential liability. For example, such electronic communications may be considered sexually explicit and/or harassing in nature. In addition, racist, sexist and ageist "jokes" electronically flying about have led to not-so-humorous lawsuits. Such evidence is discoverable in litigation. This is especially important considering the fact that e-mail messages thought to have been deleted can often later be retrieved by a computer expert. Linda Himelstein, *The Snitch in the System*, Business Week, April 17, 1995 at 104.

1. Federal law.

The Electronic Communication Privacy Act ("ECPA"), 18 U.S.C. §§ 2510-2710, amending Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (discussed supra), prohibits access to and disclosure of electronically stored data, including electronic mail and voice mail.

a. What is prohibited.

The ECPA subjects to civil suit and/or criminal penalties any person who (1) intentionally intercepts, endeavors to intercept, or procures another person to intercept, electronic communication, 18 U.S.C. § 2511(l)(a); (2) uses or discloses to any other person the contents of any electronic communication while knowing or having reason to know that the information was obtained through the illegal interception of electronic communication, 18 U.S.C. §2511(l)(c) & (d); or (3) intentionally accesses, without authorization, an electronic storage system to obtain electronic communication, 18 U.S.C. § 2701(a).

b. Covered communications.

Electronic communication, as defined by the ECPA, "means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire,

radio, electromagnetic, photo-electronic or photo optical system that affects interstate or foreign commerce . . . ." 18 U.S.C. § 2510(12).

c. Civil actions and relief.

Individuals may bring civil actions under the ECPA. Relief includes injunctive and declaratory relief, actual damages, reasonable attorneys' fees and costs, and punitive damages for violation of the interception prohibitions. 18 U.S.C. § 2520(b).

d. Three important exemptions.

(1) Entities that provide the wire or electronic communication service are exempt. 18 U.S.C. §§ 2701(c), 2702(b).

As we have found no published decisions addressing the issue, it is unclear whether the provider exception will apply to employers who own electronic services used by employees.

(2) If one of the parties to the communication consents, then the communication is exempt. 18 U.S.C. § 2511(2)(d).

(3) Business exemptions.

Interceptions by an operator of a switchboard, or by a service provider, "in the normal course of his employment while engaged in any activity which is:

> -- a necessary incident to the rendition of his service or
>
> -- to the protection of the rights or property of the provider of that service. . . ."

18 U.S.C. § 2511(2)(a)(i).

e. Federal case law.

(1) Smyth v. Pillsbury Co., 914 F. Supp. 97, 100-01 (E.D. Pa. 1996). Despite employer's repeated assurances that all e-mail communications were confidential and privileged, employers' interception of e-mail was not tortious invasion of privacy and, thus, did not violate public policy. Court found no reasonable expectation of privacy in e-mail voluntarily sent to

an employee's supervisor. Further, court held that reasonable person would not consider the employer's interception to be a substantial or highly offensive invasion of privacy.

(2) Bohach v. City of Reno, 932 F. Supp. 1232, 1237 (D. Nev. 1996). Under the federal wiretapping statutes, employer's "retrieval" of communication from "electronic storage" of computer paging system (which was essentially e-mail) was permissible, as opposed to an "interception" of a communication. Court noted that "even if there had been an interception, we would likely find implied consent in light of the plaintiff's decision to send those messages via the computer."

(3) In Steve Jackson Games, Inc. v. United States Secret Service, 36 F.3d. 457 (5th Cir. 1994), the plaintiffs contended that the government's seizure of an employer's computer, used to operate an electronic bulletin board system, and containing private electronic mail of employees that had been sent but not retrieved by the recipients, violated the ECPA. The court held that seizure of electronic mail that has been stored in an electronic bulletin board but not yet retrieved does not constitute an "intercept" under Title I. Instead, Title II governs the seizure of stored electronic communications such as unread e-mail messages, and requires the government to obtain a search warrant to obtain access to the information. See 18 U.S.C. § 2703(a). The court did not disturb the district court's unchallenged ruling that the government violated Title II of the ECPA when it obtained a warrant without informing the magistrate judge that private electronic communications were stored on the bulletin board and failing to provide notice to the defendants.

2. California law.

a. No California statute specifically addresses voice- or electronic mail, and no published case has applied existing statutes to these electronic systems.

(1) Cal. Penal Code § 631 -- Wiretapping.

(a) It is unclear whether replaying a message is a "wire communication" under the statute. Cf. People v. Medina, 189 Cal. App. 3d 39, 46-48, 234 Cal. Rptr.

256 (similar language in a federal statute held not to include a pager broadcast because the telephone link is severed before the paging system broadcasts the caller's message to the pager), cert. denied, 484 U.S. 929 (1987).

(b) At least one judge has dismissed a wiretapping claim on the grounds that it did not apply to e-mail transmissions. Flanagan v. Epson America, No. BC 007036 (Super. Ct. L.A. County).

(c) Exemption applies if there is the "consent of all parties to the communication" (Cal. Penal Code § 631 (a)), e.g., both the caller and the employee.

(2) Cal. Penal Code § 632 -- Eavesdropping.

(a) It is unclear whether voice mail and e-mail will fall under the language of this statute.

(b) Exemption applies if all parties consent.

(3) Cal. Penal Code § 637 -- Disclosure of wire communications.

(a) Prohibits and punishes willful disclosure of the contents of a private telegraphic or telephonic communication addressed to another person.

(b) Exemption applies if the person who received the message consents.

(4) California Constitution.

Article I of the California Constitution probably provides the greatest potential limitation on monitoring employee voice-mail and e-mail messages. Important factors in analyzing a constitutional claim are:

(a) Whether the employee had a reasonable expectation of privacy in the electronic system;

(b) Whether the employer owned the electronic or voice-mail system;

(c) Whether the employee received written and/or implied notice of monitoring practices;

(d) Whether the employer had a legitimate business purpose for accessing the system and retrieving the information; and

(e) Whether the monitoring was a serious invasion of the employee's privacy.

(5) California cases.

There are no reported cases dealing with the issues of e-mail and/or voice-mail monitoring. The following lawsuits filed in California are illustrative of claims based on employer monitoring of electronic devices.

(a) Flanagan v. Epson America, No. BC 007036 (Super. Ct. L.A. County). Epson employee was fired for insubordination after the employer obtained an e-mail in which the employee had written disparaging remarks. The employee alleged wrongful discharge, breach of privacy, and violation of Cal. Penal Code § 631 prohibiting telegraph interception and telephone wiretapping. The wiretapping claim was dismissed on the grounds it did not apply to electronic mail. This case originally was filed as a class action invasion of privacy suit, but class certification was rejected on the basis that employee training was done on an individual basis with no way to ascertain whether privacy was stressed.

(b) Bourke v. Nissan Motor Co., No. YC 003979 (Super. Ct. L.A. County). Two customer service representatives were placed on final warning and subsequently terminated after their supervisor discovered personal e-mail messages that were sexually suggestive. The women allege that they were wrongfully disciplined because they received, but did not initiate, the e-mail messages and were fired in retaliation for grieving the warnings.

(c) Cameron v. Mentor Graphics, No. 716361 (Super. Ct. Santa Clara County). While monitoring employees'

Internet e-mail messages, Mentor discovered that two computer programmers were revealing trade secrets to a competitor. The programmers were fired and sued for wrongful termination. This matter reportedly has settled.

(d) Shoars v. Epson America, Inc., No. SWC 112749 (Super. Ct. L.A. County). An administrative employee walked in on her manager as he was perusing other employees' e-mail printouts. When the administrator questioned her manager he told her to "mind her own business." She was discharged shortly thereafter. She alleged in a wrongful termination suit that she was fired in retaliation for questioning the company's e-mail practices.

(e) Stromer v. Sun Microsystems, No. 723308 (Super. Ct. Santa Clara County). Technical writer was fired by employer after he sent a series of e-mail messages on issues such as abortion and AIDS and containing epithets about gays. Stromer claimed his bosses violated his rights to free expression.

3. Legitimate reasons to monitor.

a. To protect company property, including company trade secrets.

b. Based on a reasonable suspicion that a crime or serious wrongdoing is about to occur or has occurred.

c. To further legitimate business goals of the company (e.g., monitoring voice mail to ensure prompt return of customer phone calls).

4. Practical advice for employers.

a. Develop a written policy providing that electronic and voice-mail systems are company property and subject to monitoring.

b. Give notice to employees in writing through manuals, employment applications, and annual reviews that electronic systems are to be used solely for business purposes, not for private purposes, and that the employer may and will access these messages. If exceptions are to be made, provide the exact scope of the exception. If an electronic system has been private to date, have the employees sign

acknowledgment forms for the new implementation of a monitoring policy.

c. Limit the use of secret passwords to access electronic systems as they increase the expectation of privacy in such messages. If a system has passwords, inform employees that the passwords do not guarantee confidentiality and the company retains the right to enter the systems.

d. Where business permits, eliminate multi-level privacy categories on electronic systems (i.e. public, semi-private, private). These systems increase the employees' expectation of privacy at higher levels.

e. Consider the benefits of a company-owned electronic system. Companies that subscribe to outside services (such as MCI or AT&T) cannot fall within the ECPA provider exemption.

f. Inform customers voice mail is not a private machine:

(1) Expressly on customer bills and invoices; and

(2) Implicitly by leaving an outgoing message on voice mail that states "employee Mr. Smith or some other employee of the company will receive your message and return your phone call."

g. Consider the least intrusive method of monitoring to achieve business goals. For example, monitoring the caller and the number of messages left is less risky than substantive message monitoring.

h. Monitor for business purposes only. Identify the business purpose of the information-gathering and weigh its importance against employee privacy. Do not monitor personal messages. Cease listening as soon as the monitor realizes a message is not related to business.

i. Alert employees that deleting an e-mail or voice-mail message from their computer or telephone may not purge the message from the system. Notify employees that such messages may still be monitored.

j. Inform employees to think before sending an electronic message or voice mail. Remind employees that e-mail messages usually can be printed, saved, and/or forwarded to others in the office or elsewhere.

k. Limit disclosure of the information to only those employees who have a need to know. Avoid disclosure outside of the company except as

required to law enforcement agencies or pursuant to court order or legitimate discovery if a proper protective order to safeguard confidentiality is entered.

G. **Undercover Operations.**

1. Employers may place operatives (e.g., shoppers and spotters) undercover in workplace to obtain information regarding worker performance and practices, misconduct, and illegal activities, including employee involvement in theft and drugs.

2. Employers who discipline or discharge employee based on a shopper's (someone who poses as a customer) report must provide the employee with a copy of the investigative report before taking any personnel action. Cal. Labor Code § 2930.

3. Recommended safeguards when using undercover operatives.

   a. Check references provided by each agency under consideration. Talk to other employers who have used the agency for the kind of investigation contemplated. Choose only reputable, experienced agencies.

   b. Check each operative's background so that his or her credibility is not vulnerable to attack when the operative is called to testify.

   c. Give specific instructions to the agency and its operatives on the parameters of investigation, types of permissible and impermissible conduct, and format of records that should be made. Require that operatives maintain a detailed, daily log, that is then transcribed into a daily report.

   d. Do not permit operative to initiate criminal activities even if goal is not to prosecute employees criminally, but merely to terminate guilty parties; otherwise, employee may claim entrapment.

   e. Instruct operative never to buy, sell, or use drugs in investigation unless investigator and employer are working in conjunction with police.

