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ATTORNEYS AT LAW

EMPLOYMENT LAW

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Fair Labor Standards Act – "Salesman" Exemption

Encino Motorcars, LLC v. Navarro, et al, 136 S. Ct. 2117 (2016). Decided June 20, 2016

What was this case about? This case was decided primarily to determine whether service advisors at an auto dealership were eligible for overtime, and whether the Department of Labor's ("DOL") interpretation of who fell under the "salesman" exemption should be given deferential treatment by courts. The company argued that service advisors were exempted under the "salesman" exemption based on the DOL's interpretation. The Supreme Court decided that the agency's interpretative guidelines that were set out in 2011 guidelines, should not get deferential treatment by the courts, because there was no indication of why they made the policy change.

Why is it important? This case is important because had the court decided in favor of the company, that ruling could have greatly expanded the number and types of employees that can be excluded from overtime based on the "salesman" exemption.

How might it apply to my business/organization? If any part of your organization is involved in selling or has a sales component, you may want to pay close attention to how you classify your employees. Just because someone has a selling aspect of their job, it does not mean that they can be deemed nonexempt for the purposes of the payment of overtime.

Fair Labor Standards Act - Class Actions

Tyson Foods, Inc. v. Bouaphakeo, et al, 136 S. Ct. 1036 (2016). Decided March 22, 2016

What was this case about? This case was decided to determine whether expert sample data can be used to validate claims of a class of employees. A class of employees of an Iowa meat processing facility sued employer for not paying overtime wages relating to time spent donning and doffing protective gear. The Supreme Court held that a representative proof from a sample, based on an expert witness's estimation of average time that employees spent donning and doffing protective gear, could be used to show predominance of common questions of law or fact.

Why is it important? This case is important because it strengthens plaintiffs' ability to bring class action wage and hour lawsuits using sample data.

How might it apply to my business/organization? If your organization faces a class action wage and hour lawsuit, especially related to donning and doffing, a class of plaintiffs can potentially use sample data created by an expert to validate their claims.

Timeframe for Filing Constructive Discharge Claims

Green v. Brennan, 136 S. Ct. 1769 (2016). Decided May 23, 2016

What was this case about? This case was decided to determine when the clock starts for a constructive discharge claim. A postal employee was passed over for a promotion and alleged that he was denied the promotion because of his race. Shortly thereafter, two of his supervisors accused him of intentionally delaying the mail, which is a criminal offense. He and the Postal Service signed an agreement precluding criminal charges in exchange for his promise to either retire or start working at a different office at a lower salary. He chose to retire, and submitted resignation paperwork a little over a month before the effective date. 96 days after signing the settlement agreement and 41 days after submitting his resignation paperwork, he contacted an Equal Employment Opportunity (EEO) counselor to report an unlawful constructive discharge. He then sued in federal district court alleging a constructive discharge that violated Title VII.

Why is it important? This case is important because it clarifies the rule on when a constructive discharge case filing timeline begins. The court clarified that the forty-five-day limitations period for contacting an Equal Employment Opportunity counselor for such action (a prerequisite to filing a lawsuit alleging discrimination) begins running only after an employee resigns, and the limitations period begins to run when the employee gives notice of his resignation, not on the effective date of the resignation.

How might it apply to my business/organization? If an employee resigns who you think may file a constructive discharge claim, it will be important to keep accurate records of not only when that employee actually resigned, but when the employee actually gave notice of their resignation.

Fee-Shifting in Title VII Cases

CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (2016). Decided May 19, 2016

What was this case about? The EEOC sued a large interstate trucking firm for hostile work environment sexual harassment against a female long-haul driver and class of similarly situated female employees in violation of Title VII. The employer won on a summary judgment motion, and was awarded attorney's fees under Title VII's fee shifting provisions. The case was appealed up to the Supreme Court, where the court held that a favorable ruling on the merits is not necessary to find that a defendant has prevailed under Title VII's fee provision.

Why is it important? This case is important because it clarifies the rule on when defendants of a Title VII lawsuit can recover fees. A defendant can recover fees whenever the claim is frivolous, unreasonable, or groundless.

How might it apply to my business/organization? If your organization successfully defends a Title VII claim, this case makes it easier to recover the expenses of fighting the lawsuit

First Amendment Rights for Public Employees

Heffernan v. City of Paterson, New Jersey, et al, 136 S.Ct. 1412 (2016). Decided April 26, 2016

What was this case about? A police officer sued the city, alleging that he was demoted in retaliation for exercising his First Amendment rights, regarding his suspected involvement in a mayoral campaign. The Supreme Court held that the fact that officer's supervisors were mistaken about officer's involvement in mayoral campaign did not bar his lawsuit, and he could still challenge the unlawful action.

Why is it important? This case is important because it clarifies the ability for a public employee to bring a lawsuit on First Amendment and other statutory grounds.

How might it apply to my business/organization? If your organization is considered a public entity or employs public employees, this case fuels protections for First Amendment rights for public employees. If you have concerns and are considering any adverse action based on a public employee's engagement in protected political activities, you may want to consult counsel before proceeding.

ERISA

Gobeille v. Liberty Mutual Insurance Co., 136 S. Ct. 936 (2016). Decided March 1, 2016

What was this case about? This case was decided to determine whether a federal statute regarding employee benefits preempts state law. An employer that operated a self-insured employee health plan sued to obtain a declaratory judgment that ERISA preempted a state statute and regulation requiring that all health insurers file reports with the state containing claims data and other health care information in an all-inclusive healthcare database. The Supreme Court held that ERISA pre-empted the state's statute.

Why is it important? This case is important because it clarifies that in some cases, a state law may have a conflicting requirement with ERISA provisions.

How might it apply to my business/organization? If your organization has self-insured healthcare plans that fall under ERISA, you may want to ensure that any state law reporting requirements are in alignment with ERISA provisions.

On the Horizon for 2017

Finally, more than three dozen petitions are pending that seek review of appeals court rulings that interpret the Fair Labor Standards Act, the Employee Retirement Income Security Act, Title VII of the 1964 Civil Rights Act, the National Labor Relations Act, the Americans with Disabilities Act and other labor and employment laws. However, here is a list and brief description of relevant employment law cases granted that are pending before the court:

Advocate Health Care Network v. Stapleton (consolidated with ***Saint Peter's Healthcare System v. Kaplan*** and ***Dignity Health v. Rollins***) - Whether an ERISA church plan exemption applies so long as a pension plan is maintained by an otherwise qualifying church-affiliated organization, or whether the exemption applies only if, in addition, a church initially established the plan.

Lewis v. Clarke - Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

Kindred Nursing Centers Limited Partnership v. Clark - Whether the Federal Arbitration Act pre-empts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement. Oral argument to be scheduled for 2017.

Gloucester County School Board v. G.G. - Whether the federal government can require a local school district to allow a transgender teenager to use restrooms corresponding to the teenager's gender identity. Oral argument to be scheduled for 2017.

McLane Co. v. EEOC - Whether a district court's decision to quash or enforce an EEOC subpoena should be reviewed de novo, which only the Ninth Circuit does, or should be reviewed deferentially, which eight other circuits do, consistent with this Court's precedents concerning the choice of standards of review. Oral argument to be scheduled for 2017.

NLRB v. SW General Inc - Whether the President's appointment of an NLRB Acting General Counsel violated the Federal Vacancies Reform Act. Oral argument on November 7, 2016.

Czyzewski v. Jevic Holding Corporation - Whether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme (which would have preferred wage claims). Oral argument on November 28, 2016.

PENDING U.S. SUPREME COURT DECISIONS

On January 13, 2017, the Supreme Court agreed to hear cases on this issue from the Fifth (***National Labor Relations Board v. Murphy Oil USA***), Seventh (***Epic Systems Corp. v. Lewis***) and Ninth (***Ernst & Young LLP v. Morris***) Circuits. The Supreme Court's decision will have a profound impact on employment cases, particularly those alleging wage and hour violations under the Fair Labor Standards Act (FLSA). If the Court upholds the Seventh and Ninth Circuits' approach, then employers will have to agree to allow class and collective actions to either proceed in arbitration or court. It is more likely that in such a scenario, employers would exclude class and collective actions from arbitration and simply permit employees to file them in court. The next Justice appointment may make a significant impact on the direction the Court will go, because currently there are only 8 Supreme Court Justices, which raises the possibility of a 4-4 decision that would simply preserve the split.

MAJOR SEVENTH CIRCUIT COURT OF APPEALS EMPLOYMENT LAW DECISIONS DURING 2016

Sexual Orientation Discrimination under Title VII

Hively v. Ivy Tech Community College. July 28, 2016. The plaintiff alleged she was denied full-time employment at Ivy Tech Community College in South Bend, Indiana, six different times and was eventually terminated because she is a lesbian. The issue here was whether she is protected under Title VII of the Civil Rights Act meaning of "sex" in the context of discrimination based on sexual orientation. The initial 7th Circuit panel ruled that the meaning of "sex" in the statute does not include sexual orientation. However, the case was reviewed again by the entire 7th Circuit panel of judges on November 30, 2016, and the decision is pending.

Fair Labor Standards Act—Are College Athletes Employees?

Berger v. NCAA. December 8, 2016. This case involved two former university track team members' claim for wages under the FLSA. The federal district court dismissed the case at an early stage, based on the pleadings, and the 7th Circuit sustained that dismissal after the former students appealed. The court concluded that as a matter of law, college athletes are not employees and are not entitled to a minimum wage under the Fair Labor Standards Act.

Punitive Damages

Gracia v. Sigmatron International, Inc. On November 29, 2016, the 7th Circuit affirmed a jury verdict in a retaliatory discharge and sexual harassment case in which the jury awarded a terminated employee $250,000 in punitive damages and $57,000 in compensatory damages. The plaintiff sued her former employer for sexual harassment and for terminating her in retaliation for reporting sexual harassment. The jury found in favor of the employer on the sexual harassment claim, but returned a verdict for the employee on the retaliation claim. The employee was an assembly line worker who was promoted several times and achieved the position of an assembly supervisor. She reported to Human Resources that her supervisor was sexually harassing her and filed a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission alleging sex and national origin discrimination. Six weeks after her first complaint to HR about her supervisor's sexual harassment and two weeks after the company received her EEOC Charge, the company terminated her employment.

Americans with Disabilities Act

Brown v. Smith. June 28, 2016. This case involved an employee who was fired for not being able to obtain a commercial driver's license ("CDL"). He could not obtain a CDL because of a diabetes disorder. He claimed he was fired in violation of the ADA. The employer said having the CDL was an essential function of the job. The court ruled that having a CDL was not an essential function of the job.

Carlson v. Christian Brothers Services. October 27, 2016. The 7th Circuit affirmed an order of summary judgment in a lawsuit under the Americans with Disabilities Act ("ADA") on the ground that the plaintiff's charge of disability discrimination was untimely. The plaintiff, a customer service representative, filed this lawsuit against her former employer alleging disability discrimination. The courts did not reach the merits of this case because it was thrown out of court based on the untimeliness of the underlying charge of discrimination.

New Legal Test for Proving Discrimination

Ortiz v. Werner Enterprises. August 19, 2016. In *Ortiz*, the 7th Circuit did away once and for all with the direct and indirect methods of proof dichotomy as well as the 'convincing mosaic' standard of proof: "the 'rat's nest' of surplus 'tests' removed from the law of this circuit..." all evidence "belongs in a single 'pile' and must be evaluated as a whole...." Moreover, "from now on, any decision of a district court that treats this phrase [convincing mosaic] as a legal requirement in an employment discrimination case is subject to summary reversal...." No more separate direct and indirect methodology and analysis. Instead, the test on summary judgment is whether a reasonable jury could find, based on all of the evidence in its totality, that the employment action in question resulted from an unlawful motivation.