H. **Consumer Credit Reports.**

1. Federal law.

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681 - 168lu (1982 & Supp. 1997), regulates the use of credit information and background checks for employment purposes. This includes investigations of applicants for employment and investigations of current employees for purposes of promotion, reassignment, or retention as an employee. The Act was amended by the Omnibus Appropriations Act of 1997. The amendments, which took effect on September 30, 1997, significantly expand the scope of an employer's duties when using outside sources to check an applicant or employee's consumer credit, personal background, criminal background, and/or medical information.

a. Definition of Consumer Reporting Agency.

The provisions of the Act may apply any time an employer uses a "consumer reporting agency" to obtain financial or other personal information about a job applicant or employee. The amendments broadly define "consumer reporting agency" as any "person" who engages in the practice of assembling or evaluating consumer credit information, or other information on consumers, for purposes of furnishing consumer reports to third parties. This definition includes credit reporting agencies such as TRW and Equifax, and other companies which provide background checks to employers, but also applies to other sources, including private investigators, used to collect criminal background information.

b. Definition of "Consumer Report" and "Investigative Consumer Report."

The Act distinguishes between two kinds of reports. The first, "consumer report," is defined broadly as any information from a consumer reporting agency which bears on a consumer's "credit worthiness, . . . character, general reputation, personal characteristics or mode of living." 15 U.S.C. § 168la(c).

The second, "investigative consumer report," is simply a "consumer report" which includes information obtained by interviews with neighbors, friends, or associates of the current or potential employee. 15 U.S.C. § 1681a(e). Thus, if an employer uses an outside agency to conduct routine reference checks, the Act may apply. An employer's obligations under the Act vary depending on whether the employer is using a "consumer report" or an "investigative consumer report."

c. How Employers May Avoid Liability Under the Act.

Employers are subject to civil and criminal penalties for noncompliance with the provisions of the Act. However, the Act provides a defense to liability where an employer can show by a preponderance of the evidence that it has adopted certain "reasonable procedures" outlined in the Act and has implemented a mechanism to prevent failures by its agents to follow those procedures.

For "consumer reports," these procedures are generally as follows:

(1) The employer must provide the applicant or employee a clear and conspicuous written disclosure, in a document consisting solely of the disclosure, that the employer may procure a consumer report for employment purposes. This disclosure must be given before the consumer report is ordered.

(2) The employer must receive prior written authorization, on a separate form, from the applicant or employee to procure the report.

(3) The employer must certify to the consumer reporting agency that it has followed these steps, and that certain other measures will be followed.

(4) Before actually taking an adverse action which will be based in whole or in part on the consumer report, the employer must provide the applicant or employee a copy of the report and a description of the individual's rights under the Act.

(5) If the employer takes an adverse action based in whole or in part on the consumer report, it must provide certain disclosures to the individual, including the individual's rights under the Act and right to dispute the reporting agency's information.

The Act requires that employers using "investigative consumer reports" follow certain procedures, in addition to those above, to ensure that they have a defense to liability under the Act. These additional procedures generally entail informing individuals of their right to learn more about the nature and scope of the investigation.

An employer utilizing these procedures may not be protected from all instances of liability, for example, if credit reports are

not used for employment purposes. In Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990), an applicant was denied employment based on the results of a credit check. After litigation commenced, the employer requested a second report for its defense. The employer was held to have violated the Act by "knowingly and willfully obtain[ing] information on a consumer from a consumer reporting agency under false pretenses," because the second report was not for "employment purposes." Id. at 1267.

2. California law.

a. Credit standing may be used as a factor in hiring, but consumer credit reports furnished for employment purposes shall not include information on age, marital status, race, color or creed. Cal. Civ. Code § 1785.18(c).

b. Prior to requesting a consumer credit report for employment purposes, the user of the report must provide notice to the employee that a report will be used and the source of the report, and the notice also must contain a box the employee can check to obtain a free copy of the report. Cal. Civ. Code § 1785.20.5(a). Further, if an employer rejects an applicant because of information contained in a consumer credit report, the employer must notify the applicant of the reason and supply the name(s) and address(es) of the consumer credit reporting agency(ies) which made the report. Cal. Civ. Code § 1785.20.5(b).

c. The Investigative Consumer Reporting Agencies Act regulates an employer's use of an "investigative consumer report." It does not include a compilation of factual information relating to a consumer's credit record. Cal. Civ. Code § 1786 et seq. If an employer uses such a report for hiring, it must notify the applicant in writing within three days of the request. Cal. Civ. Code § 1786.16(a)(2).

d. The right to privacy protects individuals against the improper use of information rightfully acquired. Therefore, care should be taken that information obtained from a credit or consumer report be distributed on a "need to know" basis only.

DRUG & ALCOHOL POLICIES AND MEDICAL TESTING

A. Assess the Potential Legal Restrictions on Substance Testing and Discipline.

1. Testing Applicants.

Drug testing of applicants has been upheld almost uniformly throughout the country.

a. Loder v. City of Glendale, 846 Cal. 4th 846, 882 (1997), cert. denied, 118 S. Ct. 44 (1997). The California Supreme Court held that when a "drug screening program is administered in a reasonable fashion as part of a lawful preemployment medical examination that is required of each job applicant, drug testing of all job applicants is constitutionally permissible under the Fourth Amendment [and California Constitution privacy clause] even though drug testing of current employees seeking promotion is not."

Applying the analysis set forth in Hill, supra, the Court weighed the applicants' privacy interests against the legitimacy and strength of the employer's interest in conducting the tests. The Court concluded that job applicants have a diminished expectation of privacy, since the application process often requires an applicant to undergo a preemployment medical examination, and such examination might in any event require urinalysis. Id. at 884. The Court also concluded that an employer has a legitimate interest in screening job applicants, since drug use creates many workplace problems, and since the employer has no ongoing opportunity to observe the applicant for signs of drug use. Id. at 884-85. Finally, the Court noted that the intrusion into privacy was somewhat mitigated by the fact that the specific testing procedure did not involve visually observing urination, but aural monitoring whereby a medical employee stood in a cubicle next to the restroom wherein the applicant provided the urine sample. Id. at 854, 884.

b. Pilkington Barnes Hind v. Superior Court, 66 Cal. App. 4th 28, 77 Cal. Rptr. 2d 596 (1998), decided the issue of when an individual who has been hired may still be considered an applicant. The employer's pre-employment drug test was not actually administered until the new hire had been on payroll for four days. After failing the test, he was terminated and he sued for wrongful termination and violation of his right to privacy. The court ruled for the employer, in part because the testing delay was requested by the applicant.

c. Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989). California appellate court held that while urinalysis drug testing does implicate the California constitutional right to privacy, drug testing of applicants was reasonable because the employer had minimized the intrusiveness of the urinalysis test by (i)

advance notice, (ii) use of medical facility and personnel to administer the test, (iii) no direct observation of applicant giving sample, (iv) guarantee of confidentiality, and (v) follow-up report to applicant, with opportunity to question and challenge test results believed erroneous.

2. Testing Current Employees.

Current employees have a greater expectation of privacy than do applicants. Loder, 14 Cal. 41 at 885; Luck, 218 Cal. App. 3d at 1. There is a risk that drug testing of current employees will be deemed to violate an employee's right to privacy unless the employer has either (i) reason to believe that an employee has used illegal drugs at work or is drug impaired at work ("suspicion-based testing") or (ii) the necessity for periodic testing because of a safety risk overrides the employee's right of privacy (such as operators of dangerous equipment) ("suspicionless testing"), and the employer conducts such testing by the least intrusive method reasonably available.

a. Suspicionless Testing:

- Should be used only where safety is implicated.

- In Loder, 14 Cal. 41 at 881, the California Supreme Court held that the City of Glendale's drug-testing program was unconstitutional as applied to current employees. Under the program, employees applying for a promotion were required to take a drug test, regardless of the nature of their position. The Court held that an employer may implement such a suspicionless testing program only where the nature or duties of the positions at issue sufficiently implicate public safety or similar concerns to justify the intrusion. While the Court's ruling was premised solely on the Fourth Amendment -- which, unlike California's constitutional privacy clause, applies only to public employers -- the Court may well have arrived at the same conclusion under the California Constitution.

- In AFL-CIO v. California Unemployment Ins. Appeals Bd., 23 Cal. App. 4th 51, 28 Cal. Rptr. 2d 210 (1994), the appellate court upheld the discharge of a housekeeping employee on an offshore drilling platform who refused to take a drug test during an annual physical examination, concluding that the safety concerns on the platform were a compelling interest justifying drug tests.

- In Luck, 218 Cal. App. 3d 1, the appellate court held that a random urinalysis drug test of a computer operator violated her right to privacy because her job did not affect the safety of the railroad and there was no demonstrated reason to believe that she was taking or impaired by drugs.

- In Semore, 217 Cal. App. 3d 1087, an employee refused to take a pupillary-reaction test during a random test and was terminated. The court refused to dismiss the lawsuit on the basis of the pleadings alone and sent it back to the trial court for a full development of the record on such factors as nature of equipment used, manner of administration, reliability of test, procedures for handling test results, safety concerns of the employer, and type of job held by the employee in order to determine whether the test was too intrusive or whether it served the employer's needs.

b. Testing based on reasonable suspicion.

- Requires supervisory training and reliable testing methods.

Testing on reasonable suspicion has been upheld in virtually all jurisdictions which have considered the issue. Where testing purportedly on reasonable suspicion has led to employer liability, either the suspicion was not "reasonable" or the method of testing was unreliable. See, e. g., Kraslawsky v. Upper Deck Co., 12 IER Cases 1789, 1793 (Cal. Ct. App. 1997) (reversing summary judgment on secretary's constitutional privacy claim, which arose from her discharge following her refusal to undergo a drug test; fact that employer had an established suspicion-based testing policy did not warrant summary judgment in light of the fact that there remained a genuine issue as to whether employer's suspicions were reasonable, since secretary contended that the alleged conduct giving rise to the test did not actually occur and the supervisors had never received training on symptoms of substance abuse).

3. Federal Law.

a. Some employers are subject to federal drug testing regulations. E.g., Department of Transportation regulations (trucking, air carriers, pipeline), Department of Defense (defense contractors). In some instances these regulations expressly state that they do not preempt state law (e.g., Department of Defense Interim Regulations), while in other instances the regulations do preempt state law (e.g., Department of Transportation final rule).

b. The Supreme Court has held that a government-mandated drug test constitutes a "search" within the meaning of the Fourth Amendment to the U.S. Constitution, which generally bars government actors from undertaking a search or seizure absent individualized suspicion. Chandler v. Miller, 12 IER Cases 1233, 1235 (U.S. 1997). Where the mandatory drug test of a particular employee is premised on probable cause to believe that the employee is under the influence of drugs at the workplace, the test generally survives Fourth Amendment scrutiny. Pierce v. Smith, 13 IER Cases 8, 13 (5th Cir. 1997).