Workplace Harassment

Cole v. Board of Trustees of Northern Illinois University. On September 27, 2016, the 7th Circuit affirmed an order of summary judgment in a lawsuit in which an African-American employee alleged that he experienced a hostile work environment, including a hangman's noose in his workspace, as well as race discrimination and retaliation. The plaintiff's hostile work environment claim failed because he did not establish a basis for employer liability for the alleged harassment. Workplace harassment that is sufficiently severe or pervasive to alter the terms and conditions of employment is actionable under Title VII as a claim of hostile work environment. To prove a claim for hostile work environment based on race, an employee must establish that: (1) he or she was subjected to unwelcome harassment; (2) the harassment was based on his or her race; (3) the harassment was severe or pervasive enough to alter the conditions of the employee's work environment by creating a hostile or abusive situation; and (4) there is a basis for employer liability. In determining whether a work environment is sufficiently abusive to be actionable, courts consider whether the conduct is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.

Retaliation

Volling, et al. v. Kurtz Paramedic Services, Inc. On October 19, 2016, the 7th Circuit reversed an order of summary judgment on Title VII and Illinois Human Rights Act ("IHRA") retaliation claims in which the plaintiffs alleged that the defendant refused to hire them as emergency medical technicians because of their prior sexual harassment complaints against interrelated business entities. Under federal and Illinois law, it is unlawful for an employer to retaliate against an employee or job applicant because he or she engaged in protected activity such as opposing sexual harassment or any other unlawful employment practice of any employer.

Williams v. Office of the Chief Judge of Cook County, Illinois, et al. On October 11, 2016, the 7th Circuit affirmed summary judgment on claims for race discrimination and retaliation. The plaintiff, a probation officer who was told that she was fired for job abandonment, filed a lawsuit in which she alleged that she fired because of her race, in retaliation for complaining about racial harassment, and in retaliation for filing a workers' compensation claim. The plaintiff claimed that the decision-maker fired her in connection with a dispute about her return-to-work date from her injury-related leave of absence. However, she failed to offer any evidence that the decision-maker knew of the dispute and, therefore, she could not establish the causal connection necessary to sustain her retaliation claim.

MAJOR ILLINOIS STATE EMPLOYMENT LAW DECISIONS DURING 2016

Retaliation

Seeman v. Wes Kochel, Inc. On September 19, 2016, the Illinois Appellate Court, Third District, affirmed the trial court's order granting summary judgment in a retaliatory discharge case. The plaintiff alleged that he was fired because of his protected activity of service to a volunteer fire department because he was fired for tardiness due to responding to a fire call. Under Illinois law there is a common-law tort claim for retaliatory discharge, which is an exception to the doctrine of employment "at will." A plaintiff must allege that he or she was discharged in retaliation for his or her protected activities and that the discharge violates public policy. Retaliatory discharge claims have not been successful when only private interests are at stake.

STATUS OF TRANSGENDER LEGAL ISSUES

Legal issues specific to transgender individuals are currently drawing great attention across the United States. Current litigation stemming from Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972 includes both workplace discrimination and discrimination in education. This is a concern for businesses as well as other organizations, which need to ensure that their policies are compliant with the law.

In March 2016, the State of North Carolina made national headlines when it passed a law called the Public Facilities Privacy & Security Act. Commonly referred to as a "bathroom law" the law regulates access to public facilities and requires that individuals use the facilities that correspond to the sex identified on their birth certificates. While this law has been temporarily halted by the courts, situations like this leave businesses and organizations with the difficult task of trying to determine how to craft compliant practices.

It is unclear at this point how the law in this area will develop. However, there is some indication of how courts are interpreting issues related to sex discrimination and public accommodation for transgender individuals. Most recently, courts seem to be closer to recognizing gender identity as a protected status under both Title VII and Title IX. Below is the citation and brief description of significant recent litigation in this area:

Title VII Cases

Fabian v. Hospital of Central Connecticut, 172 F. Supp. 3d 509 (D. Conn. March 18, 2016). The court held that discrimination on the basis of transgender identity is a valid claim under Title VII as discrimination because of sex. This case was in the context of employment discrimination.

Roberts v. Clark County School District, 312 F.R.D. 594 (D. Nev. January 11, 2016). The court ruled in favor of a transgender school police officer, holding that a transgender person does not have to provide medical records of a transgender transition, in response to Title VII and state gender discrimination claims and an emotional distress claim.

Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). The court upheld a favorable ruling in a sex discrimination claim by a transgender employee who had been discharged. The employee was born biologically male and subsequently diagnosed with gender identity disorder (GID). She alleged that she was discriminated against on basis of sex and her medical condition. The District Court granted summary judgment in favor of the employee on the sex-discrimination claim, and granted summary judgment in favor of supervisor on medical condition claim, and the court of appeals affirmed.

Etsitty v. Utah Transit Authority, 502 F. 3d 1215 (10th Cir. 2007). The court held that discrimination based on an individual's status as a transsexual is not discrimination "because of sex" under Title VII.

Title IX Cases

Board of Education of the Highland Local School District v. United States Dept. of Education, 2016 WL 5372349 (S.D. Ohio September 16, 2016), Case No. 2:16-cv-524. The school district's policy restricted transgender girl from using the girls' restroom. The student sued under Title IX. The court held that the student would likely succeed on the merits of Title IX and Equal Protection Clause claims and preliminarily enjoined the school district's policy. The case is pending in the 6th Circuit Court of Appeals.

Carcano v. McCrory Berger, 2016 WL 4508192 (N.D. N.C. August 26, 2016), Case No. 1:16-cv-236. This is the case discussed above. This case challenged North Carolina law requiring that multiple occupancy bathrooms and changing facilities be designated for and only used by persons based on their biological sex. The court ruled that Title IX claims could proceed, that individual plaintiffs were likely to succeed on the merits of a Title IX claim, but not an equal protection claim and the court granted a preliminary injunction of the state law.

Texas v. United States, 2016 WL 4426495 (N.D. Texas August 21, 2016), Case No. 7:16-cv-00054. The court upheld the state's request not to implement Federal agency policy requiring that facilities be offered to individuals based on gender identity. The court declined to agree that Title VII & Title IX require facilities that correspond to gender identity versus biological sex.

Johnston v. University of Pittsburgh of Com. System of Higher Education, 97 F. Supp. 3d 657 (W.D. Pa. March 31, 2015). In this case the Plaintiff refused to stop using male-designated locker rooms and bathroom facilities. The court found that transgender status was not protected. The court reasoned that Title IX's prohibition applies only to a binary conception of sex consistent with biological sex.

As these cases indicate, the issue of whether employers or organizations can single out transgender individuals or place restrictions or limitations on individuals based on their biological gender remains unknown, at least on a national scale. However, there is one case currently pending before the Supreme Court that may provide more firm guidance on the issue. *Gloucester County School Board v. G.G.*, 822 F.3d 709 (4th Cir.), *cert. granted in part*, 137 S. Ct. 369 (2016), raises the issue of whether the federal government can require a federal fund-receiving local school district to allow a transgender teenager to use restrooms corresponding to the teenager's gender identity. The Department of Education ("DOE") says so, yet Title IX bars discrimination "on the basis of sex." The 4th Circuit relied on the DOE policy when it ruled against the school district. The government has until March 2, 2017 to file an amicus brief, so the new administration could change the government's policy. Oral argument has not yet been scheduled.

NATIONAL LABOR RELATIONS ACT (NLRA) AND PROTECTED CONCERTED ACTIVITY

Many employers mistakenly believe that because they are in a non-union environment, the NLRA does not apply to their organization. This is simply not true. Many of the violations that have been investigated by the National Labor Relations Board (NLRB) recently, have involved non-union workplaces. Whether your organization is unionized or not, Section 7 of the NLRA guarantees protections to employees engaged in "concerted activity."

Concerted activity generally means employees acting with co-workers to address work-related issues. Examples include: talking with one or more co-workers about your wages and benefits or other working conditions, circulating a petition asking for better hours, participating in a concerted refusal to work in unsafe conditions, openly talking about your pay and benefits, and joining with co-workers to talk directly to your employer, to a government agency, or to the media about problems in your workplace. Whether or not concerted activity is protected depends on the facts of the case. However, if employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the NLRB may deem your organization to have committed an Unfair Labor Practice (ULP). Recently, many of the violations of Section 7 have been found in employee handbooks, particularly as it relates to rules around confidentiality. It is important to have handbooks and any revisions undergo attorney review.

OTHER RECENT LEGISLATIVE DEVELOPMENTS IN EMPLOYMENT LAW

Medical Marijuana Update

While marijuana continues to be outlawed at the federal level as a controlled substance, states have continued to pass laws allowing for both the medical and recreational use of

marijuana. This is challenging for employers, as it is unclear whether, and to what extent, employees have protections under the Family Medical Leave Act (FMLA) or the Americans with Disabilities Act (ADA). It generally stands that an employer may enforce its drug testing policies and take adverse action against an employee who tests positive. However, employers should do so with caution. The following states passed ballot measures in 2016 in favor of medical marijuana: Arkansas, Florida, North Dakota, Ohio, and Pennsylvania. One state, Louisiana, changed its law from requiring a prescription for medical marijuana, to requiring that medical marijuana is recommended by a physician.

Genetic Information Nondiscrimination Act of 2008 (GINA)

GINA forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. GINA also restricts employers and other entities from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

Under GINA, it is also illegal to harass a person because of his or her genetic information, and it is illegal to fire, demote, harass, or otherwise "retaliate" against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination.

"Ban the Box" Laws

Recently, many states (including Illinois) have adopted legislation that precludes employers from asking about an applicant's criminal history on employment applications. Whether or not an employer operates in a state where these laws have been passed, employers should refrain from including these types of questions on an employment application, because it increases liability. Employers should not ask any questions about a person's criminal history until after an offer of employment is made. Requiring that a person successfully passes a background investigation as a contingency for an offer of employment is an acceptable practice in any state.

Sick Leave Law Updates

Effective January 1, 2017, the Illinois Sick Leave Act requires employers to allow employees to use personal sick leave benefits provided by the employer for absences due to an illness, injury, or medical appointment of the employee's child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent, for reasonable periods of time as necessary, on the same terms that the employee uses those benefits for their own illness or injury. The law also prohibits retaliation for use of such benefits.

Paid Sick Leave Laws

Over the past few years, several states and localities have passed laws requiring employers to provide minimum amounts of sick leave for their employees. Currently 4 states:

California, Connecticut, Massachusetts, and Oregon have passed paid sick leave laws in addition to Washington, D.C. Several major cities have paid sick leave laws including: Los Angeles, Minneapolis, New York City, Philadelphia, Pittsburgh, San Diego, San Francisco, and Seattle.
In 2016, Cook County (which includes Chicago) passed the Earned Sick Leave ordinance allowing employees to accrue sick leave up to 40 hours per year. Individuals are covered under this ordinance if they:

- Perform at least 2 hours of work for a covered employer while physically present in the county in any particular 2-week period; and
- Work at least 80 hours for a covered employer in any 120-day period.

Covered employers include individuals and companies with a place of business in Cook County that employ 1 or more covered employees. Additional considerations:

- Employees begin to accrue paid sick leave on the first calendar day after the start of their employment.
- The ordinance assumes exempt employees work 40 hours per week unless their normal workweek is less, in which case the accrual will be based on the number of hours of their normal workweek.
- Required accrual is capped at 40 hours per year, but employees may carryover up to 20 hours per 12-month period.
- New employees can begin using accrued paid sick leave no later than 180 days following the beginning of their employment.
- Employers may set limits on the increments in which paid sick leave may be used, not to exceed 4 hours per day.
- Accrued paid sick leave does not have to be paid out upon termination.

Government entities and Indian tribes are not covered employers. Employees must accrue at least 1 hour of paid sick leave for every 40 hours worked. This ordinance goes into effect July 1, 2017.

Illinois Freedom to Work Act (Concerning Non Compete Agreements)

Effective January 1, 2017, this law bans employers from entering into non-compete agreements with “low wage employees” and declares those agreements to be illegal and void. The law appears to limit the prohibition specifically to non-competition clauses and not other types of agreements. The law defines a low wage employee as any employee who earns the applicable (federal, state, local) minimum wage. Government entities are excluded as employers.

Illinois Right to Privacy in the Workplace Act Updates

In 2016, this Illinois law was updated to also prohibit prospective employers from requesting employees’ and applicants’ social media passwords on networking websites. The act extends employees’ and applicants’ privacy protection beyond passwords to usernames and personal online accounts, and adds retaliation provisions. Effective Jan. 1, 2017, the act now prohibits employers from:

- Asking, requiring or coercing employees or applicants to provide passwords or other related account information for accessing their personal online accounts.
- Demanding access to employees' and applicant's personal online accounts.
- Asking, requiring or coercing employees and applicants to authenticate or access their personal online accounts in an employer's presence.
- Requiring or coercing employees and applicants to invite employers to join groups affiliated with their personal online accounts.
- Requiring or coercing employees and applicants to join employers' online accounts or add employers or employment agencies to contact lists for their personal online accounts.
- Retaliating against an employee or applicant for refusing any of the above activities.

We strongly encourage our clients to review and update their social media policies addressing an employees' use of personal online accounts while on the job, inadvertent disclosures of employees' personal online accounts, reporting violations under this act and limited exceptions when an employer may request content sharing from an employee's or applicant's personal online accounts.

EMPLOYMENT LAW STATUTES

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII is a federal statute which prohibits employers from discriminating against employees and employee applicants on the basis of race, color, religion, sex or national origin. Title VII also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

With respect to retaliation claims, the success of a retaliation claim against an employer is not dependent on the success or validity of the employee's underlying claim of discrimination. Therefore, even if a court finds, or an employer believes, that there is no merit to an employee's discrimination claim, the employer may still be liable for retaliating against the employee for asserting his/her rights under Title VII. Based on this, it is imperative that employers train their supervisors and managers to exercise caution in the treatment of any employee who has engaged in protected activity under Title VII's anti-retaliation provision.

Who is an Employer

Title VII applies to employers with 15 or more employees, regardless of whether they are full-time or part-time. 42 U.S.C. § 2000e(b).

Even if an employer has fewer than 15 employees, it may still be covered under Title VII if it is part of an affiliated group of corporations that has the minimum number of employees in the aggregate. Corporations will constitute an "affiliated group" under the following circumstances: (1) where a parent company would be liable for its subsidiary employer's debts, torts, or contract breaches under the traditional standards for "piercing the corporate veil"; (2) where an enterprise split itself into a number of small entities with the intention of avoiding liability under the discrimination laws; and (3) where the parent company directed the allegedly discriminatory act, practice or policy.

The term "employer" does not include: (1) the United States; (2) a corporation wholly owned by the United States; (3) an Indian tribe; (4) any department or agency of the District of Columbia subject by statute to procedures of the competitive service; or (5) a bona fide membership or club (other than a labor organization) that is exempt from taxation if it employs fewer than twenty-five persons.

Who is an Employee

The term "employee" under Title VII includes actual employees of an employer. Volunteers can qualify as employees if they receive some form of compensation or benefit in exchange for serving as a volunteer.

Persons classified as "independent contractors" may be considered employees if, notwithstanding their title, they are actually functioning as employees. Generally, courts consider the following factors to determine whether an independent contractor is actually an employee: (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work; (2) the kind of occupation and nature of skill

required, including whether skills are obtained in the workplace; (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance operations; (4) method and form of payment and benefits; and (5) length of job commitment and/or expectations.

Some courts have also concluded that the employees of another organization may be able to state a claim of discrimination against a second employer under the "joint employer theory," which considers any entity that exerts significant control over the employee as an employer for purposes of Title VII. For example, a company employing a temporary worker through an employment agency can be considered the employer of the temporary worker under Title VII under the joint employer theory.

Some employees may be considered the "employer" if they are highly placed in the organization. If the employee's authority is exercised by right, versus by delegation, the individual is an employer.

Public officials and their staff members are not considered "employees."

The Equal Employment Opportunity Commission & Title VII

The Equal Employment Opportunity Commission ("EEOC") is the federal agency responsible for receiving and investigating charges of discrimination under Title VII and other employment statutes. The EEOC itself can bring a lawsuit charging discrimination without initiation by an employee or potential employee.

Filing a "charge of discrimination" with the EEOC is a prerequisite to an individual filing a lawsuit for violation of Title VII. The statute of limitations for filing a Title VII claim with the EEOC depends on whether the state is a "deferral state," meaning it has a state agency similar to the EEOC. As stated above, in deferral states, an employee alleging a Title VII violation must file a claim with the EEOC within 300 days following the alleged unlawful practice. In states that do not have a state commission or state agency equivalent to the EEOC, the employee is required to file a charge within 180 days after the conduct in violation of Title VII occurred.

The tolling period is calculated from the time the discrete discriminatory act (*i.e.*, discharge, termination, demotion) occurs, and claims are time-barred if not filed within the applicable 180- or 300-day period, even if the discriminatory act is related to acts that fall within the required timeframe. However, in cases involving continuing violations, such as hostile work environment claims, where the discriminatory act(s) do not fall within one single day, claims are not time-barred so long as a single act comprising the hostile work environment falls within the limitation period.

Once a charge is filed, EEOC investigators must notify the employer within 10 days, and will proceed to interview witnesses, examine documents, and possibly visit the employment site to conduct a fact-finding investigation. During this process, the EEOC can require that the employer provide a statement of the employer's position (often referred to as a "position statement"), as well as relevant records and documents for examination. Most of the EEOC's activities and information relating to a particular charge are protected by confidentiality

regulations. 29 CFR § 1601.22 & § 1601.26. It is important to note that documents submitted to the EEOC or the equivalent state agency must be maintained for the statutory period, or an adverse inference could be drawn from the spoliation of evidence. *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93 (2d Cir. 2001).

After investigation, and within 120 days from the filing of a charge, the EEOC will either: dismiss the charge, issue a "no cause" determination, or issue a "reasonable cause" determination. A dismissal is issued if the EEOC determines that there is no reasonable cause to believe the charge is true, or if the aggrieved party fails to cooperate with the EEOC's investigation and settlement efforts. 42 U.S.C. § 2000e-5(b) & 29 CFR § 1601.18. The EEOC will issue a reasonable cause or no cause determination based on whether it finds reasonable cause to believe that an unlawful employment practice has occurred or is occurring by the employer. 29 CFR § 1601.19; 29 CFR § 1601.21.

If support for a discrimination charge is found, Title VII requires the EEOC to attempt to settle the matter through conciliation proceedings, "to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b); 29 CFR § 1601.24. In *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), the Supreme Court held that "failure to conciliate" was a valid affirmative defense and that the EEOC's conciliation process may be subject to judicial review. The scope of the judicial review is narrow and gives the EEOC discretion to determine the type and extent of the conciliation in each case. The EEOC's obligations are to inform the employer about the allegation, describe what the employees have suffered as a result, and give the employers an opportunity to remedy the alleged discriminatory practice.

If the conciliation process is unsuccessful, the EEOC can file its own lawsuit against the employer. An individual can also bring a lawsuit against an employer for Title VII violations whether or not the EEOC's findings support a claim, or if the charge has been on file with the agency for 180 days with no determination during that time. Even if the EEOC dismisses the claim or reaches a settlement with the employer to which the aggrieved individual is not a party, the individual may still bring suit. 29 CFR § 1601.28(e).

Another prerequisite to an individual filing suit is the EEOC's issuance of a "Notice of Right to Sue." This notice is issued either automatically with an EEOC dismissal or determination as described above, or upon the request of the individual. The notice gives the individual authorization to bring an action under Title VII in federal district court within 90 days from the date the notice is issued, and will include the EEOC's disposition of the charge. 29 CFR § 1601.28. However, even if a party fails to file a claim within 90 days after the notice is issued, a court may allow a party to file a claim based on the doctrine of equitable tolling.

There are some exceptions to the timing requirements and procedures followed by the EEOC in states that have their own laws against discrimination and their own state agencies policing these laws. In these states, a complaining party may be required to file his/her charge with the state agency and allow the state agency to investigate for a period of time prior to filing the charge with the EEOC. In such instances, there are additional regulations and agreements which govern the interplay between the state agency and the EEOC.

EEO Reporting Requirements/EEOC Notice

The EEO-1 Report is the principal reporting form by which employers provide the federal government with a count of their workforce by ethnicity, race, and gender, divided into job categories. The EEOC requires the EEO-1 Report annually from private employers with 100 or more employees and federal contractors with federal government contracts of $50,000 or more and 50 or more employees.

The EEO filing requirements specifically exclude state and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations.

Employers must also post an official EEOC Notice in a conspicuous location in the workplace, stating that equal employment is the law and individuals who believe they have been discriminated against should contact the EEOC. A fine can be imposed for each offense of the EEOC Notice requirement.

Who May Sue Under Title VII

Title VII allows employees "claiming to be aggrieved" to sue for discrimination. 42 U.S.C. § 2000e-5(f). This includes not only employees who have been discriminated or retaliated against, but also other employees who can establish that they have suffered damage as a result of the employer's discrimination against another employee. For example, a female employee had standing to bring a Title VII claim against her employer for alleged emotional trauma she suffered as a result of the alleged sexual harassment of a female co-worker. *Leibovitz v. New York City Transit Authority*, 252 F.3d 179 (2d Cir. 2001).

A former employee can bring a claim under Title VII for retaliation if the former employer commits an act after the employment relationship has ended that can be construed as retaliation, such as providing a negative reference.

Damages

A federal court may apply several types of remedies and damages if a Title VII violation is found, including the following:

(1) prohibit the employer from engaging in the unlawful practice and act;
(2) order affirmative relief, including reinstatement or hiring of the individual, if appropriate;
(3) award back pay from the time of the discriminatory act to the time gainful employment is secured or the employer offers to re-employ unconditionally, but no further back than two years from the filing of the charge; award front pay from the time of the judgment to the time the individual could reasonably be expected to obtain substantially comparable employment (42 U.S.C. § 2000e-5(g));
(4) award compensatory and punitive damages if the court finds the employer acted with malice or reckless indifference to the rights of the individual; and/or

(5) award attorneys' fees and costs, including expert witness fees, to the prevailing party upon the discretion of the court. (42 U.S.C. § 1981(a); 2000e-5(k)).

Compensatory damages are awarded for intentional discrimination resulting in future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary losses. The EEOC has the authority to require employers to pay compensatory damages when the EEOC finds discrimination against federal employees in violation of Title VII. *West v. Gibson*, 119 S. Ct. 1906 (1999).

Punitive damages may be awarded in Title VII cases if the employee demonstrates that the employer acted with malice or reckless indifference to the employee's federally protected right to be free from discrimination. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). An employer can be liable for punitive damages for its employee's conduct if the employee: (1) held a managerial position; (2) was acting within the course of employment; or (3) acted with reckless indifference toward the complaining employee's federally protected rights. For example, an award of punitive damages was upheld where an employer sought to hire only a female for a vacant position and refused to grant any interviews to male applicants. *Medcalf v. Trustees of Univ. of Pa.*, 71 Fed. Appx. 924 (3d Cir. 2003).