However, many federal regulations mandate random drug testing absent individualized suspicion of wrongdoing. Most of these regulations have been upheld on the basis of the extreme safety concerns involved. See, e. g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (mandatory urinalysis testing will survive constitutional scrutiny, in the absence of a warrant or individualized suspicion, if the "important governmental interest furthered by the intrusion outweighs the privacy interests implicated by the search. . . ."); Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990) (upholding FAA regulations for airline personnel, including repair station employees; safety concerns outweigh privacy interest), cert. denied, 498 U.S. 1083 (1991); Int'l Bhd. of Elec. Workers v. Skinner, 913 F.2d 1454 (9th Cir. 1990), (upholding DOT regulations for pipeline industry; possibility of catastrophic consequences justified random drug testing); Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989) (governmental interest in safety at chemical weapons plant outweighed employees' expectation of privacy, so that random drug test of employees did not violate the Fourth Amendment); Nat'l Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990) (government's interest in safety justified random urinalysis drug testing of motor vehicle operators employed by the Department of Agriculture); cf. Pierce v. Smith, 13 IER 8, 14 (5th Cir. 1997) (government hospital could require medical resident to undergo urinalysis test after she slapped a patient, despite no prior

policy of drug testing; special need to ensure safe medical care outweighed resident's diminished expectation of privacy as student and hospital worker).

Nevertheless, some federal provisions have been enjoined. See, e. g., Amalgamated Transit Union v. Skinner, 894 F. 2d 1362 (D.C. Cir. 1990) (Urban Mass Transit Transportation Administration did not have the authority to impose national drug testing requirements).

4. Confidentiality requirements.

a. An employer must be careful to treat any information obtained during the course of post-offer inquiries and medical examinations in accordance with the ADA's confidentiality requirements.

b. An employer may provide information obtained in the course of a post-offer medical examination to "appropriate decision-makers involved in the hiring process so they can make employment decisions consistent with the ADA." See, e. g., Twigg, 406 S.E.2d 52. For example, the employer may give the information to an occupational health professional in an attempt to work out a reasonable accommodation. This information may only be shared with individuals involved in the hiring process who need to know the information.

c. Once the selection is made, the ADA requires that the information be maintained in a separate, confidential medical file, not simply in the employee's personnel file.

d. The ADA allows subsequent disclosure in only the following situations:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(2) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;

(3) Government officials investigating compliance with the ADA must be provided with relevant information on request;

(4) Employers may submit information to state workers' compensation offices, state second injury funds or workers' compensation insurance carriers in accordance with state workers' compensation laws; and

(5) Employers may use the information for insurance purposes.

e. The fact that an applicant was not hired or that an employee no longer works for the employer does not terminate the employer's obligation to maintain the confidentiality of medical information regarding the individual.

f. Note that even if an individual reveals medical information in response to a non-medical inquiry, the information still must be kept confidential.

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

a. Employer drug and alcohol policies might have a disparate impact on a protected group. However, the business necessity defense is ordinarily applicable. See New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (plaintiffs alleged racially disparate impact of employment exclusion for methadone users; court, however, held that any adverse minority impact was assuredly rebutted by an employer's demonstration that a narcotics rule -- and the rule's application to methadone users -- is a business necessity).

b. A particular method of drug or alcohol testing might have a disparate impact on a protected group. See Chaney v. Southern Ry. Co., 847 F.2d 718 (11th Cir. 1988) (court orders reconsideration of plaintiff's claim that employer's reliance on seemingly unreliable EMIT drug test alone has a discriminatory impact on black employees; court stressed that if EMIT test does in fact have substantial adverse impact on protected group, employer must show that use of a particular drug test is business necessity). Thus, it is important to have an accurate procedure in place for confirming initial positive results to minimize the likelihood of false positives and substantiate the accuracy of the testing process.

6. United States Constitution – Fourth Amendment Concerns.

a. The Fourth Amendment protects public employees against unreasonable searches and seizures. It is unsettled whether public employee drug and alcohol testing and searches, absent an

individualized reasonable suspicion, violate the Fourth Amendment. Generally, the employer will be required to articulate a "special need" for conducting the drug test, absent reasonable suspicion, sufficient to outweigh the individual employee's privacy interests.

b. Courts generally uphold applicant drug testing because an applicant expectation of privacy is diminished when seeking employment. See, e.g., Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir.) (Department of Justice drug testing of applicants for anti-trust attorney positions upheld), cert. denied, 502 U.S. 1020 (1991); Loder v. City of Glendale, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 (1997) (city's suspicionless drug testing of all job applicants who were offered position was upheld).

c. Courts generally allow random drug testing only under limited circumstances where there is a compelling governmental interest.

(1) Most courts have struck down random testing of government employees. See, e.g., American Fed'n of Gov't Employees v. Thornburgh, 720 F. Supp. 154 (N.D. Cal. 1989) (even after Supreme Court's decisions in Skinner and Von Raab, Fourth Amendment prohibits random testing of Federal Bureau of Prisons employees); Amalgamated Transit Union v. Sunline Transit Agency, 663 F. Supp. 1560 (C.D. Cal. 1987) (preliminary injunction granted against random drug screening of bus drivers and maintenance workers).

(2) Random testing has been upheld where there is a high safety risk, where the employer is involved in a highly regulated industry or where there are compelling national security interests. See, e.g., AFL-CIO v. Unemployment Ins. Appeals Bd., 23 Cal. App. 4th 51, 28 Cal. Rptr. 2d 210 (1994) (upholding random testing during physical exam because safety concerns on offshore drilling platform were a compelling interest; Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 609 A.2d 11 (1992) (upholding random testing of oil refinery workers of oil refinery workers after company discovered evidence of on-site marijuana use); International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292 (9th Cir. 1991) (upholding drug testing of truck drivers because "a 26,000 pound truck" becomes a lethal weapon in the hands of the drug-impaired); Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990) (upholding testing of airline employees), cert. denied, 498 U.S. 1083 (1991);

Hartness v. Bush, 919 F.2d 170 (D.C. Cir. 1990) (upholding random drug testing of employees holding secret security clearances), cert. denied, 501 U.S. 1251 (1991); International Bhd. of Electrical Workers v. Skinner, 913 F.2d 1454 (9th Cir. 1990) (upholding testing of pipeline workers); Rushton v. Nebraska Public Power Dist., 844 F.2d 562 (8th Cir. 1988) (random testing of personnel in state-owned nuclear power plant is constitutional); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (urinalysis may be performed on systematic random selection of prison guards who have regular contact with prisoners).

d. Post-accident testing.

Courts have permitted such testing primarily in three situations:

(1) Where the employee's job classification involves high-risk duties. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (blood and urine testing of railroad employees for alcohol and drug use following certain train accidents and rule violations is permissible).

(2) Where the accident is serious. See, e.g., American Fed'n of Gov't Employees v. Wilson, 5 IER 1201 (E.D. Cal. 1990) (upholding post-accident drug tests of employees involved in a mishap involving a nuclear weapon or an accident resulting in substantial property damage or serious injury).

(3) Where safety or other compelling concerns outweigh employees' privacy interests. See, e.g., Tanks v. Greater Cleveland Reg'l Transit Auth., 930 F.2d 475 (6th Cir. 1991) (upholding testing of bus driver involved in minor accident because of nature of driver's duties); Teamsters, 932 F.2d at 1308 (upholding post-accident testing of truck drivers involved in "reportable accidents"); cf. Wilson, 5 IER at 1213 (mandatory testing of employees after a mishap involving only "minor physical injury and minimal property damage" is impermissible because the policy does not advance the governmental interest in deterring serious accidents).

e. Periodic or fitness-for-duty testing.

Courts have split on the legality of drug testing as part of a routine periodic physical, upon return from leave of absence or upon other job actions such as promotion.

(1) National Treasury Employees' Union v. Von Raab, 489 U.S. 656 (1989) (compulsory urine testing of job transfer applicants for Customs Service positions permissible in light of the strong governmental interest in employing individuals for specified key positions in drug enforcement).

(2) Wrightsell v. City of Chicago, 678 F. Supp. 727 (N.D. Ill. 1988) (testing as part of a physical after return from leave is reasonable).

(3) Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299 (1989) (Railroad's inclusion of drug testing in periodic and return-from leave physical examinations was arguably justified by implied terms of collective bargaining agreement).

f. Reasonable suspicion testing.

Employers may require drug tests where they have formed a reasonable suspicion that the employee is working while drug-impaired. Such programs will likely withstand constitutional scrutiny if the procedures for detecting impairment are reasonable and employees have been forewarned of the policy.

The critical issue in determining the constitutionality of a reasonable suspicion drug test is whether the criteria used by the employer to spot impairment is, in fact, reasonable.

(1) Balancing the employer's legitimate reason for requiring the drug test against the individual's privacy interest, many courts have held that employers may not test employees holding non safety-sensitive jobs where the employee presents indicia of off-duty drug use or impairment. See National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990) (the employer has no legitimate reason for detecting off-duty drug use); National Fed'n of Fed. Employees v. Cheney, 742 F. Supp. 4 (D.D.C. 1990) (employee may not be tested based on an arrest or conviction for a drug related offense); but see Von Raab, 489 U.S. at 674 ("the almost unique mission of the Service gives the Government a compelling interest in

insuring that many of these covered employees do not use drugs even off-duty, for such use creates risks of bribery and blackmail against which the government is entitled to guard").

(2) Similarly, courts have struck down tests utilizing amorphous indicators of on-the-job drug use. See Yeutter, 918 F.2d at 968 (the "reasonableness of a suspicion of drug use formed solely on basis of 'abnormal conduct' is not self-evident"); Burka v. New York City Transit Auth., 739 F. Supp. 814 (S.D.N.Y. 1990) (employee may not be tested on "reasonable suspicion" after returning to work from an extended absence or suspension); Cheney, 742 F. Supp. at 7-8 (absent careful observation by a supervisor trained in detection of drug-impairment, the employer may not rely on symptoms, such as an elevated heart rate and drowsiness, which could easily be attributed to non-drug-related causes).

(3) Although reasonable suspicion may be formed by reference to workplace rumors, the rumor must permit a reasonable inference that the employee used the drugs. Ford v. Dowd, 931 F.2d 1286 (8th Cir. 1991) (police officer could not be asked to submit to drug testing based solely on unsubstantiated rumor that he associated with drug dealers).

3. State unemployment benefits.

a. Unemployment benefits ordinarily may be provided when an employee is justifiably discharged, unless the employee is guilty of "willful misconduct."

b. A positive drug test may constitute misconduct and justify a denial of state unemployment benefits.

c. An employee who is discharged for violation of a company's substance abuse policy may receive unemployment benefits if it is determined that the employee's alcoholism or drug addiction caused a non-volitional breach of the policy. See, e.g., Jacobs v. California Unemployment Ins. Appeals Bd., 25 Cal. App. 3d 1035, 102 Cal. Rptr. 364 (1972) (employee discharged due to excessive absenteeism caused by his alcoholism was entitled to benefits because his alcoholism was a disease that incapacitated him from controlling his actions).

4. Common law claims.

Claims may be filed based on drug testing for wrongful discharge, breach of the claims brought against an employer are based not on the actual testing requirement, but rather on the process used by the employer or the actions taken once the test results are received. See Section VI- Miscellaneous Tort and Contract Claims.

5. Medical Information and Screening.

a. The Americans with Disabilities Act of 1990 ("ADA") prohibits businesses with at least 15 full-time employees from inquiring into the disability status of pre-offer applicants and, subject to several exceptions, employees. However, inquiries can be made regarding an applicant's or employee's ability to perform essential job functions.

(1) A "disability" means

(a) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(b) A record of such an impairment; or

(c) Being regarded as having such impairment. 42 U.S.C. 12102(2).

(2) Congress identified and excluded from protection of the ADA a few specific categories of persons that otherwise might have been thought to be covered.

Individuals who are "currently engaging in the illegal use of drugs" are not protected. 42 U. S.C. 12114(a). The "illegal" use of drugs refers both to the use of unlawful drugs, such as cocaine, and the unlawful use of prescription drugs, such as codeine or Valium. See 42 U.S.C. § 12111(6).

(3) The ADA does cover those who:

(a) Have successfully completed a supervised drug-rehabilitation program and are no longer engaging in the illegal use of drugs, or have otherwise been rehabilitated successfully and are no longer engaging in the illegal use of drugs; or

(b) Are participating in a supervised rehabilitation program and are no longer engaging in such use; or

(c) Are erroneously regarded as engaging in such use, but are not engaging in such use. 42 U.S.C. 12114(b).

(4) Alcohol Testing Under the ADA.

(a) Alcohol receives special treatment under the ADA. Unlike current illegal drug addiction, alcoholism is considered a disability. Guidance Manual at E-6. An employer may ask an applicant whether he or she drinks alcohol or whether he or she has been arrested for an alcohol-related offense. These questions are not considered likely to elicit information about whether an applicant is an alcoholic. However, questions about the quantity of alcohol the applicant consumes or whether the applicant has ever undergone treatment for alcohol addiction are improper, as are any pre-offer medical examinations designed to detect alcohol use.

(b) After an offer is made, tests can be administered, but only if all entering employees are subjected to the same test and the information is kept in proper confidence. The results cannot be used to deny an alcoholic candidate a job unless the employer can show that the exclusion of an alcoholic is job-related and consistent with a business necessity; the same showing that must be made for an exclusion based on any other disability. An employee may be discharged for misconduct or poor performance attributable to the adverse effects of alcohol. See Hogarth v. Thornburgh, 833 F. Supp. 1077, 1086-88 (S.D. N.Y. 1993) (termination proper where employee could not perform his job and behavior was caused by disability such as alcoholism and manic-depressive disorder); Harris v. Ohio Bureau of Employment Serv., 553 N.E.2d 1350 (Ohio 1990) (termination proper where alcoholism affected employee's job performance).

(c) However, the court in Judice v. Hospital Serv. Dist. No. 1, 919 F. Supp. 978, 984 (E.D. La. 1996) held that a public entity did not violate the ADA by requiring a

second specialized medical evaluation before reinstating a neurosurgeon following alcohol rehabilitation.

B. **Designing a Drug & Alcohol Policy and Program Which Fit the Company's Needs.**

1. Seek input from a variety of sources, including human resources staff, supervisors, company medical personnel and counsel.

2. Gather relevant data on known drug and alcohol incidents, absenteeism, tardiness, productivity, health care usage, accidents and workers' compensation claims within the company's workforce. Take necessary steps to cover data analyses by the attorney client privilege.

3. Evaluate the nature and extent of the perceived problem, the actual or potential impact on the company's business, and the cost of and legal risk associated with alternative policies and programs.

4. Decide whether to emphasize rehabilitation, discipline or both.

   a. A clear, written discipline policy is essential to place employees on notice of the consequences of use, possession or sale of alcohol, drugs or other controlled substances.

   b. Many employers offer one of the following basic types of Employee Assistance Programs ("EAPs").

      (1) In-house programs: counseling offered on company premises by the company's medical department.

      (2) Outside provider programs: outside agencies and firms establish and run EAPs, including psychological counseling and medical treatment.

      (3) Union programs: some large unions run EAPs for members and their families.

   c. Most employers will want to establish a program which combines the rehabilitation and discipline approaches.

      (1) One option is to offer rehabilitation in lieu of discipline only where the employee self-identifies the problem before the employer detects it.

(2) Another option is to offer rehabilitation for a first violation in lieu of discipline, but require the employee to execute a "last chance" agreement as a condition of returning to work.

(a) Employer agrees not to discharge based on the incident in return for employee's agreement to enter treatment and bring performance up to standard in all respects. Employee acknowledges that he/she will be subject to discharge if employee violates the terms of the agreement by renewed involvement with the substance, failure to remain in treatment, failure to fulfill the conditions of the treatment program, failure to pass a periodic unannounced drug/substance test or further substandard performance or conduct.

(b) Employee receives assurance that decision to seek treatment will not be grounds for adverse action against employee.

5. Confront potential dilemmas and decide in advance how to handle them.

a. Is the company going to assume the legal risks associated with pre-employment testing? If so, what substances should be included? Is the company willing to deny employment to the recreational drug user even though it may be offering jobs to some who drink excessively?

b. Is the company going to follow the more risky course of conducting tests or searches of current employees on a periodic basis? Or, is the company going to take the more prudent course of conducting employee tests or searches only where it has reason to believe that an employee is violating company policy?

c. Is the company willing to deny employment to or terminate all individuals when they first test positive for drugs, even when they are highly qualified or superior performers?

d. What constitutes "reason to believe" or "suspicion" that an employee is violating company policy? Is the company willing to assume the potential legal risks of giving a test to any employee injured in a work-related accident as part of the initial treatment of the injury, to employees who compile a record of excessive absenteeism, etc.?

e. Should employees who voluntarily tell their supervisors that they are drug or alcohol abusers be treated differently than employees who are discovered to be drug or alcohol abusers through other means?

6. Consider the practical problems an employer will face on cross- examination before a jury if it applies less stringent standards for managers than others.

a. Pre-employment screening, if conducted, should cover all jobs from president to janitor.

b. The same disciplinary policy should apply to all employees.

c. If consumption of alcohol during working hours is contrary to company policy, should the company prohibit alcoholic beverages on the premises during working hours, even for "special occasions," and not reimburse employees for alcoholic beverages consumed during working hours?

C. **Seek Expert Advice on Testing Methods and Reliability.**

1. Alcohol tests.

a. Alcohol intoxication most commonly is measured according to "Blood Alcohol Concentration" ("BAC") and is expressed as a percentage. For example, a .20 result means that alcohol constitutes two-tenths of a percent of the blood serum in the sample. Measurements may be taken from blood, urine and breath samples.

b. Blood analysis directly measures a subject's blood/alcohol level. Gas chromatography reportedly is the most reliable blood analysis method.

c. Breath analysis by infrared spectrometry measures the amount of alcohol in the breath, from which the breath/alcohol level is inferred. Although breath analysis provides only an indirect measure of BAC, it reportedly is reliable and widely accepted.

2. Drug tests.

a. No drug test can measure level of impairment.

Drug concentrations in urine do not correlate with degree of impairment. Moreover, no drug test can accurately measure recency of drug use. Many experts conclude that drug testing can yield

accurate evidence of prior exposure to drugs but cannot identify pattern of drug use, abuse of drugs, dependence on drugs or mental or behavioral impairments that may result from drug use. Thus, a confirmed positive drug test alone does not establish that an employee used drugs while on the job, was under the influence of drugs while on the job or was impaired by drugs while on the job. A confirmed positive drug test may mean only that the employee used drugs on his/her private time away from work and suffered no work impairment from such drug use.

b. Confirmation.

All test manufacturers emphatically recommend that positive test results on a screening test be confirmed with another, at least equally sensitive, test using a different chemical process.

c. Standard screening tests.

(1) Enzyme Multiplied Immunoassay Technique ("EMIT")

Since its development in 1980, EMIT has become the most widely used drug test outside the military. It is the easiest to administer and least expensive. The test can be programmed to detect marijuana, cocaine, PCP, heroin, barbiturates, amphetamines, methaqualone, phencyclidine and opiates. EMIT tests only for the presence of drug metabolites, not drug concentrations or recency of ingestion. It can identify the correct drug group but not necessarily the specific substance that was used, except for marijuana.

(2) Radio-immunoassay (RIA)

Has approximately the same specificity as EMIT.

(3) Fluorescent Polarization Immunoassay ("FPIA")

Currently available for ethanol, cocaine, phencyclidine, opiates, benzodiazepines and barbiturates. Rather than using a single yes/no cutoff, FPIA can be programmed flexibly to establish the positive results threshold at any point between established minimum and maximum concentrations.

(4) Thin-layer Chromatography ("TLC")

TLC is more specific than EMIT or RIA and can screen simultaneously for several drugs. However, the test places substantial reliance on the skill and judgment of the technician, and may have a higher rate of false positives than other methods.

(5) Hair Follicle Drug Testing

Considered highly accurate, testing hair follicles can detect drug use as far back as 3 months. However, this testing method is more expensive than urine testing and different ethnic groups may experience false-positives as a result of having different hair structure.

(6) Saliva Drug Testing

This is one of the best testing methods for determining current use and impairment from most commonly abused drugs, with the exception of marijuana. Because there is direct observation during the process of obtaining the test sample, there is a low risk of adulteration.

d. Standard confirmation test.

Gas Chromatography/Mass Spectrometry ("GC/MS") is a state-of-the-art analytic technique that can test for and specifically identify a wide spectrum of drugs, including amphetamines, heroin, barbiturates, methadone, tranquilizers, phencyclidine and marijuana. It is much more accurate than EMIT, but also much more expensive ($40-$100). GC/MS is the most widely used and universally accepted method for confirmation of positive test results determined initially by EMIT or RIA. It allows independent verification of results using the same sample and provides a printed record, which permits a determination that the test was performed correctly. GC/MS can be performed only by highly-trained technicians.

3. Accuracy.

a. The most commonly used substance tests are highly reliable if the laboratory maintains good quality control procedures, follows manufacturer's protocols, performs a confirmation assay on all positive results by a chemical method different from that used for the initial screening and uses well-trained, certified personnel who follow acceptable test procedures.

b. False Positives.

Because the standard screening tests, except those for marijuana, identify only the class of drug but not the specific substance, positive test results occasionally can be produced by standard prescription drugs. In addition, cross-reactivity of screening tests for certain drug classes can produce positive test results when the only drugs used were over-the-counter, non-prescription drugs.

This lack of specificity and the cross-reactivity of screening tests have three implications for employers. First, before administering any test, employers should ask persons taking the test if they have taken any prescription or nonprescription drugs in the past thirty days. Second, employers should confirm every initial positive test with a more sophisticated test which can differentiate among and positively identify each substance in a class. Third, employers should give employees and applicants the opportunity to explain or challenge positive test results, perhaps by arranging for a second laboratory to retest a portion of the sample.

A. **Make Thorough Inquiries of Prospective Laboratories.**

1. Is the facility licensed by the Centers for Disease Control?

2. Is the facility licensed to perform toxicology testing by the state and federal governments? Forensic testing? Industrial testing? Other licenses?.

3. What experience does the facility have in testing contraband substances and in testing for the presence of alcohol, drugs or other controlled substances in the system? What is the current volume of such tests conducted? For how many years has the facility conducted these tests? What method(s) of testing are used? What are the credentials and training of those who run the tests? Are the tests run by licensed technologists? Does a licensed toxicologist supervise?

4. For which other employers does the laboratory perform such testing? Check these references. Select only a reputable laboratory which specializes in these tests.

5. What applicable qualitative and quantitative tests does the lab run?

6. What is the error rate on each test: (1) false positive results? (2) false negative results? Has the laboratory established a threshold level for positive

readings that is sufficiently high to eliminate questionable test results based on trace amounts of drugs which might result from indirect exposure (e.g., employee's presence in a smoke-filled room)?