Front pay is a proper remedy in Title VII cases when reinstatement is not available or not advisable, and is designed to compensate victims of discrimination for the reasonable period of time it would take to find comparable employment. Front pay is a remedy authorized by Congress as an alternative to awarding reinstatement. Also, in awarding a judgment of back pay, a court may include pre-judgment interest on the award, which is computed up to the date of the final judgment. *Fine v. Ryan Int'l Airlines*, 305 F.3d 746 (7th Cir. 2002).

Prohibited Conduct under Title VII

Under Title VII, employers are prohibited from taking adverse employment actions against employees for discriminatory or retaliatory reasons. To constitute an adverse employment action, the action must be more than a mere inconvenience or alteration of job responsibilities.

Once an adverse employment action is established, Title VII plaintiffs are required to show that such actions were either intentionally or unintentionally discriminatory. Intentional discrimination ("disparate treatment") occurs where an illegal factor – such as race or sex – motivates the employer's decision. In contrast, unintentional discrimination ("disparate impact") involves a situation where an employer's decision is not motivated by discriminatory animus. For example, an employment policy that requires that employees have a high school diploma without allowing a GED to stand for the equivalent of a high school diploma may be found to be discriminatory if the application of the policy has a disparate impact on members of a protected group. Another example of a policy that can have a disparate impact on members of a protected class includes a pre-employment strength test or physical agility test that has a disparate impact on female applicants.

Employers attempting to avoid Title VII liability should be cautious about voiding certain policies because the act of voiding policies, even in an attempt to prevent discrimination against one class of employees may result in blatant discrimination against another class of employees. *Ricci* v. *DeStefano*, 129 S. Ct. 2658 (2009); *United States v. Brennan*, 650 F.3d 65, 72 (2d Cir. 2011) (citing *Ricci*). In *Ricci*, a group of white firefighters and one Hispanic firefighter sued the City of New Haven, alleging that the City's refusal to certify the results of a promotional examination violated Title VII. The City claimed the voiding of the examination results was necessary to avoid disparate-impact liability, as no black firefighters qualified for promotions. The Supreme Court addressed the question of whether the City's purpose – to avoid disparate-impact liability – excuses what otherwise would have been prohibited disparate-treatment discrimination. The Court found that the City had no strong basis in evidence that the tests were discriminatory against black firefighters and, therefore, the City was in violation of Title VII when it voided the exam results. Based on the holding in *Ricci*, employers are strongly encouraged to consult with counsel before taking action with respect to any policies or rules that impact particular classes of employees.

Examples of Unlawful Conduct under Title VII

Religious Discrimination

Common forms of unlawful religious discrimination include:

- ☐ Refusing to hire individuals of a certain religion, imposing stricter promotion requirements for persons of a certain religion, and imposing more or different work requirements on an employee because of that employee's religious beliefs or practices.
- ☐ Religious slurs or hostility.
- ☐ Subjecting employees to harassment because of their religious beliefs or practices, or lack thereof, or because of the religious practices or beliefs of people with whom they associate;
- ☐ Treating employees differently based on their spouses' religious beliefs;
- ☐ Denying a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices, or lack thereof, if an accommodation will not impose an undue hardship on the conduct of the business; and
- ☐ Retaliating against an applicant or employee who has engaged in protected activity, including participation in a discrimination investigation (*i.e.*, filing an EEO charge or testifying as a witness in someone else's EEO matter), or opposition to alleged religious discrimination (*i.e.*, complaining to the human resources department about alleged religious discrimination).

☐ Maintaining policies that restrict forms of religious expression, which do not have a comparable effect on workplace efficiency and do not impose an undue hardship on the employer, such as:

- Requiring employees to be clean shaven with short haircuts, *Brown v. F.L. Roberts & Co., Inc.*, 419 F. Supp. 2d 7 (D. Mass. 2006);

- Requiring employees to sign written acknowledgments of diversity policies that require employees to ascribe worth to behavior that conflicts with religious beliefs, *Buonanno v. AT&T Broadband, LLC,* 313 F. Supp. 2d 1069 (D. Colo. 2004); and

- Requiring employees to participate, or not participate, in a religious activity as a condition of employment. However, Title VII provides exceptions to this requirement in certain circumstances, which permit discrimination on the basis of religion. These exceptions are discussed in the Exemptions for Religious Organizations section below.

Generally, an employer may not place more restrictions on religious expression than on other forms of expression that have a comparable effect on workplace efficiency. Therefore, employers must permit employees to engage in religious expression, unless the religious expression would impose an undue hardship on the employer.

Race/Color Discrimination

Common forms of unlawful race/color discrimination include:

☐ Discriminatory recruiting, hiring, and advancement practices, such as:

- Soliciting applications only from sources in which all or most potential workers are of the same race or color;

- Requiring applicants to have a certain educational background that is not important for job performance or business needs; or

- Testing applicants for knowledge, skills or abilities that are not important for job performance or business needs.

☐ Compensation and other employment terms, conditions, and privileges based on race/color. Race or color discrimination may not be the basis for differences in pay or benefits, work assignments, performance evaluations, training, discipline or discharge, or any other area of employment.

☐ Segregation and classification of employees based on race/color, such as:

- Physically isolating them from other employees or from customer contact;

- Delegating assignments according to race or color;

- Excluding members of one group from particular positions; or

- Grouping or categorizing employees or jobs so that certain jobs are generally held by members of a certain protected group.

National Origin Discrimination

Common forms of unlawful national origin discrimination include:

☐ Accent discrimination, such as basing an employment decision on an employee's foreign accent, unless the accent materially interferes with job performance.

☐ English fluency requirements, unless English fluency is required for the effective performance of the position.

☐ English-only rules, unless adopted for nondiscriminatory reasons such as when necessary to promote the safe or efficient operation of the employer's business.

Sex Discrimination

Common forms of unlawful sex discrimination include:

☐ Recruiting, hiring, and advancing employees on the basis of sex.

☐ Basing compensation and other employment terms, conditions, and privileges of employment on sex.

☐ Segregating and classifying employees on the basis of sex.

☐ Sexual Harassment

Harassment

While sexual harassment is the most commonly discussed form of harassment, Title VII prohibits all forms of harassment based on the categories protected by the Act. Indeed, Title VII prohibits harassment on the basis of a person's race, color, national origin, and religion, in addition to sex. Harassment based on national origin, race/color, and religion can take many forms, including racial, ethnic, or religious slurs, workplace graffiti, or other offensive conduct directed towards an individual's race, religion, birthplace, ethnicity, culture, or foreign accent.

Regardless of the basis, harassment violates Title VII when it is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive. Employers must be aware that a hostile environment may be created by the actions of supervisors, coworkers, or even non-employees such as customers or business partners.

Under Title VII, the standard for harassment by supervisors is strict liability, whereas the standard for harassment by co-workers is negligence. Title VII does not define the term "supervisor." In circumstances where the alleged harasser is a non-supervisor, the traditional rule of notice still applies. An employer that has been put on notice that an employee is being harassed faces liability under the Act for failing to take action to preclude discriminatory behavior.

Sex Discrimination and the Pregnancy Discrimination Act

The 1978 Pregnancy Discrimination Act ("PDA") amended Title VII to make it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. Pregnancy is not a legal reason for refusing to hire, refusing to promote, discharging, laying off, or failing to reinstate an otherwise qualified female applicant or employee. The PDA also prohibits employers from discriminating against employees because they intend to become pregnant.

In the event that a woman is no longer able to perform her normal job functions as a result of her pregnancy, her employer must treat her in the same manner as it treats any other employee who is temporarily disabled for other reasons. This does not mean that the PDA guarantees pregnant women a right to work; it simply requires that pregnant employees and applicants be treated the same as similarly situated employees and applicants affected by other conditions that impact their ability to work. For example, if an employer allows temporarily disabled workers to take time off for their disabilities, then that employer must also allow pregnant workers to take time off for maternity leave.

The trend for states is moving in a direction of providing more protection for pregnant employees in the workplace. For example, in August of 2014, amendments were made to the Illinois Human Rights Act regarding pregnancy, which became effective January 1, 2015. The Act provides that employers must provide reasonable accommodations for pregnant women, including, but not limited to, longer breaks, temporary job transfers, light-duty assignments, extra seating, modification of equipment or duties, and time off to recover from pregnancy-related conditions.

Maternity Leave

Maternity leave is a form of disability or sick leave during which a female employee is unable to work as a result of pregnancy, childbirth, or related medical conditions and is a right guaranteed to eligible employees under the Family Medical Leave Act.

Although some pregnant employees have the right to take time off for maternity leave, they cannot be forced to do so. For example, an employer cannot force a female employee to begin her maternity leave during her second trimester of pregnancy. The PDA also prohibits employers from forcing women to take unwanted maternity leaves. *Somers v. Aldine Independent School District*, 464 F.Supp. 900 (S.D.Tex. 1979). In *Somers*, a school policy required pregnant employees to take mandatory maternity leaves following their third month of pregnancy. The court held that the school's policy violated the PDA.

The PDA does not require employers to pay disability benefits to women during maternity leave unless the employer already has a disability or sick leave benefit program in place. If there is no program in place, a pregnant employee is not entitled to disability benefits.

Paternity Leave

The PDA's rules relating to maternity leave are based on a pregnant employee's physical inability to work as a result of pregnancy, childbirth or other related conditions, and thus, expectant fathers are not necessarily entitled to paternity leave. As such, expecting fathers do not have the same rights under the PDA to paternity leave. However, if an employer allows extended maternity leave beyond the period of disability for female employees to care for their newborn children, those employers cannot deny paternity leave to male employees for similar purposes.

Marital Status

Additionally, under the Act, employers cannot take action against a pregnant woman on the basis of her marital status. Even a facially neutral policy prohibiting both women and men from having children outside of marriage violates the Act because unwed motherhood cannot be discovered as easily as unwed fatherhood.

Abortion

The PDA applies to all situations in which women are "affected by pregnancy, childbirth, and related medical conditions." Based on this, the Third Circuit has construed the PDA to cover women who have abortions. *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 576 (2008). In *C.A.R.S.*, the plaintiff sued her employer, alleging that she had been fired in violation of the PDA for having an abortion. Shortly after the plaintiff informed her employer of her pregnancy, the plaintiff's doctor informed her that her baby had multiple deformities and that she should terminate the pregnancy. Three days later, on the day of her baby's funeral, the plaintiff was informed that she was being terminated from her job. The employer argued that the plaintiff had been fired for abandoning her job; however, the plaintiff argued that her husband had called the office and received consent for the plaintiff to take time off of work. The court held that the plaintiff had established a *prima facie* case of pregnancy discrimination, precluding summary judgment in favor of the employer on the issue of whether it had fired the plaintiff on the basis of her abortion.

Courts have been reluctant to address the interplay between Title VII's prohibition against sex discrimination and an employer's adverse employment action on the basis of an employee's abortion. Therefore, employers must consult the law of their particular jurisdiction before taking any action against employees who choose to have an abortion. In addition, there may be certain exemptions for religious employers, depending on the circumstances and whether the religious mission has been consistently applied.

Religious Discrimination

Title VII protects workers from employment discrimination based on their religion, in addition to other categories. Title VII also requires reasonable accommodation of employees'

sincerely held religious beliefs, observances, and practices when requested, unless accommodation would impose an undue hardship on business operations. The prohibition on discrimination and the requirement of reasonable accommodation apply whether the religious views in question are mainstream or non-traditional, and even if not recognized by any organized religion. These protections also extend to those who profess no religious beliefs.