7. What procedures are used to double check results? Are all positive results confirmed by an alternative procedure and a different technician before the results are released? What other steps can be taken to reduce the error rate?

8. What alternative tests are available and what are their error rates?

9. What steps does the laboratory take to coordinate with the employer?

10. Does the laboratory draw its own samples? If so, if the company brings an employee in for testing, what is the longest period of time which could elapse before the test sample is taken from the employee?

11. If the laboratory does not draw its own samples, where should the samples be drawn? What procedure does it use to pick up samples and ensure the chain of custody?

12. How soon are the results available?

13. Does the laboratory have toxicologists who could be good witnesses in court regarding matters such as the type of test used, its accuracy, the testing process followed and the interpretation of the test results? What are the credentials of these individuals?

14. Will the laboratory indemnify the employer if the employer is sued as a result of action it takes on false positive results?

15. What safeguards does the laboratory employ to ensure that test results remain confidential?

16. What system does the laboratory use to ensure that samples are retained and preserved for possible future checking by the employee or his/her representative? How long are samples retained? How are they stored? What labeling process is used?

17. In which periodic testing verification programs does the laboratory participate? Does the laboratory participate in the Interlaboratory Comparison Program sponsored by the College of American Pathologists? What internal quality control protocol does the laboratory follow?

B. **Draft a Comprehensive Company Policy Concerning Drugs, Alcohol, Controlled Substances, Searches and Testing.**

1. State in writing what conduct is prohibited on company property or during working hours.

   a. Trafficking.

   b. Possession.

   c. Use.

   d. Being impaired or under the influence.

   e. Presence in one's system of a detectable amount of any illegal drug or any of its metabolites.

2. Indicate what disciplinary action will be taken against employees who violate the policy.

3. Cover situations in which an employee is taking over-the-counter or prescribed medication. An employee who is under the influence of a medication may present the same production and safety problems as one using illegal drugs.

4. Identify the circumstances under which testing or searches may be conducted (e.g., random, upon reasonable suspicion). Provide in the policy that employee refusal to submit to a test or search may result in termination for violation of the policy and insubordination. State the possible consequences of failing a test, including termination.

5. Make a policy decision on police involvement.

   a. Should the company act on its own in relatively minor cases of illegal substance possession or contact law enforcement officials in all cases?

   b. If the company brings a law enforcement agency into the matter, and criminal charges are filed but then dropped, consider the possibility of a suit against the company for malicious prosecution of a criminal action and other claims. Also remember the claims which may arise if the employee's constitutional or other rights are violated by a law enforcement agency which the company has called into the matter.

6. Satisfy collective bargaining obligations with the union before implementing a program. Unless the union has clearly and unmistakably waived its right to bargain over the matter, the employer has an obligation under the National Labor Relations Act ("NLRA") to bargain over drug testing of current employees.

C. **Clearly Articulate Company Policy To Employees.**

1. Communicate the new policy and program well in advance of their institution.

2. State the company's anti-drug/alcohol/controlled substance philosophy in as many written forms as possible: employment application, employee handbook, employee rules, memorandum on new policy, bulletin board notices and signs in employment office and locker rooms. Consider requiring each employee to sign an acknowledgment of the testing requirement on the employment application or other pre-hire form.

3. If feasible, organize a meeting of current employees before instituting the policy. At the meeting, explain the company policy and have all employees sign a statement indicating that they are aware of and have received a copy of the policy. If an employee refuses to sign, a supervisor should write on the statement: "I witnessed [name of supervisor] give [name of employee] a copy of the policy dated [date] on [date given to employee]."

   Note: If you ask employees to sign a statement indicating that they agree to abide by the policy, consider what action the company will take when an employee refuses to sign.

4. Explain the policy to new employees at orientation programs and have them sign a statement indicating that they are aware of and have received a copy of the policy.

5. Consider making the policy a part of all contracts negotiated with outside contractors who would enter company premises to perform work.

6. Decide whether the company should post warning signs about its search policy at all entrances to company premises. For example:

   > Entry upon this property is deemed consent to an inspection of your person, vehicle and personal effects at any time while entering, while upon, or while leaving the property. Inspections will be conducted at the discretion of the company. If you do not consent to such conditions, please do not enter this property.

D. Establish and Follow Proper Guidelines for Conducting Substance Tests.

1. Check state and local laws and regulations for any restrictions.

2. Before an applicant or employee is tested, have the individual sign a new consent form authorizing the test and communication of the test results to the company. Do not make promises or use coercion or force to obtain consent.

3. Pre-employment testing.

   a. If pre-employment tests for the presence of alcohol, drugs or controlled substances are given, administer them to all applicants who reach a given stage of the selection process for the classification(s) covered by the policy.

   b. Analyze testing results for disparate impact on protected groups.

   c. If the company is a federal government contractor or covered subcontractor, it must weigh the potential risk of a handicap discrimination charge and lawsuit under the Rehabilitation Act.

   d. Give notice to job applicants on the job application form or other pre-employment form, indicating that testing will be conducted as a part of the employment process.

4. Testing of current employees.

   a. The most prudent course is to limit testing of current employees to those cases where the company believes that the employee is "under the influence" of alcohol, drugs or controlled substances. Do not purport to apply a "reasonable cause" standard.

   b. Any company which requires all employees to submit to a test whenever they compile a record of excessive absences or when they contribute to an on-the-job injury or accident, etc., should document the factual, statistical and other information which the company believes justifies such testing and establishes a reason to believe such an employee may be under the influence.

   c. Random or periodic testing of employees can be risky because of the possibility of an invasion of privacy claim. However, periodic testing of employees in "safety-sensitive" or "hazardous" jobs will generally be defensible if conducted pursuant to an established written policy.

d. Many employers require employees who return to work following enrollment in a rehabilitation program to be tested periodically pursuant to the terms of a written "last chance agreement" between the employee and the company to ensure that substance abuse has not recurred. Discuss the legality of such testing with your legal counsel before requiring it.

5. General testing safeguards for supervisors to follow.

a. Where possible, at least two supervisors should observe and concur that the employee's observed behavior raises a reason to believe that the employee is "under the influence."

b. Obtain approval of the personnel department or a designated management official before testing. Articulate to the personnel department or other official the basis for the belief that testing is appropriate (e.g., the facts which lead the supervisor to believe that the employee is under the influence).

c. Tell the employee why the company is requesting the employee to take a substance test. Treat the employee with courtesy throughout the investigatory and testing process. Hold conversations in private, away from the presence of other employees who do not have a "need to know" about the matter.

d. Permit a bargaining unit employee to have a union representative present during the investigation and testing of the employee if he/she requests one.

e. Inform any employee who refuses to give written consent to the test that refusal will require immediate suspension of the employee pending further investigation. The company will make determinations concerning discipline of that employee, up to and including discharge, on the basis of evidence then available to the company and any reasonable inferences which the company draws from that evidence and the refusal to consent to the test.

f. Promptly take the employee to the company's medical department, or local hospital, laboratory or clinic, to obtain blood and/or urine specimens.

g. After the specimens are obtained, suspend the employee with pay pending further investigation and receipt of the test results.

h. If the employee is suspected of being under the influence of alcohol, drugs or a controlled substance, provide the employee with safe transportation home.

i. Have a qualified laboratory do qualitative testing on the blood and urine specimens to determine if alcohol, drugs or controlled substances are present.

j. When test results are received, treat them as strictly confidential. Keep test results and any other related records or information in a locked medical file; do not intermingle them with other personnel records. Do not discuss the matter with family members, friends, or anyone else who is not directly involved in the investigation. Information about the results should not be released, without the employee's written consent, to anyone aside from the person tested and those who have a "need to know" within the company.

k. If quantitative tests are made on the amount of the substance in the employee's system, contact a qualified medical expert to ascertain if the test results are significant and indicate a likelihood that the employee was under the influence of alcohol, drugs or controlled substances.

l. After the test results are received, two representatives of management should meet with the employee. Once again, allow a bargaining unit employee to have a union representative present at his/her request. If the test results were negative, put the employee back to work and assure the employee that the investigation is over and that no report alleging the employee was under the influence will be placed in his/her personnel file. If the test results were positive, explain the results to the employee, ask the employee for any explanation or information that management should consider before finalizing its decision and take appropriate disciplinary action which may be discharge.

m. If any employee is disciplined or discharged for refusal to submit to a search or testing, provide additional reasons for the discharge or discipline (e.g., "a reasonable, good faith belief that the employee violated the company rule against possession, use, sale or transfer of drugs and/or alcohol on company premises").

n. With advice of counsel or other designated expert, prepare a detailed written report about the incident, including all facts which indicated a reason to believe the employee had violated company policy and steps taken to comply with procedural safeguards. Obtain written statements from witnesses.

(1) Cover preliminary drafts by the attorney-client privilege.

(2) Avoid defamatory conclusions and remarks.

E. <u>Train Supervisors to Deal Effectively and Appropriately With Employees Who Appear to be Under the Influence of or Abusing Drugs Alcohol or Other Controlled Substances</u>.

1. <u>Supervisors should receive training on the following topics</u>:

a. The provisions of the company's policy, including applicable search and test procedures;

b. The physical appearance of various illegal substances;

c. The physical and psychological symptoms of someone who is under the influence of alcohol, drugs or other controlled substances. Physical symptoms may include red or blurry eyes, odor of alcohol, dilated pupils, unsteady or erratic movements and/or slurred speech;

d. The subtle changes in personality and actions which are characteristic of an abuser, as well as the following potential performance indicators: procrastination, poor judgment, performance variability between a.m. and p.m., tardiness and absenteeism, irritability and long breaks;

e. The importance of developing and articulating performance standards; assessing performance against those standards; and identifying, documenting, and counseling or disciplining employees for specific problems with work performance;

(1) Documentation should include date, time, place, the specific misconduct or performance problem, the rule or policy violated, any prior notice or counseling given, the adverse consequences to the company (e.g., safety of other employees or customers jeopardized, or productivity adversely affected) and the consequences of future misconduct or poor performance.

F. Keep Information Confidential.

1. Communicate information relative to investigations, possible employee rule violations, medical tests and discipline only to those few individuals who "need to know" the information in order to perform their job function.

    a. Be sure that any information distributed internally is accurate and complete.

    b. Take precautions to ensure that confidential information is not given to persons not authorized to receive it, including the employee's family members and friends.

2. Place information about suspected substance abuse and testing results in locked medical files separate from the routine personnel file of the person involved.

3. Avoid stigmatizing employees who seek professional help for rehabilitation.

MISCELLANEOUS TORT AND CONTRACT CLAIMS

A. Express contracts. An express contract of employment is formed when the employer and employee declare (in writing or orally) their agreement to enter into the employment relationship. When there is an alleged express contract of employment, a plaintiff must prove the following elements: (1) the existence of a contract, (2) performance by the employee or some justification for nonperformance, (3) failure to perform the contract by the employer, and (4) resulting damages to the employee.

B. Implied contracts. Absent an express agreement, employees often claim that the employer's representations in policies or handbooks constituted an "offer" of employment that was impliedly "accepted" by the employee's continued service. Depending on the circumstances, courts in nearly all states have recognized that employee handbooks and other writings distributed to workers may be legally binding under this theory, and that an employer's failure to follow through on a handbook promise may trigger legal liability. Such cases have involved handbook provisions such as discipline and discharge procedures, provisions requiring "just cause" for discipline or discharge, equal employment opportunity commitments, and provisions regarding compensation and benefit programs.

C. Promissory estoppel. If the employee is unable to meet the technical requirements of proof for either an express or implied contract of employment, he or she may be able to recover damages from an employer on the theory of promissory estoppel. Although promissory estoppel is, technically, not a contract claim, its elements are similar to those of an implied contract claim.

Under the promissory estoppel theory, the employee will claim that the employer made a promise concerning employment upon which the employee relied to his or her detriment. Although the employee cannot prove the existence of a contract, the court will, in order to avoid "injustice," enforce the employer's "promise."

D. Breach of the covenant of good faith and fair dealing. Employees are increasingly asserting claims that their employer violated a covenant of good faith and fair dealing. Such claims may be based on the employer's general promise or commitment to employees that it will treat all employees "fairly" or in "good faith." The claim can be based on either an express covenant or an implied covenant. States vary considerably in the extent to which they recognize these claims.

E. Defamation (Libel and Slander). These torts relate to the publication (if the publication is oral, the tort is slander; if it is in writing, the tort is libel) of statements of fact that disparage the reputation of a plaintiff, by the defendant, to another person. Publication to a single person is sufficient for defamation liability. Statements that are derogatory of an employee's ability to do his or her job, and statements that impugn an employee's honesty, are per se defamatory, meaning that the employee's injuries are presumed and need not be proven by the employee.

F. Outrageous Conduct (Intentional Infliction of Emotional Distress). The basic elements of this claim are (a) the defendant engaged in extreme and outrageous conduct; (b) the defendant engaged in conduct recklessly or with the intent of causing the plaintiff severe emotional distress; and (c) the plaintiff suffered severe emotional distress as a result of the defendant's conduct. Proof of accompanying physical injury is not required. The tort focuses on the defendant's conduct and liability attaches if the conduct is determined to be "extreme and outrageous."

G. Tortious Interference with Contract. Traditionally, this tort applied when a commercial relationship existed between two parties and an unrelated actor (a third party) wrongfully induced a breach of contract to gain an unfair competitive advantage. The basic elements of the claim are (a) the existence of a valid contract between the plaintiff and another; (b) knowledge by the defendant of this contract or of facts which should lead him to inquire as to the existence of the contract; (c) intent by the

defendant to induce a breach of contract by the other party; (d) actions by the defendant which induce a breach of contract by the other party; and (e) damage to the plaintiff. This claim has now been broadened to include improper interference with terminable-at-will contracts, including employment contracts. Therefore, when a third party tortiously induces an employer to fire a worker (or not to hire a worker), the third party can be held liable for intentional interference with contract.

H. Negligent Hiring/Negligent Supervision/Negligent Retention. If an employer knows or reasonably should know that an employee is incapable of performing his job assignments and hires or retains the employee despite this knowledge, or fails to adequately supervise the employee, the employer must pay damages to anyone injured as a result of the employee's inability. The issue is whether the employer could have foreseen the employee's wrongdoing.

I. Intentional Misrepresentation/Fraud. The elements of a claim for intentional misrepresentation/fraud are (a) the employer made a false representation of a material past or present fact to an employee or prospective employee; (b) the employer made the false representation of a material past or present fact with knowledge of its falsity or with an utter indifference as to its truth or falsity; (c) the employee or prospective employee receiving the false representation was unaware of its falsity; (d) the employer made the representation with the intent that the person receiving it would act in reliance on the representation; (e) the person receiving the representation reasonably relied on it; and (f) the reliance on the false representation caused damage and injury to the employee or prospective employee.

J. Invasion of Privacy (Intrusion Upon Seclusion & Disclosure of Private Facts). The claim for "intrusion upon seclusion" focuses on the manner in which information that a person has tried to keep private has been obtained by a third-party. The reasonable expectations of privacy held by the employee are relevant. The elements of this claim are (a) the employer intentionally intruded, physically or otherwise, upon the employee's seclusion or solitude; and (b) the intrusion in question would be considered to be offensive by a reasonable person. The tort of invasion of privacy by disclosure of private facts does not focus on the manner in which the privacy is invaded; rather, it focuses on whether a "disclosure" of private facts was reasonable. The elements of the claim for "disclosure of private facts" are (a) the employer disclosed a fact concerning an employee that was private in nature; (b) the disclosure was made to the public; (c) the disclosure was one which would be highly offensive to a reasonable person; (d) the disclosed fact was not of legitimate concern to the public; and (e) the one who disclosed the fact did so with reckless disregard of the private nature of the

fact disclosed.

EMPLOYEE DISCHARGE, DISCIPLINE AND APPRAISAL

EMPLOYEE DISCHARGE, DISCIPLINE AND APPRAISAL

ESTABLISH AND ARTICULATE A STANDARD FOR DISCIPLINE AND DISCHARGE.

A. Define The Employer's Discipline, Discharge And Layoff Standard.

1. Several benefits:

   a. Provides guidance for employees -- therefore fair notice.

   b. Provides guidance for managers/decision-makers -- therefore fair and more consistent decisions.

   c. May permit the employer to impose its written standard on the judge/jury.

2. Courts probably will permit employers to set and enforce their own termination standards so long as they:

   a. Have a reasonable standard which does not itself violate any statute.

   b. Give advance notice of the standard to employees.

   c. Comply with the published standard.

3. If the employer defines its own termination standard, it must not terminate an employee unless it satisfies that standard. However, if the employer does satisfy its own standard, it will have the strongest possible case, and also have fewer claims brought against it.

4. What should the standard be? There are many possibilities:

   a. "Just cause"? -- No. This brings the employer back to letting a jury decide, five years later, whether what it did was "fair" or not. This is the typical standard in union settings.

   b. Have a single list of offenses "with discipline up to and including discharge"? -- No. This provides no real guidance to anyone. The employer constantly will have to explain/defend why it chose discharge, the harshest penalty.

   c. "Employment at will"?

(1) Legal? Yes. E.g., Shapiro v. Wells Fargo, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984). (Note, however, that written agreements will not bar Tameny-type public policy or discrimination claims.).

5. Recommended standard: Combine "at will" clause with "termination guidelines."

a. Incorporate "at will" clause in the policy: expressly articulate the right to terminate employment, or any of the terms or conditions of employment, at any time with or without cause. It is vital to provide that the written at will agreement cannot be modified except by another writing signed by a high level company official. See sample clause attached as Exhibit "A."

b. Indicate that, although the employer and employee reserve the right to terminate employment without cause, the employer has adopted termination guidelines.

c. Separately outline in one section those actions that normally result in discharge on the first occurrence. Then, in a second section, list the infractions that normally result in discharge after the employee has received a prior warning for the same or other offense. See Exhibit "B."

d. Adopt separate policies for exempt and nonunion non-exempt employees. In the policy for exempt employees, articulate employer's policy that exempt jobs require consistent high-level performance and that employees will be terminated if in management's opinion they fail to satisfy the company's high expectations. See Exhibit "B-3."

e. Advantages:

(1) The California Supreme Court in Foley v. Interactive Data Corp. confirmed that "employer and employee are free to agree to a contract terminable at will or subject to limitations. Their agreement will be enforced so long as it does not violate legal strictures external to the contract . . . ." 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211 (1988). Thus, an employer may be able to secure dismissal of breach of contract and covenant claims before a lawsuit reaches the jury if the plaintiff signed a properly worded at will agreement.

(2) Gives employees notice of expectations.

(3) Provides guidance for decision-makers; fosters consistency and thus minimizes potential EEO liability which arises when protected group members are adversely affected.

(4) Preserves fall-back argument that employer's standard must be imposed on the trier of fact, and because employer complied with discipline/termination policy, it has not breached any contract.

f. Disadvantages:

(1) At will clause is unattractive to potential employees; absence of job security may impede recruitment in certain industries and of candidates who have "secure" jobs.

(2) May encourage current employees to seek protection against arbitrary discharge by organizing through a union.

(3) May be difficult to convince current employees to sign a written, integrated contract for at will employment.

g. Implement an enforceable at will standard by including the clause in key personnel documents and obtain a signature in consideration for the granting of employment or some employment benefit. Place the clause directly above the employee's signature line of:

(1) Employment application [see Exhibit "A"].

(2) Integrated offer letter which each successful applicant is required to sign and return. Establish system to ensure that all new employees have signed an at will clause prior to or at the time they accept employment.

(3) Employee handbook. Employees should sign an acknowledgment of receipt which repeats the at will language.

(4) Employee benefits plans, particularly stock option, bonus and incentive plans.

(5) Promotion or pay increase agreements.

h. Do not contradict the at will policy in other documents.

6. The "discipline, up to and including discharge" standard.

a. Advantages:

(1) Provides notice and guidance to employees on what conduct is not acceptable.

(2) In the absence of past practice, allows the employer flexibility in terminating or imposing other discipline for violations.

b. Disadvantages:

(1) Fails to provide detailed guidance to decision-makers on the appropriate type of discipline (e.g., warning or termination); thus increases likelihood of inconsistent treatment of similar misconduct.

(2) Makes it more difficult to get a lawsuit dismissed early in a wrongful discharge case; an employee who is "guilty" can still argue that there is a disputed issue which allows the jury to decide whether discharge was too harsh of a penalty and therefore the employer breached the implied contract and covenant.

7. Reserve the right to lay off employees when, in management's judgment, business conditions make a cutback or reorganization appropriate.

a. Reserve the right to choose which employees will be laid off and retained based on the company's judgment of such factors as skills, abilities, experience, flexibility, versatility and other qualifications. Do not provide that layoffs will be seniority based.

b. Avoid guaranteeing laid-off employees the right to placement in other positions.

B. Implement the Termination and Layoff Standard.

1. Distribute the termination policy to current as well as new employees.

a. Require both new and existing employees to sign an acknowledgment of receipt.

b. Include in employee handbook.

c. Post in the workplace along with other documents like EEOC posters.

2. Delete from recruitment literature and other personnel documents any terms or representations which state or imply that the employee will be terminated only for cause: e.g., retained permanently, so long as performance is satisfactory or until retirement; treated fairly; or have job security. Read documents from the perspective of the plaintiff's attorney.

   a. Eliminate every word or phrase which could be used against the employer, such as "long-term employment," "permanent employee," "just or good cause," "long career with us," "fair and equitable treatment," "due process," and "give three warnings before termination."

3. Train interviewers on what they can and cannot say.

4. Do not issue documents which contradict the termination standard or create implied contracts to terminate only for cause or only after certain procedures are followed.

5. Consider a mandatory, signed arbitration agreement with new employees or with current employees in consideration for the granting of some employment benefit.

6. Carefully draft by-laws and/or board of directors' resolutions to effectively delegate board's right to terminate officers at will to decision-makers.

DELIVER MORE THAN YOU PROMISE

A. Make Effective Use Of Performance Evaluations.

1. Require candid evaluations which accurately compare the employee's performance to the employer's expectations. Performance evaluations which do not candidly advise employees of deficiencies fail to achieve their purpose of strengthening performance. Further, they undermine an employer's ability to win a discharge case as plaintiffs display good performance evaluations in court, and juries are inclined to bind an employer to the conclusions contained in them.

2. Use an evaluation form which is properly designed. Do not give an "overall" rating. The form should encourage hard choices and require clearly stated explanations for the evaluation. For example:

   Above Expectations
   Meets Expectations

Needs Improvement
Unsatisfactory

Do not give a "satisfactory" rating to a below-average employee.