Definition of "Religion"

Title VII defines "religion" to include "all aspects of religious observance and practice as well as belief." Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. Further, a person's religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion."

Religious beliefs include theistic beliefs as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death." Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.

Reasonable Accommodations for Sincerely Held Religious Beliefs

Title VII requires an employer to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship. A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to comply with his or her religious beliefs.

Title VII requires employers to accommodate only those religious beliefs that are "sincerely held." Therefore, whether or not a religious belief is "sincerely held" by an applicant or employee is only relevant to religious accommodation, not to claims of disparate treatment or harassment because of religion.

Like the "religious" nature of a belief or practice, the "sincerity" of an employee's stated religious belief is usually not in dispute. Nevertheless, there are some circumstances in which an employer may assert as a defense that it was not required to provide accommodation because the employee's asserted religious belief was not sincerely held. An employer should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion. However, if an employee requests a religious accommodation and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.

In order for an employer to provide reasonable accommodations, the employee's religious beliefs must conflict with an employment requirement, and the employer must be informed of the conflict. No "magic words" are required to place an employer on notice of an applicant's or employee's conflict between religious needs and a work requirement. Nevertheless, the applicant or employee must provide enough information to make the employer aware that a conflict exists between the individual's religious practice or belief and a requirement for applying for or performing the job.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), the issue before the Court was whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a religious observance and practice only if the employer has actual knowledge that a religious accommodation was required, and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee. The EEOC filed suit after a practicing Muslim was denied a position with the defendant store because of her headscarf. During her interview, the applicant wore a black headscarf, but the scarf was not discussed. However, the interviewer did inform the applicant about the store's dress code, which prohibited black clothing and caps. The applicant did not ask any questions regarding the policy and did not ask for a religious accommodation. Thus, the store argued that it did not violate Title VII because it did not have notice that the applicant wore a head scarf based on her religious beliefs.

The Court held that an employer's actual knowledge of a religious accommodation was unnecessary. As long as the employer had the motive of refusing to hire an applicant based on a *suspected* need for accommodation, Title VII has been violated.

The EEOC has identified the following practices as examples of areas where employers commonly fail to reasonably accommodate religious beliefs and practices:

- ☐ Observance of a Sabbath or religious holiday;
- ☐ Prayer breaks during work hours;
- ☐ Dietary requirements;
- ☐ Taking days off during a mourning period for a deceased relative;
- ☐ Prohibitions against medical examinations;
- ☐ Prohibitions against membership in labor or other organizations; and
- ☐ Dress and personal grooming practices (29 CFR § 1605, Appx. A).

Some examples of reasonable accommodations include schedule swapping, flexible scheduling, lateral transfers, and changing job assignments. Courts have held the following practices to constitute reasonable accommodations:

- ☐ Allowing a teacher to take unpaid absences so that the teacher could observe six holy days mandated by his religion during the school year.
- ☐ Permitting a police officer to wear a cross ring or bracelet instead of a cross pin, where wearing a pin would violate city code.
- ☐ Permitting an employee to use the phrase "Have a Blessed Day" with her co-workers, while prohibiting her from including the phrase in her written correspondence with company customers.

- ☐ Transferring a nurse to the newborn intensive care unit in response to her informing the hospital that her religious beliefs prevented her from assisting in emergency procedures terminating pregnancies.
- ☐ Permitting a sales consultant who refused to work Saturdays due to his religious beliefs, to swap shifts with other employees in order to take Saturdays off.
- ☐ Allowing a Native American student to wear his hair visibly long, in accordance with his religious beliefs, notwithstanding the school's hygiene policy.

Undue Hardships

An accommodation poses an undue hardship upon an employer if the employer would have to bear "more than a *de minimis* cost" in order to accommodate an employee's religious practices. This is a far lower standard for an employer to meet than undue hardship under the Americans with Disabilities Act, which is defined in that statute as "significant difficulty or expense."

In determining whether there is more than a *de minimis* cost, courts generally consider: (1) the cost to the employer; (2) the relation of that cost to the operating costs of the employer; (3) the employer's financial resources; and (4) the number of individuals who will need a particular accommodation.

The Ministerial Exception and Title VII Exemptions for Religious Organizations

Title VII contains an exception for religious employers who wish to hire persons of a particular faith:

42 U.S.C. Section 2000e-1(a): "This subchapter shall not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities; and

42 U.S.C. Section 2000e-2(e)(2): [I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."

See, e.g., Equal Opportunity Commission v. Mississippi College, 626 F 2d 477 (5th Cir. 1980) (No violation of Title VII where college hired teacher who was member of Baptist religion over person who was not a member of Baptist religion).

Religious institutions cannot discriminate on the basis of other protected categories

What may seem like a case of protected discrimination on the basis of religion may also amount to unlawful discrimination on other protected bases, such as sex, national origin, pregnancy, or other categories protected by some state laws, such as homosexuality. When that is the case, the religious institution will not be able to rely on the Title VII exemption as a defense.

For example, in *Vigars v. Valley Christian Center of Dublin*, 805 F. Supp. 802 (N.D. Cal. 1992), a parochial school could not rely on the exemption when it terminated a teacher's employment on the basis of her out-of-wedlock pregnancy, even though sex outside of marriage violated the school's religious values, because the school's actions may have amounted to discrimination on the basis of pregnancy.

Likewise, in *Ganzy v. Allen Christian School*, 995 F. Supp. 340 (E.D.N.Y 1998), the exemption did not apply with respect to an unmarried pregnant teacher's Title VII claim alleging her termination resulted from her pregnancy, because a genuine issue of material fact remained as to whether the termination resulted from the teacher's pregnancy or from the teacher violating the school's religious beliefs by engaging in premarital sexual activity.

In *Cline v. Catholic Diocese of Toledo,* 206 F.3d 651 (6th Cir. 2000), the Sixth Circuit reiterated that courts have made clear that if the school's purported "discrimination" is based on a policy of preventing extramarital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discriminated based on pregnancy in violation of Title VII. However, the court refused to grant summary judgment for the Diocese because school officials had acknowledged during depositions that the plaintiff's pregnancy alone had signaled to them that she was engaged in premarital sex, and that the school does not otherwise inquire as to whether men are engaged in premarital sex.

In contrast, the Eighth Circuit in *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987), upheld a private social club for girls' termination of a pregnant, unmarried staff member for violation of the club's "role model rule." The court found that the termination was justified by business necessity because there was a manifest relationship between the club's fundamental purpose and the rule.

And, in *Boyd v. Harding Academy of Memphis*, 88 F.3d 410 (6th Cir. 1996), the court ruled in favor of a religious school that terminated the employment of a pregnant, unwed preschool teacher, finding that the school had a history of terminating both male and female employees for engaging in extramarital sexual relationships in violation of school's code of conduct.

Ministerial Exception

The First Amendment bars claims of employment discrimination brought by ministers of a church. The government cannot interfere with the decision of a religious organization to terminate one of its ministers, because to do so would violate the First Amendment. *Hosanna-*

Tabor Evangelical Lutheran Church and School v. EEOC et al., 132 S. Ct. 694, 706 (2012) ("Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.").

The ministerial exception is not dependent upon ordination, but upon the function of the position. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). Non-ordained employees are ministerial employees when they are responsible for conveying the Church's message, *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 704 (7th Cir. 2003), teaching the faith, *Hosanna-Tabor*, 132 S. Ct. at 708, and carrying out the Church's mission. *Id.*, *Rayburn*, 772 F.2d at 1169; *Young v. The Northern Illinois Conference of the United Methodist Church*, 21 F.3d 184, 186 (7th Cir. 1994).

Pre *Hosanna-Tabor* Cases

Ministerial Exception upheld:

Young v. The Northern Illinois Conference of the United Methodist Church, 21 F.3d 184, 186 (7th Cir. 1994) (African-American who served as probationary minister for church brought Title VII race claims which were denied under ministerial exception).

EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996) (the ministerial exception barred a sex discrimination claim brought by a tenured member of the University's department of religious canon law).

Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999), *cert. denied*, 531 U.S. 814 (2000) (ministerial exception bars ADA claim brought by church choir director).

EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000) (the ministerial exception was applied to a cathedral's music director, who was also employed part-time as the music teacher).

Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698, 704 (7th Cir. 2003) (ministerial exception precluded Title VII claims by Communications Manager for diocese).

Pardue v. Center City Consortium Schools of Archdiocese of Washington, 875 A. 2d 669 (DC Ct. App. 2005) (principal of Catholic School was a ministerial employee).

Coulee Catholic Schools v. Labor and Industry Review Commission, 768 N.W. 2d 868 (Wisconsin 2009) (first grade teacher's age discrimination claim barred by ministerial exception. Teacher opened class with prayer; prayer at lunch, secular classes included religious content; taught religion three days a week; helped celebrate school wide religious holiday; Catholic school was considered a ministry of the church; attended weekly mass with her students; and participated in various aspects of mass).

Ministerial Exception not upheld:

Redhead v. Conference of Seventh-Day Adventists, 440 F. Supp. 2d 211 (E.D. New York 2006) (teacher who taught one hour of bible study per day, and attended worship service once a year not a ministerial employee).

Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849 (S.D. Indiana 1998) (teacher who taught one class in religion per term and organized Mass once a month not covered by ministerial exception.)

Hosanna-Tabor

The key case regarding teachers and the ministerial exception is *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC et al.*, 132 S. Ct. 694 (2012). In that case, the Supreme Court held that a "called" elementary school teacher at a Lutheran school was a ministerial employee. The Court specifically held that its ruling did not extend to non-called teachers. Since *Hosanna-Tabor*, one federal district court has held that a lay, non-called Catholic school teacher is not a ministerial employee. *Herx v. Diocese of Ft. Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014).

In *Hosanna-Tabor*, the Court considered four factors in reaching its decision that the teacher was a minister. It is recommended that employers apply these four factors when deciding whether a position is a ministerial position:

Does the employer hold the teacher out as a ministerial employee? In *Hosanna-Tabor*, the school held their called teachers out as ministers by issuing them a "diploma of vocation" and giving her the title "minister of Religion, Commissioned." The congregation periodically reviewed the teacher's skills of ministry and ministerial responsibilities and provided her with continuing ministerial education. Consider whether and how you identify your ministerial employees--what do you do to distinguish your ministerial employees from your non-ministerial employees. In this regard, you should look at how your institution evaluates and holds out other ministerial staff and do the same for all of the employees that you believe are ministerial employees. Another thing to consider: have you had any employees for whom the institution petitioned for a work visa? If so, did you apply for a religious worker visa for them and was it granted? If you instead applied for an H1-B visa, why did you not apply for a religious worker visa for them? Evidence that an employee is working on a religious worker visa could serve as strong evidence that the position is a ministerial position.

The next factor the Court considered was the degree of religious training required for the commissioning as a minister. In *Hosanna-Tabor*, the teacher had to 1) complete eight college-level courses in ministry, 2) receive the endorsement of her local Synod and 3) pass an oral examination by a faculty committee at a Lutheran college. Consider for your institution what level of religious education, formation and training is required for your ministerial employees.

The third factor the Court considered was the fact that the teacher held herself out as a minister by 1) accepting the formal call to religious service, 2) claiming a special housing allowance available only to ministers and 3) by identifying herself in other public documents as a minister. How do your ministerial employees hold themselves out as ministers?

The final factor the Court considered was the teacher's job duties. In this regard, the job description will be important but it will also be important to show what the teacher actually did of a ministerial nature each day. Make sure the job descriptions for your ministerial employees accurately reflect the ministerial aspects of the positions. While a ministerial employee can have administrative duties and those duties can be part of the job description, the ministerial duties should be described also. Keep in mind when drafting a job description for a ministerial employee that a job is ministerial if it is responsible for conveying the Church's message, teaching the faith and/or carrying out the Church's mission.