3. Pre-evaluation Employee Input.

Because lack of communication is one of the most common charges made against appraisals, it is wise to involve an employee in the early stages of the appraisal process. This may mean interviewing or sending a form to the employee to self-evaluate prior year performance, identify the job's key elements or goals, and solicit concerns and reactions to the work performed over the past year. Such a preliminary interview or survey is time-consuming, but it provides the employee with an occasion to communicate with the supervisor before the appraisal is completed. This communication can have a very beneficial effect on employee morale and acceptance of the appraisal. It may also prove useful during a lawsuit, especially where an employer's justification for terminating an employee was the employee's failure to meet a goal or perform a key duty identified by the employee herself.

4. Train supervisors on how to establish performance standards, communicate these standards and assess performance against these standards.

5. If termination is a likely possibility, say so. An employee whose performance is so poor that he/she is in danger of being discharged should be advised of, as specifically as possible, what areas need improvement, what he/she must do to correct performance problems and what will happen if the necessary corrections do not occur.

6. After the performance evaluation has been prepared, present it to, and discuss it with, the employee. Maintain evidence that this has occurred, preferably in the form of the employee's signature on the evaluation form.

B. <u>Give Appropriate Counseling</u>.

1. <u>Poor performance situations</u>.

a. <u>Give the employee a chance to improve</u>.

b. <u>Give the employee thorough written notice of deficiencies. Consider addressing the following issues</u>:

(1) The major responsibilities/duties which the employee is not performing adequately and the skills, knowledge or abilities which do not meet standards.

(2) Specific illustrations of the deficiencies, including facts and dates. Provide written examples, if possible. The greater the detail, the more valuable the warning.

(3) The date and substance of prior training, instruction or counseling given to the employee.

(4) The measurable or definable standard(s) the employee must meet.

(5) Steps the employee should take to meet the standard(s).

(6) The time frame in which the employee is expected to meet the standard(s); do not, however, state or imply that the employee will be retained for a specific period of time. The notice should indicate that if performance does not show immediate and continuous improvement or does not meet the standard within a specified period, further disciplinary action (or discharge) will result.

(7) The consequences of failing to meet the standard(s) within the specified period.

(8) A reference to the meeting at which the employee received the warning, including the employee's admissions and commitments.

(9) The employee's signed acknowledgment that he/she has carefully read and received a copy of the notice (or, if the employee refuses to sign, a witness' notation that the employee read and received a copy)-

"I have carefully read and have been given a copy of this memorandum."

[Name of Employee]

[Date]

The employee cannot be forced to sign the memorandum. If the employee refuses to sign, the supervisor should write on the form, "Employee refused to sign." If another supervisor is present, have that supervisor sign and date the form also: "I, [supervisor], gave a copy of this document to [employee] on [date] and asked [employee] to read it carefully."

[Name of Witness]

[Date]

c. Give a "last and final" warning where possible -- same component parts except explicit statement that next time equals termination.

d. After giving the warning, keep the employee informed of his/her progress in correcting the problem(s). If termination later is necessary, it should not come as a surprise to the employee.

2. Misconduct situations.

a. List in the written discharge policy what types of misconduct usually will lead to immediate discharge.

b. Impose discipline short of termination for less serious types of misconduct and in close cases.

c. Ensure that the employee understands why he/she is being disciplined and what conduct the employee must avoid in the future by giving thorough written notice of the type suggested above.

d. Give a "last and final" warning as the last stage of progressive discipline. Explicitly state that the next incident will result in immediate discharge.

e. Consider a "last chance" agreement in which the employee acknowledges the seriousness of the situation and that any further problems (of any kind) will lead to immediate discharge.

f. In particularly serious situations, an employee may be immediately suspended (with or without pay) until an investigation can be done. Do not let the suspension drag on indefinitely, however.

3. Maintain detailed documentation of counseling.

a. Prepare specific written warnings or counseling memoranda addressed to the employee.

b. As noted above, require the employee to sign the original to indicate that the employee has read and received a copy. (If the employee will not sign, have a witness sign.)

c. File the signed original in the employee's personnel file. Preserve anything which would be useful in court, including examples of the employee's poor work, records establishing the employee's misconduct, and any documentary evidence of the fact that the employee was given prior warnings or notice of the problems.

d. Even in cases of verbal counseling, some written record should be kept. Train supervisors to at least make handwritten notes of such counseling (which they should sign and date) to create a contemporaneous record. Such notes immediately should be sent to human resources for safekeeping.

e. Investigative notes and statements should be kept confidential.

(1) Facts, not conclusions, should be the focus of these documents.

(2) These documents should contain as much detail as possible.

(3) In many instances, these notes will be prepared in anticipation of litigation and should be directed to counsel. If handled properly, they will be shielded from disclosure in subsequent litigation by the attorney-client privilege and/or attorney work product doctrine.

HANDLE TERMINATIONS FAIRLY AND CONSISTENTLY

A. Require A Thorough Interview With A Prospective Dischargee By Two Management Representatives.

1. This is not an "exit interview" after the termination decision is made; it must occur before any decision is reached.

2. Use an outline designed to tie down all relevant facts before the employee hires a lawyer who will try to recharacterize them.

3. Consider including some of the following questions:

   a. Does the employee agree that the employer's version of the facts is accurate? If not, what facts are in dispute and what evidence supports the employee's position? What other individuals have knowledge of the facts?

   b. Does the employee have any mitigating circumstances the employer should consider?

   c. Does the employee agree that termination is an appropriate decision? If not, what employer action is appropriate?

4. Take and retain detailed notes.

5. Benefits:

   a. Management may learn new facts that warrant further investigation or exonerate the employee.

   b. Mitigating circumstances may surface that should be weighed.

   c. The employee may admit wrongdoing, get caught in a lie, refuse to talk, become belligerent or quit -- all of which strengthen the employer's case.

   d. In any event, the pre-discharge interview gives the appearance of fairness.

B. Before Finalizing A Termination Decision, Require Review And Approval By An Individual Who Is Knowledgeable About Legal Requirements And Company Policies/Practices.

1. Reasons for having a "Czar of Discharge":

   a. Avoids precipitous actions.

   b. Two decision-makers are more likely to make a defensible decision than one.

   c. Allows the employer to pre-select a credible, articulate individual who will be its principal witness in any post-termination litigation.

   d. Helps defeat a plaintiffs potential argument that the decision-maker was "biased" or had a grudge against the plaintiff.

   e. Assures that compliance with relevant company policies and procedures, and legal requirements has been confirmed by a trained reviewer.

   f. Allows the reviewer to testify that the process is credible and that proposed terminations have been disapproved when they do not meet standards.

   g. Looks fair.

2. If it is imperative that management relieve the employee of his/her duties immediately, suspend the employee pending completion of investigation.

C. Require The "Czar Of Discharge" To Answer "Yes" To Most -- In The Typical Case, All -- Of The Following Questions As A Condition Of Approving The Termination.

1. Has the employer gathered all of the facts? In particular, has management asked the employee for an explanation of the incident(s) that precipitated the desire to discharge? If so, has management kept detailed notes of the employee's explanations, admissions, alibis and/or outbursts?

2. Is the recommendation to discharge based on provable facts, rather than suspicions or feelings? Has the company obtained the documentary evidence which will establish the facts, and considered obtaining signed witness statements? Has management reviewed all appropriate documents such as supervisors' records? If the discharge is for substandard performance, do the

employee's and co-workers' work product, error rates and/or production rates show that the employees retained were better performers?

3. Is the situation covered by any employer policy, procedure or rule? If so, is discharge consistent with the policy, procedure or rule?

4. Has the employee been informed of and did he/she understand the standard expected or rule violated?

5. Except in the case of serious misconduct, has the employee been disciplined formally in the recent past for a similar performance problem or violation?

6. If the employee has been disciplined in the recent past, was the employee told that further problems would result in discharge?

7. Has the employee been given a sufficient opportunity to correct the performance or other problem that led to the earlier discipline?

8. Is there proper written documentation of all important details on past discipline and counseling, as well as on the final incident if any, to confirm that termination is justified? Has management examined the employee's entire personnel record, including recent performance evaluations?

9. Are any mitigating factors (e.g., illness, death in the family, long service) outweighed by the seriousness of the misconduct or deficiencies in the job performance?

10. Is it inappropriate to demote or transfer the employee as an alternative to discharge?[11] Would a medical or personal leave of absence not be appropriate to address the problem?

11. Is discharge a reasonable penalty in this case?

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[11] Employers should be prepared for likely jury questions such as: How could the employer fire this employee for poor performance without providing a chance to return to the job the employee formerly performed so well? Why did the employer not give the employee a final warning and a chance to succeed with a different, unbiased supervisor before discharge?

12. Is discharge consistent with the company's past practice? In other words, have similar previous cases resulted in discharge?

13. Has management considered whether it would be better to issue a "last and final warning" or "last chance" agreement?

14. Have the supervisor and the personnel department (or other appropriate impartial reviewer) approved the recommendation to discharge?

15. Does the discharge notice include all of the justifiable bases for discharge? Have the least defamatory words been used that are consistent with the offense/reason and the employer's policy?

16. If the employee is an officer, has the decision-maker been authorized by the board of directors or the by-laws to make the decision?

D. <u>In Layoff Cases, There Are Three Additional Questions To Ask</u>:

1. Can the employer demonstrate an economic need to lay off <u>some</u> employee(s) in the working group in question for lack of work or other compelling financial reasons?

2. Can the employer prove a legitimate business reason (consistent with any applicable company policy and prior performance evaluations) for selecting the particular employee in question to be laid off instead of other employees in the same working group (i.e., department/job classification/labor grade/facility)?

3. Has management considered the employee in question for other positions both within and outside his/her normal working group prior to layoff?

E. <u>In Conducting The Actual Termination, Protect The Employee's Privacy And Dignity</u>.

1. Inform the employee in private of the employer's decision. (Two management representatives should be present, and the decision should be communicated in a calm, respectful, pleasant manner.)

2. Give the real reason(s) for the termination. Be thorough. Use the least inflammatory choice of words. Explain why the employee's continued employment is not in the employer's best interests. The speaker should present the decision as "the company's decision," and should avoid the temptation to curry favor with the employee by suggesting that he/she or others disagreed with the decision.

3. Remind the employee that the employer has listened to his/her side of the story and that the situation has been reviewed by an impartial person after a thorough investigation.

4. After the termination meeting, create a written record of what transpired.

5. Arrange for the employee to gather personal belongings when co-workers are not in the area. Do not parade the terminated employee out of the building with a security guard if there are other unobtrusive means of safeguarding company security.

6. Limit the disclosure of information regarding the fact of and reason for the discharge to those who have a need to know.

F. <u>Consider Negotiating An Amicable End To The Employment Relationship By Providing Separation Benefits And/Or Outplacement In Exchange For The Employee's Voluntary Release Of All Claims</u>.

1. An employer may not require an employee to sign a release as a condition of receiving wages or benefits otherwise due.