Herx v. Diocese of Fort Wayne-South Bend, Inc. The federal district court for the Northern District of Indiana ruled in September 2014 that a lay Catholic school teacher who did not teach religion was not a ministerial employee. The District Court followed the criteria above in making its determination:

> The Diocese hasn't shown that Mrs. Herx' teaching qualifications or job responsibilities in any way compare to Ms. Perich's situation. Nothing in the summary judgment record suggests that Mrs. Herx was a member of the clergy of the Catholic Church. Mrs. Herx has never led planning for a Mass, hasn't been ordained by the Catholic Church, hasn't held a title with the Catholic Church, has never had (and wasn't required to have) any religious instruction or training to be a teacher at the school, has never held herself out as a priest or minister, and was considered by the principal to be a "lay teacher". The religions teachers for the Diocese schools have different contracts than the non-religion teachers and are required to have religious education and training. For example, Cynthia Wolf, a religion teacher in the Diocese, has a Master's Degree in Theology. Labeling Mrs. Herx a "minister" based on her attendance and participation in prayer and religious services with her students, which was done in a supervisory capacity, would greatly expand the scope of the ministerial exception and ultimately would qualify all of the Diocese's teachers as ministers, a position rejected by the *Hosanna-Tabor* Court.
>
> Deeming Mrs. Herx a "minister" of the Catholic Church would expand the scope of the ministerial exception too far and, in fact, would moot the religious exemptions of Title VII and the ADA.

Herx v. Diocese of Ft. Wayne-S. Bend Inc., 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014).

CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 ("CRA") was passed in response to a number of United States Supreme Court decisions that limited the rights of employees to sue their employers for race discrimination under Section 1981 of the Civil Rights Act of 1886 ("Section 1981"). The Act modified Section 1981 in several important ways, from issues of substantive proof to jury trial rights and forms of monetary recovery. Congress enacted the Civil Rights Act of 1991 "to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation of victims." *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003).

Scope of the Civil Rights Act of 1991

Among other changes, the CRA added Section 1981(b), which provides that the term "make and enforce contracts" includes the making, performance, modification, and termination of contacts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. Accordingly, the 1991 amendments permit employees to sue under Section 1981 for post-contract-formation/modification conduct, including discriminatory termination.

Although Section 1981 does not itself use the word "race," the Supreme Court has construed it to forbid all "racial" discrimination in the making of private as well as public contracts. Over the years, "racial discrimination" has been expanded to cover ethnic groups including, but not limited to, Hispanics, Asians and Arabs. *Saint Francis Coll. v. Al-Khazraji*, 107 S. Ct. 2022 (1987); *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987). *See also Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751 (7th Cir. 2006); *Abdullahi v. Prada USA Corp*., 520 F.3d 710 (7th Cir. 2008).

Differences from Title VII

Section 1981 applies to all employers, regardless of size, which is unlike Title VII's restriction to employers with 15 or more employees. Moreover, individual supervisors may be named under Section 1981 (though not under Title VII) if they personally harassed or discriminated against the plaintiff. *Musikiwamba v. ESSI, Inc*., 760 F.2d 740, 753 (7th Cir. 1985). Also, unlike claims brought under Title VII, Section 1981 claims are filed directly in federal court, not with the EEOC or any other agency. Moreover, a successful plaintiff may receive unlimited compensatory and punitive damages, as there are no caps on damages under Section 1981. Additionally, Section 1981 authorizes retaliation claims. *CBOCS West, Inc. v. Humphries*, 28 S. Ct. 1951 (2008).

Damages

The CRA also expanded the remedies available to employees who file suit under the ADA or Title VII. According to Section 1981(a), plaintiffs can now claim compensatory and punitive damages. The passage of the CRA also allowed plaintiffs to recover damages under Title VII "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses" as well as punitive damages. 42 U.S.C. § 1981 (a)(b)(1) & (3); *Hildebrandt v. Illinois Department of Natural Resources*, 347 F.3d 1014 (7th Cir. 2003).

In order to be awarded punitive damages under the CRA, the employee must prove that the employer acted with malice or reckless indifference to his/her federally protected rights (*e.g*., the right to be free from discrimination). However, punitive damages are not available against "a government, government agency or political subdivision." 42 U.S.C. § 1981 (a)(b)(1). In *Hildebrandt*, the court held that the plaintiff could not recover punitive damages in a Title VII claim against the Illinois Department of Natural Resources because it is a government agency.

Compensatory damages under the CRA, on the other hand, are awarded for intentional discrimination – *i.e.*, disparate treatment claims – resulting in future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. The following limitations for the combination of punitive and compensatory damages apply to intentional discrimination claims based on sex, religion, or disability (though juries are not informed of these caps):

Number of Employees	**Damages Cap**
15 - 100	$50,000
101 - 200	$100,000
201 - 500	$200,000
501 and more	$300,000

These caps apply only to the punitive and compensatory aspects of an award, and do not include back pay. It is presently unclear whether or not the caps apply to front pay.

One court has held that damages and awards created pursuant to the CRA may not be applied retroactively to allow recovery for discriminatory conduct that occurred before the Act's effective date, regardless of whether a trial on the merits was concluded prior to the date the Act became effective. *Trout v. Secretary of Navy*, 317 F.3d 286 (D.C. Cir. 2003).

Section 1981 also provides for the recovery of attorney's fees by the prevailing party.

SEXUAL HARASSMENT

What is Sexual Harassment?

Sexual harassment is defined under federal law as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment. Conduct is considered unwelcome if the individual did not request or invite it and considered the conduct to be undesirable or offensive. An individual's submission to the conduct or failure to complain does not always mean that the conduct was welcome. There are also various state and local laws that govern sexual harassment as well.

It is important to note that the victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee, such as a client or customer of the employer. The victim does not have to be the person harassed but could be anyone affected by the offensive conduct. Unlawful sexual harassment may occur without economic injury to or discharge of the victim.

Courts have generally divided sexual harassment cases into two distinct types of claims: quid pro quo harassment, and hostile work environment. A person can establish a sexual harassment claim under either or both scenarios.

Quid Pro Quo Harassment

Quid pro quo harassment occurs where the employee's acceptance of the harassment is an expressed or implied condition of employment or advancement, or where the employee's rejection of the harassing conduct leads to a tangible employment action. In other words, it occurs when a manager or supervisor conditions an employment benefit on an employee's submission to unwelcome sexual conduct. An example of this is a situation where a supervisor asks an employee for a sexual favor in exchange for a promotion.

Hostile Work Environment

A hostile work environment exists when one's behavior within a workplace creates an environment that is difficult or uncomfortable for another person to work in. In this situation the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive for a reasonable person to perceive the environment as abusive. Common complaints in sexual harassment lawsuits include fondling, suggestive remarks, sexually-suggestive photos displayed in the workplace, use of sexual language or off-color jokes. Here are some examples of situations that create a hostile work environment:

Verbal Conduct:

- Making or using derogatory comments, epithets, slurs and jokes; telling sexual or dirty jokes; Verbal sexual advances or propositions
- Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes or invitations
- Spreading sexual rumors or talking about another's sexual activity or performance; or harassment can include offensive remarks about a person's sex, such as offensive comments to a woman about women in general.

Visual Conduct:

- Leering, making sexual gestures, displaying of suggestive objects or pictures, cartoons, posters or other written materials; touching oneself sexually in front of others. Circulating or showing emails or other Internet communications of a sexual nature.

Physical Conduct:

- Touching, assault, impeding or blocking movements.

Employer Liability for Sexual Harassment

Employers are automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (*e.g.*, independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

Employers must clearly communicate to employees that sexual harassment will not be tolerated, and demonstrate that sexual harassment is not tolerated. They can do this by:

- Being observant for signs of sexual harassment
- Having and implementing a lawful and effective program to prevent sexual harassment.
- Not tolerating unwanted jokes, gestures, comments and banter
- Remembering that each employee is different. What appears to be a harmless joke or innuendo to you may actually be unwelcome to another.
- Not letting outside appearances deceive. Outwardly, an employee may seem accepting of sexual statements, jokes or innuendoes, but may, in reality, consider them unwelcome and offensive.

Warning Signs of Sexual Harassment

The following are examples of signs that sexual harassment is occurring or has occurred in your work environment:

- Refusing to work with, or asking not to work alone with, another employee
- Asking for a transfer or leaving employment for no apparent reason
- Missing work, being tardy, or reduced productivity, for no apparent reason
- Personal arguments between employees or employees and 3rd parties
- An employee suddenly, for no apparent reason, becomes uncommunicative or hard to work with.
- A dating or sexual relationship, or the appearance of a dating or sexual relationship between employees and/or employees and a 3rd party.
- Signs of hostility between employees and/or employees and 3rd parties who were once, or who are now, partners in a dating or sexual relationship.

How to Develop a Successful Sexual Harassment Policy

A lawful and effective program for preventing/eliminating sexual harassment must include a sexual harassment policy. This policy must be: 1) in writing; 2) circulated to all employees and, in California, to "future" employees; and 3) signed by all employees (signed acknowledgement). In addition to this, a policy should include the following:

1) A definition of sexual harassment
2) A statement of the employer's commitment to prohibiting sexual harassment
3) A description of the consequences of engaging in sexual harassment
4) An explanation that reporting is encouraged and that describes the reporting mechanism
5) An explanation that there will be no retaliation for reporting or participating in the investigation of a complaint of sexual harassment
6) Provisions to fully inform employees of their rights
7) An explanation that the employer will fully and effectively investigate complaints of sexual harassment
8) An explanation that the employer will take prompt and effective remediation action if harassment is proven
9) A list of employee's rights
    a. To not be subjected to sexual harassment in the workplace
    b. To be able to report sexual harassment to someone other than a direct supervisor and without fear of retaliation
    c. To have his/her complaint of sexual harassment promptly and thoroughly investigated
    d. To be informed of the results of the investigation and the action taken

Tips on Conducting an Investigation

First, it is important to note that an investigation must be immediate, thorough, objective and complete. Also, a determination must be made and the results communicated to the complainant, the alleged harasser and, as appropriate, to all others directly concerned. In other words, you cannot allow an investigation to linger indefinitely. When conducting an investigation, the goal should be to:

- Make conclusions regarding veracity of the complaint
- Determine whether there was a policy violation
- Make recommendations regarding discipline or other corrective action

When conducting an investigation, typically the first step is to interview the complaining employee. Make sure you are collecting the following information:

- Complete lists of acts complained of
- Whether isolated incident or pattern
- Demeanor of employee
- Identify witnesses
- Obtain corroborating evidence
- Ask employee what action they would like to see taken

Also:

- Consider interviewing witnesses prior to interviewing accused – get a full picture
- Interview witnesses individually

- Maintain confidentiality to extent possible

*A note on confidentiality—An employer should take reasonable steps to investigate and respond to the complaint in a manner consistent with a request for confidentiality from an employee. However, the individual charged with investigating the allegations should discuss confidentiality standards. Make sure the employee is aware that in order to address the conduct, the alleged harasser will likely need to be told the identity of the complainant.

When interviewing the person accused of sexual harassment, be sure to do the following:

- Confront them with general allegations
- Note their response to allegations
- Give the accused an opportunity to respond
- Determine the extent and nature of their interactions with complainant
- If they deny the allegations, ask for facts suggesting motive for fabrication
- Search for supporting documentation or other evidence to corroborate allegations
- Make sure to document each step of the investigation
- If you receive a complaint orally, draft a memo
- Draft memos of interviews of each party and witnesses

Things to consider when making conclusions about the investigation:

- Credibility of parties and witnesses
- Strength of evidence
- Factual conclusions
- Unresolved factual issues
- Whether violation of company policy occurred

Tips on Concluding an Investigation

- Draft a report of your findings
    - Include factual findings regarding each issue
    - Include dates of interviews and other steps taken
    - Detail critical information from interviews
    - Focus on policy violations
    - Explain any actions taken

- Communicate your findings
    - Inform the complaining party
    - Inform the person accused of the harassment
    - As appropriate, inform all others directly concerned

- Take prompt and effective remediation action if necessary
    - Appropriate action taken against the harasser
    - Communication of that action to the complainant

- Steps taken to prevent further harassment
- Appropriate action to remedy the complainant's loss, if any

Appropriate Ways for Supervisors to Respond to Sexual Harassment

Learning how to respond to sexual harassment is critically important in fulfilling your obligation as a supervisor. If an employee reports harassment to you, or you observe the harassment, you must immediately report the matter to your supervisor or to Human Resources. You should not make a finding on whether the complaint rises to the level of sexual harassment. You cannot and should not refrain from reporting to your supervisor or HR a complaint of sexual harassment reported to you because the employee requests confidentiality.

Make sure that there is no retaliation against the complaining employee. It is unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII or, in California, for filing a complaint with, or otherwise participating in investigative activities conducted by the DFEH or the Commission. Employees have a right to file a complaint of sexual harassment with the EEOC, or the appropriate state or local human rights agency, even if the employer has a program for preventing/eliminating harassment. Finally, employers must take steps to prevent the alleged harasser or anyone else from retaliating against the victim or the person who reported the alleged harassment.

Specific California Laws on (Sexual) Harassment

California's Fair Employment and Housing Act ("FEHA") defines harassment because of sex as including sexual harassment, gender harassment—harassment based on gender, gender identity, gender expression and transgender status, harassment based on pregnancy, childbirth, breastfeeding, and related medical conditions. In California, specific things that constitute unlawful harassment are:

- Offering employment benefits in exchange for sexual favors
- Making or threatening reprisals after a negative response to sexual advances
- Unpaid interns and volunteers are considered employees for purposes of harassment claims.

Additional requirements for a California sexual harassment program:

- Post FEHA signage regarding sexual harassment (DFEH-162)
- Distribute information to employees about sexual harassment—the DFEH pamphlet "Sexual Harassment is Forbidden by Law" (DFEH-185)
- Provide sexual harassment training to employees;
- Provide sexual harassment training to supervisors

Finally, with respect to liability in California, if harassment occurs, an employer may be liable even if management was not aware of the harassment. An employer might avoid liability if the harasser is a non-management employee, the employer had no knowledge of the harassment, and there was a program to prevent harassment.

California Abusive Conduct Law

In California, "Abusive Conduct" is defined as the "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." Abusive conduct may include:

- Repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets;
- Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliation; or
- The gratuitous sabotage or undermining of a person's work performance.

Supervisors have an obligation to report abusive conduct of which they become aware, as they would report harassment. Employers must investigate reports of abusive conduct as they would investigate claims of harassment.

With respect to harassment and abusive conduct training, employers must retain all written training materials and copies of the certificates of attendance. In the case of webinars, employers must also record all questions and responses or guidance given.

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (the "ADA") became law in 1990. The ADA prohibits employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA also places requirements on employers to make reasonable accommodations for qualified individuals with disabilities. The Americans with Disabilities Act Amendments Act of 2008 (the "ADAAA") changed the way many of the familiar ADA terms are interpreted, so that those terms are now interpreted very broadly. Thus, the ADA requires employers and employees to engage in a legitimate, interactive process when the question of a disability arises-the focus is not to be on the presence or absence of a disability or whether such disability substantially limits a major life activity.

Associational Discrimination

The ADA prohibits discrimination because of the known disability of an individual with whom the employee is known to have a relationship or association. For example, if an employee's spouse has Alzheimer's disease, an employer cannot discriminate against that employee based on an assumption that the employee will be absent from work frequently to care for his or her spouse.

Retaliation

The ADA also makes it unlawful to retaliate against an individual for opposing employment practices that discriminate based on disability or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADA.

Who Monitors Enforcement of the ADA and ADAAA

The federal Equal Employment Opportunity Commission monitors enforcement of the law. Individuals who believe that an employer has violated their rights under the ADA can file a Charge of Discrimination with the EEOC. In Illinois, charges can also be filed with the Illinois Department of Human Rights.

To Whom Does the ADA Apply

The ADA applies to employers with 15 or more employees. The 15-employee requirement is calculated by the "payroll" method, meaning that part-time and flex-time employees count toward the minimum.

What Does the ADA Require of Employers

An employer is required to make a **reasonable accommodation** to the known **disability** of a **qualified applicant or employee** if it would not impose an **"undue hardship"** on the operation of the employer's business.

1. <u>What is a Disability?</u>

The determination of whether an individual is entitled to ADA protection hinges on whether or not the individual suffers from a "disability" as defined by the Act. A "disability" is defined as:

a) a physical or mental impairment that substantially limits one or more of the major life activities of an individual;
b) a record of such an impairment; or
c) being regarded as having such an impairment.

This definition is to be interpreted expansively in favor of a broad range of individuals.

The term **"substantially limits"** has been interpreted to mean "unable to perform a major life activity that most people in the general population can perform," or "restricted as to the condition, manner or duration under which an individual can perform a particular activity as compared to the condition, manner, or duration under which most people in the general population can perform that same major life activity." An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

The ADAAA provides that the ameliorative effects of ordinary eyeglasses or contact lenses are to be considered in determining whether an impairment substantially limits a major life activity. Specifically, the ADAAA states that mitigating measures other than "ordinary eyeglasses or contact lenses shall not be considered in assessing whether an individual has a disability." The purpose of this exception is to prevent claims of disability by the plethora of individuals who wear either ordinary glasses or contact lenses. EEOC guidelines provide that qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision shall not be used unless shown to be job-related for the position in question and consistent with business necessity.

Under the ADA and the ADAAA, major life activities have been defined as 1) basic activities that the average person in the general population can perform with little or no difficulty and 2) major bodily functions; thus, major life activities include, but are not limited to, the following:

- caring for one's self
- performing manual tasks
- everyday activities such as breathing, seeing, hearing, speaking, eating, sleeping, and walking
- standing, lifting, and bending
- learning, reading, concentrating, thinking, and communicating
- working
- functions of the immune system
- normal cell growth
- functions involving the digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive systems

The ADA prohibits discrimination against an individual who is **"regarded as"** having a disability. Thus, the ADA not only covers those who actually do have impairments that substantially limit major life activities, but also covers individuals who are perceived by their employer as having such impairments. The ADAAA provides that, while individuals who are "regarded as" disabled are protected from discrimination, employers are not required to provide reasonable accommodations or make reasonable modifications to policies, practices, or procedures for them.

a) **Examples of Impairments Which Consistently Meet the Definition of Disability**

EEOC guidelines provide that some types of impairments will consistently meet the definition of disability. In addition to examples such as **deafness, blindness, intellectual disability** (formerly termed mental retardation), **partially or completely missing limbs,** and **mobility impairments requiring the use of a wheelchair,** which were previously included in the regulations, other examples of impairments that the regulations provide will consistently meet the definition of "disability" include, but are not limited to **amputation, autism, cancer, cerebral palsy, diabetes, epilepsy** - which substantially limits major life activities such as functions of the brain or, during a seizure, seeing, hearing, speaking, walking, or thinking,

HIV/AIDS, lymphedema, multiple sclerosis and muscular dystrophy, sickle cell disease, rheumatoid arthritis and mental impairments such as **major depression, anxiety disorders, personality disorders, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia.** This list of examples is merely intended to illustrate some of the types of impairments that are consistently substantially limiting. Other types of impairments not specifically identified may also consistently be substantially limiting, such as some forms of depression other than major depression and seizure disorders other than epilepsy.

b) **The Following Are Not Considered Disabilities**

Employees and applicants engaged in the **illegal use of drugs** are not "disabled" under the Act when an employer acts on the basis of such use. 29 CFR 1630.3. This exception applies to both the use of illegal drugs and the unlawful use of prescription drugs. Employers may also hold illegal drug users to the same performance standards as other employees.

Moreover, employers may seek reasonable assurance that no illegal drug use is either currently occurring or has occurred so recently that its continuing use is a real and ongoing problem. As such, tests for illegal drugs are not subject to the ADA's restrictions on medical examinations. Also, some employers may be able to establish a prohibition against hiring individuals with a history of illegal drug use if that prohibition is job-related and consistent with business necessity. For example, an employer whose employees are required to carry firearms could likely establish such a policy without violating the Act. Typically such exceptions are granted when the prohibition is safety-related.

However, employers should remain wary of "regarded as" situations. Employees or applicants who are erroneously perceived as engaging in drug use, but are not in fact doing so, are protected under the Act. The same holds true for individuals who are no longer illegally using drugs and have been either successfully rehabilitated or are currently involved in the rehabilitation process.

c) **Special rules for alcohol and smoking**

While **alcoholism** can constitute a disability under the ADA, employers may still require employees suffering from this condition to conduct themselves reasonably within the workplace. Specifically, an employer may flatly prohibit the use of alcohol in the workplace and may prohibit employees from being under the influence of alcohol while in the workplace. Additionally, an employer may hold an alcoholic employee to the same job qualifications and performance and behavioral standards to which it holds all other employees, even if any unsatisfactory performance or behavior stems from the employee's alcoholism.

Employers are free to prohibit or impose restrictions upon **smoking** in the workplace. These restrictions do not violate any portion of the ADA.

2. Who is a Qualified Individual?

The ADA defines a "qualified individual" as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of his or her employment position. Written employment descriptions or job postings are considered evidence as to the essential functions of a job, as long as the functions listed in such descriptions are accurate and do not include tasks that are unrelated to the job. If the employee cannot perform the essential functions of the job legitimately required by the employer, the employee is not a "qualified individual" under the ADA.

In a recent Seventh Circuit opinion, *Shell v. Smith*, No. 789 F.3d 715, (7th Cir. 2015), the plaintiff was working as a mechanic's helper for the city's transit system. In the job description, it stated that a mechanic's helper must occasionally drive buses, which required a Commercial Driver's License (CDL). The plaintiff had hearing and vision impairments which prevented him from obtaining a CDL, but he had worked in the position for twelve years without ever having driven a bus. When the city implemented personnel changes, a new manager told the plaintiff that he would be terminated if he did not get a CDL because it was required in the job description. When the plaintiff failed to obtain the CDL, he was terminated and the plaintiff sued under the ADA for failure to accommodate his disability.

The city maintained that the plaintiff was not a "qualified individual" because he could not satisfy all the necessary job requirements. The court found that the city could only require the plaintiff to have a CDL if it was "necessary to perform an essential function of the mechanic helper's position." Therefore, if driving the bus was not an essential and fundamental part of the job, the city could not use it as a reason to terminate the plaintiff. The Seventh Circuit found that there was evidence for both sides and the record did not establish that driving a bus was an "essential function" of the mechanic's helper position; therefore, the case should be allowed to proceed to a jury.

3. What is a Reasonable Accommodation?

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business. Both the employer and the employee seeking an accommodation must cooperate in the interactive process of identifying a suitable accommodation. According to the EEOC, reasonable accommodations may include, but are not limited to:

- making existing facilities used by employees readily accessible to and usable by persons with disabilities;
- job restructuring, modifying work schedules, or reassignment to a vacant position;
- acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, or providing qualified readers or interpreters;
- providing a leave of absence.

An employer need not create a new position or "bump" another employee to allow the disabled employee to be reassigned. Here in Illinois, however, an employer is required to appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer. *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012); *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2399 (2016).