2. Remember that a general release does not waive workers' compensation or unemployment benefits.

3. Use a thorough release form.

   a. Explicitly list contract, tort, statutory and discrimination claims waived.

   b. Indicate that the employee has carefully read, understands and has voluntarily entered into the agreement.

   c. State the employee's right to review the release with private counsel.

   d. Include an explicit release of all known and unknown claims against both the employer and its employees.

   e. Include a clause stating that the employee represents that he or she has not filed any claims against the employer, but if the employee has, the employee will dismiss those claims with prejudice.

f. Provide for binding arbitration of any disputes between the parties, including but not limited to alleged breaches of the agreement.

g. Include an indemnity provision which holds the employee liable for damages, including attorneys' fees and costs, which the employer incurs because of the employee's breach of the agreement.

h. Require the employee to keep the terms, amount and fact of the settlement confidential.

i. Include a proprietary information/trade secrets clause where appropriate.

j. Include a "sole and entire agreement" clause. This is a clause that states that the written settlement agreement is the only agreement between the parties. This helps to ward off any subsequent claim by the employee that a separate oral or written agreement existed which might contradict the terms of the written settlement agreement.

4. Give the employee time, preferably at least one week, to review the agreement with counsel if interested.

5. Where the employee is age 40 or older, you must comply with the federal Older Workers Benefit Protection Act, an amendment to the Age Discrimination in Employment Act ("ADEA"), in order for the release to be effective as to federal age discrimination claims.

a. The waiver must be in writing, and it must be written in such a way that it is calculated to be understood by the individual to whom it applies. Where the waiver is part of a benefit package or program applicable to more than one employee, it must be in writing and calculated to be understood by the average individual eligible to participate.

b. The waiver must specifically state that it releases all claims arising under the ADEA.

c. The waiver may not require employees to waive rights or claims under the ADEA that may arise after the date the waiver is signed by the employee.

d. The waiver must be contractually valid; that is, the employee must receive valuable consideration for the waiver in addition to any

benefits or amounts which the employee already was entitled to receive.

e. The employee must be advised in writing to consult with an attorney prior to signing the agreement containing the waiver.

f. If the employee has not asserted an age discrimination claim, the employee must be given a period of at least 21 days within which to consider whether to sign the waiver. If an age claim has been asserted, the employee must be given a "reasonable" time within which to consider the waiver. Alternatively, if the waiver is requested in connection with a termination or severance program offered to a group or class of employees, each employee must be given at least 45 days within which to consider the waiver.

g. If an age claim has not been asserted, the waiver must be part of an agreement that is revocable for at least 7 days following the employee's signing of the agreement, and the waiver will not become effective or enforceable until the 7-day period has expired.

h. Where the waiver is requested in connection with a termination or severance program offered to a group or class of employees, the employer at the outset of the 45-day waiting period must inform each eligible employee in writing of (1) the class of employees who are eligible, the specific eligibility requirements for the participation in the program, and any applicable time limits for participation and (ii) the job titles and ages of all the employees eligible or selected for the program, and the ages of all employees in the same job classification or organizational unit who are not eligible or selected.

6. Benefits of outplacement assistance.

a. Consider offering outplacement services to terminated employees as part of any severance package.

b. The majority of wrongful termination suits are brought by terminated employees who have not found another job.

c. A comparable new job cuts off liability for back pay, plus there will be less jury sympathy.

POST-DISCHARGE EVENTS

A. Employment References.

While employment references may be helpful in showing good faith, on balance, they are dangerous. An employee unable to find work may sue the former employer for defamation. Moreover, a recipient of the reference may sue if the employee does not work out.

1. Be aware that claims may be based on both negative and positive job references.

   a. Negative references which are in any way false may give rise to a defamation claim.

   b. A positive reference which omits key facts also may give rise to liability. Randi W. v. Muroc Joint Unified School Dist., 14 Cal. 4th 1066, 60 Cal. Rptr. 2d 263 (1997) (the California Supreme Court held that the defendant school districts could be held liable for failing to disclose to another school district a former employee's alleged past record of sexual misbehavior; the school districts had written glowing letters of recommendation on behalf of the former employee, who subsequently obtained the position he sought and thereafter was charged with unlawfully touching a minor).

   c. Providing inaccurate information in a job reference or other report also may give rise to liability. E.g., Bulkin v. Western Kraft E., Inc., 422 F. Supp. 43 7, 442-45 (E.D. Pa. 1976) (employee alleged that he had suffered embarrassment and an adverse credit rating because the employer had disclosed inaccurate personnel file information; court held that an employee could state a cause of action for negligence under both Pennsylvania and New Jersey law).

   d. Defamation suits may arise in the absence of a job reference: Some courts have recognized defamation claims unrelated to employment references. See, for example, the case of McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 795-98, 168 Cal. Rptr. 89 (1980), where the plaintiff alleged that his employer had made false and defamatory statements to him in reviewing his performance, that these statements formed the basis for dismissal and that he had been compelled to repeat these defamatory statements when he applied for further employment. The court held that the employee stated a cognizable claim for defamation because it was foreseeable that the

employee would be under a strong compulsion to republish the defamatory statements to others in order to obtain another job.

2. The best policy is not to provide more than name, dates of employment, and last position held. An employer may wish to provide more information if it receives a written authorization from an employee authorizing the release of such information.

B. Unemployment Claims.

1. Overview.

The unemployment insurance concept began as a creature of federal law with the enactment of the Social Security Act of 1935. The current version of program is the Federal Unemployment Tax Act (the "Act"). 26 U.S.C. § 3301 et seq. Under the Act, states are free to establish their own unemployment insurance programs so long as they meet federal guidelines.

2. Purpose of the Law.

Unemployment programs were enacted to provide for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through "no fault of their own," and to reduce involuntary unemployment and the suffering caused thereby to a minimum.

3. Nature And Source Of Unemployment Compensation Benefits.

Unemployment programs provide for payment of insurance benefits over an extended period of time. The amount of the benefits usually depends on the worker's earnings during the calendar quarter in which the worker's wages were highest, which amount must be within a predetermined minimum and maximum. Benefits are paid from state unemployment funds, which usually are special funds, separate from all public money or general funds of the state.

a. Length of benefits.

In California, for example, benefits are payable for up to 26 weeks and may be extended for an additional 13 weeks during certain periods of high unemployment. Payment of federal-state extended compensation thereafter may be available. Under certain circumstances, additional benefits may be available during a period of training or retraining.

4. Eligibility for benefits in the discharge arena.

Under California's unemployment program, an individual who is discharged for misconduct is not eligible for unemployment benefits.

a. What constitutes misconduct?

"Misconduct" is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior that the employer has the right to expect of an employee, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. California regulations provide that misconduct exists if all of the following elements are present:

(1) The claimant owes a material duty to the employer under the contract of employment;

(2) There is substantial breach of that duty;

(3) The breach is a willful or wanton disregard of that duty; and

(4) The breach disregards the employer's interests and injures or tends to injure the employer's interests.

b. Discharge for lesser reasons will not disqualify employees.

Generally, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not misconduct.

Because the policy underlying benefits is to provide benefits to persons unemployed through no fault of their own, "fault" is the basic element to be considered in interpreting and applying unemployment insurance law. The determination of fault is not concluded by a finding that the discharge was justified or that the employer had a "right" to discharge the employee. The employee's conduct must evince culpability or bad faith.

A claimant may not be denied benefits solely on the basis of a good faith error in judgment.

CERTIFICATION TO BE PLACED ON THE EMPLOYMENT APPLICATION

"EMPLOYMENT CERTIFICATION AND AT WILL AGREEMENT"

Please read carefully and sign below:

I certify that the information contained in this application is correct to the best of my knowledge. I understand that should I be hired, falsification of this information or material omission is grounds for termination of my employment at any time.

I understand and agree to the following:

1. My prior employers, educational institutions and other references listed on this application are authorized to give the Company any and all information concerning my previous employment and any pertinent information they may have, personal or otherwise. I release all persons or entities from all liability for any damage that may result from furnishing information to the Company. I also release the Company and all of its employees from all liability for any damage that may result from the Company's reliance on the information furnished.

2. My employment with the Company is contingent upon my successful completion of a physical examination which includes a blood, urine and/or other medical test for alcohol, drugs and controlled substances. Prior to testing, I agree to sign the Company's authorization forms wherein I will agree to submit to such testing and to authorize the release of the results to the Company. The physical examination and substance test will be conducted at the Company's expense by a health care provider selected by the Company.

3. I must produce applicable documents showing that I am a United States citizen or alien lawfully authorized to work in the United States, within the time frame specified by the Company, to meet the Immigration Reform and Control Act of 1986 requirements.

If I fail to comply with any of the requirements set forth above, I understand that any offer of employment will be rescinded or my employment will be terminated.

In consideration of my employment, I agree to conform to the Company's policies, rules and regulations. I further understand and agree that my employment is at will, and therefore, can terminate, with or without cause, and with or without notice, at any time, at my option or the Company's option and that the Company can terminate or change all other terms and conditions of my employment, with or without cause, and with or without notice, at any time. I further understand and agree that this at will employment relationship will remain in effect throughout my employment with the Company, or any of its parent or affiliated companies, unless it is modified by a specific, express written employment contract which is signed by the President of the Company and me. This at will employment relationship may not be modified by any oral or implied agreement.

Date Signature

(NON-EXEMPT EMPLOYEES]

DISCIPLINE AND DISCHARGE

I. General Rules of Conduct

A. Actions Which Result In Immediate Discharge.

There are certain kinds of actions which cannot be permitted to occur because of their unfair impact on other employees and/or the firm. Such offenses warrant discharge on the first occurrence. Some examples of such offenses are:

1. Insubordination.

2. Breach of Confidence.

3. Falsification of any work, personnel or reimbursement records.

4. Unauthorized taking of firm property, or unauthorized charges against the firm's account.

5. Two consecutive absences without prior approval or calling in.

6. Possession, use, or being under the influence of alcohol or drugs while at work or on firm business.

7. Gross misconduct of any kind.

B. Actions Which Normally Result In Warning Prior To Discharge.

There are certain other actions which should not occur, but normally it is the repeated occurrence of the action rather than the first occurrence of the action which results in discharge. For such actions, an employee will receive some warning prior to discharge. Examples of such offenses include:

1. Inefficient performance of assigned duties and/or responsibilities.

2. Poor performance of assigned duties and/or responsibilities.

3. Excessive absenteeism and/or tardiness.

4. Failure to comply with safety rules and procedures.

5. Carelessness or negligence in the performance of assigned duties or in the care and use of firm property.

6. Poor working relationships with co-workers or customers.

The foregoing are simply examples of unacceptable conduct. Obviously, our Company is involved in a highly competitive business, where many other individuals and companies rely on the quality and reliability of our work product and service. Thus, all employees are expected to provide excellent and reliable services to the company, its clients, and its other employees. Any failure to meet this high standard is a ground for concern, discipline and, in the kind of instances illustrated above, discharge.

_____

[Employee Signature]

[EXEMPT EMPLOYEES]

OUR COMPANY'S HIGH STANDARDS

Our Company's success depends on excellent working relationships and high quality performance from all members of the management team, from first-line supervisors to the President. When we fail to meet these high standards, all of our employees suffer. For these reasons, exempt employees accept and continue employment on the basis that they may be terminated whenever they fail to satisfy the Company's high standards, when a management change is deemed necessary, or for any other reason which is not prohibited by statute.

[OPTIONAL: Exempt employees who are terminated for these kinds or reasons will receive [one] week's severance pay for each year of Company service or major part thereof. Exempt employees who are terminated for misconduct will receive no severance pay.]

[Employee Signature]