The ADA does not call for an employer to "set aside a pool of positions" for recovering employees or make such positions available indefinitely to an employee whose recovery has run its course without restoring that worker to his or her original state. On the other hand, an offer of reassignment to an inferior position does not constitute a reasonable accommodation when a position is available with benefits and compensation similar to the employee's previous position.

An employer is not required to honor a disabled employee's request for accommodation when the request conflicts with the employer's bona fide seniority system. *U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002); *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2399 (2016). In *Barnett*, the plaintiff injured his back while handling cargo for the defendant. To accommodate the plaintiff's disability, he was transferred to a position in a mailroom, which was a less physically demanding position. When this position became open for bidding under the terms of the defendant's seniority plan, the plaintiff requested his accommodation take precedent over the terms of the seniority system. The defendant refused to make an exception to its seniority system, and the plaintiff lost the position. The court held that an accommodation which requests an employer to make an exception to its long-established seniority system is not reasonable.

The following are examples of accommodations that were held to be reasonable:

- Transferring an employee to a different department or section that is better suited to the employee's condition. In *Emerson v. Northern States Power Co.*, 256 F.3d 506 (7th Cir. 2001), the court held that a police district transferring a disabled police officer to a district where he could take a desk job was a reasonable accommodation.

- Allowing an employee with a back condition to work as a truck driver with a no-lifting requirement.

a. Requesting a Reasonable Accommodation

As a general matter, an employee must request an accommodation before a duty arises on behalf of the employer to provide one. However, exceptions to this general rule exist that might create an affirmative duty to provide a reasonable accommodation on behalf of an employee, even absent a specific request by the disabled employee. For example, in *Fliss v. Movado Group, Inc.*, No. 98 C 3383, 2000 WL 1154633 (N.D. Ill. Aug. 14, 2000), an employee who did a significant amount of traveling as part of her job presented the employer with a note from her doctor which stated that she could not stand or sit for longer

than 30-minute increments . Based on this, the employer believed the employee would not be able to travel in planes and terminated the employee. The employer argued that the employee never made a request for accommodation. However, the court held that the doctor's note could be viewed as a request for accommodation and held against the employer. Additionally, in cases where an employer knows of both an employee's disability and a resulting need for an accommodation, some courts have indicated that the employer might have an obligation to provide the accommodation even if the employee has not specifically requested it. This situation may also arise where the visible symptoms of an employee's disability are so obviously manifestations of an underlying disability that it would be reasonable for the employee to infer that his employer actually knew of the disability. However, an employer should be cautious when approaching an employee who the employer deems in need of an accommodation. If the employer makes it clear that he or she believes that the employee needs an accommodation, the employee becomes covered under the "regarded as" prong of the ADA.

b. Requesting documentation of a disability

Employers may require an employee requesting reasonable accommodations to provide documentation that is sufficient to substantiate that the employee has a disability under the ADA and needs the reasonable accommodation requested. However, employers cannot ask for unrelated documentation. This means that in most circumstances, an employer cannot ask for an employee's complete medical records, because they are likely to contain information unrelated to the disability at issue and the need for accommodation.

According to the EEOC's guidelines, documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and (2) substantiates why the requested reasonable accommodation is needed.

The EEOC's guidelines state that documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation. Documentation also might be insufficient where, for example: (1) the health care professional does not have the expertise to give an opinion about the employee's medical condition and the limitations imposed by it; (2) the information does not specify the functional limitations due to the disability; or (3) other factors indicate that the information provided is not credible or is fraudulent. If an employee provides insufficient documentation, an employer does not have to provide reasonable accommodation until sufficient documentation is provided.

An employer may require an employee to go to an appropriate health care professional of the employer's choosing if the employee provides insufficient documentation from his/her treating physician (or other health care professional) to substantiate that he/she has an ADA disability and needs a reasonable accommodation. However, if an employee provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner. The employer should also consider

consulting with the employee's doctor (with the employee's consent) before requiring the employee to go to a health care professional of its choice.

4. What is an Undue Hardship?

An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer. Undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. As such, generalized conclusions will not suffice to support a claim of undue hardship. A determination of undue hardship should be based on several factors, including:

- the nature and cost of the requested accommodation;
- the overall financial resources of the facility making the accommodation, the number of persons employed at the facility, and the effect of the proposed accommodation on the facility's expenses and resources;
- the type and location of the employer's facilities (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation; and
- the impact of the accommodation on the operation of the facility.

When assessing whether a particular accommodation would be too costly, employers are to consider all possible sources of outside funding. According to the EEOC's guidelines, undue hardship is determined based on the net cost to the employer. Thus, an employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation. In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if he/she will pay the difference.

If an employer determines that one particular reasonable accommodation will cause undue hardship, but a second type of reasonable accommodation will be effective and will not cause undue hardship, then the employer must provide the second accommodation.

Further, an employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability, nor can undue hardship be based on the fact that providing a reasonable accommodation might have a negative impact on the morale of other employees. However, employers may be able to show undue hardship where providing a reasonable accommodation would be unduly disruptive to other employees' ability to work.

5. Medical Examinations

A medical examination cannot be required prior to employment. However, an employer may require a medical exam after an offer of employment has been made, and the offer of employment may be conditioned on the results of the exam, if:

- all entering employees are subjected to a medical exam; and
- information obtained regarding the applicant's medical condition is collected and maintained separately in a confidential medical file.

Supervisors and managers may be informed of medical restrictions on work or duties, and first aid personnel may also be informed, when appropriate, if an employee's disability may require medical treatment.

EEOC guidelines permit employers to require current employees to undergo medical examinations to determine whether the employees are fit to perform the essential functions of the job, as long as the examinations are job-related and consistent with business necessity. Per the EEOC, an examination meets these standards when an employer has a reasonable belief based on objective evidence that a medical condition will impair an employee's ability to perform essential functions or will pose a threat due to a medical condition. A "reasonable belief" must be based on objective evidence prior to requiring the medication examination and not on general assumptions. The exam must also serve a business necessity and be a reasonable means of meeting that goal.

6. Pre-Employment Inquiries

An employer may ask a prospective employee if he/she is capable of performing the essential functions of the position, with or without reasonable accommodation. However, an employer should not ask an employee if he/she has a disability.

The EEOC has articulated in detail what is and is not considered a disability-related inquiry under the ADA. A "disability-related inquiry" is a question or series of questions that is likely to elicit information about a disability. Questions that are not likely to elicit information about a disability are not disability-related inquiries and, therefore, are not prohibited under the ADA.

Impermissible disability-related inquiries may include the following:

- asking an employee whether s/he has (or ever had) a disability, asking how s/he became disabled, or inquiring about the nature or severity of an employee's disability;
- asking an employee to provide medical documentation regarding his/her disability;
- asking an employee's co-worker, family member, doctor, or another person about the employee's disability;
- asking about an employee's genetic information;
- asking about an employee's prior workers' compensation history;

- asking an employee whether s/he is currently taking any prescription drugs or medications and/or whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications; and
- asking an employee a broad question about his/her impairments that is likely to elicit information about a disability (*e.g.*, What impairments do you have?).

Permissible questions include the following:

- asking generally about an employee's well-being (*e.g.*, How are you?), asking an employee who looks tired or ill if s/he is feeling okay, asking an employee who is sneezing or coughing whether s/he has a cold or allergies, or asking how an employee is doing following the death of a loved one or the end of a marriage/relationship;
- asking an employee about non-disability-related impairments (*e.g.*, How did you break your leg?);
- asking an employee whether s/he can perform job functions;
- asking an employee whether s/he has been drinking;
- asking an employee about his/her current illegal use of drugs;
- asking a pregnant employee how she is feeling or when her baby is due; and
- asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency.

7. Last Chance Agreements

A last chance agreement is an agreement entered into between an employee and an employer that states that if the employee engages in certain conduct, his or her employment will terminate. Employers have utilized "last chance agreements" with employees violating company policies or rules. These agreements are commonly used with employees returning to work after completing a drug rehabilitation program. The employer will typically have the employee sign an agreement stating that if the employee fails a drug test in the future, the employer will immediately discharge the employee from his/her position. One court has held that last chance agreements do not violate the ADA. In *Longen v. Waterous Co.*, 347 F.3d 685 (8th Cir. 2003), the court considered the last chance agreement to be a valid contract supported with consideration and held that it did not violate the ADA because it merely subjected the employee to different conditions than those imposed on other employees.

8. Damages

The following types of damages may be awarded to an individual discriminated against in violation of the ADA:

- compensatory damages
- punitive damages
- back pay
- front pay

Punitive damages are available where an employer violates the ADA intentionally or recklessly acts in violation of the law or displays a reckless indifference toward the employee's condition.

AGE DISCRIMINATION IN EMPLOYMENT ACT

The ADEA prohibits an employer from failing to hire, refusing to hire or discharging an individual who is over the age of 40 on the basis of age. In addition, employers are prohibited from discriminating against workers over the age of 40 with respect to the terms, conditions, and privileges of employment because of age. As with Title VII, employers may not retaliate against employees who assert their rights under the ADEA.

It is also unlawful to limit, segregate or classify employees in any way that would deprive the employee of employment opportunities or adversely affect his/her status as an employee. Additionally, while some federal circuits have held that the ADEA precludes practices that have a discriminatory impact on older workers, several circuits have held that there is no discriminatory impact theory available under the ADEA.

The ADEA also bars employers from advertising any employment preference that discriminates against those within the protected age group, reducing the wages of any employee to comply with the ADEA, or discriminating in favor of younger individuals within the protected age group.

In addition, the ADEA prohibits harassment in employment on the basis of a person's age, such as offensive remarks about a person's age. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision, such as the victim being fired or demoted. The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Examples of Prohibited Activities

- ☐ Refusing to hire an applicant who is within the protected age class based on the applicant's age.
- ☐ Discriminating with respect to benefits, terms, conditions and privileges of employment against employees within the protected class on the basis of age.
- ☐ Terminating an employee in the protected class on the basis of age.
- ☐ Placing an advertisement for a position which restricts applicants to a certain age class (*i.e.*, age 16 to 35).
- ☐ Imposing a system of mandatory retirement on workers under age 65, who have been with the company for less than two years and who make less than $44,000 per year.
- ☐ Implementing a policy of slowly eliminating older employees.

The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA.

Permissible Actions by Employers

An employer's salary policy that correlates wages to experience is not a violation of the ADEA if it is not based on the employee's age. *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994). In *Francis W. Parker School*, a 63-year-old plaintiff was not hired at the defendant school because he qualified for a higher salary than the school could afford. The court held that the school's policy of linking wages to experience was economically defensible and a reasonable way to determine salaries. Although the criteria had a disparate impact on older workers, it was not based upon age.

Additionally, the ADEA does not require that older workers be treated more favorably than their younger counter parts. *Brophy v. Philadelphia Police Dep't.*, No. Civ.A. 03-CV-4139, 2004 WL 1717616 (E.D. Pa. Jul. 28, 2004). In *Brophy*, a 74-year-old police recruit, who had previously served as a police officer, FBI agent, and director of security, requested a training waiver. The defendant employer denied the request, and the recruit subsequently failed the firearm and running tests. The court found that the waiver denial was not proof of age discrimination, as it had been 26 years since the recruit had served as a police officer on the streets. Consequently, the denial was deemed "objectively reasonable."

The 7th Circuit Court of Appeals has held that an employee's "obsolete skill set", which caused him to be of "declining value" to the company, was sufficient to support the individual's termination during a reduction in force, and found that the termination did not constitute age discrimination. *Martino v. MCI Communications Services, Inc.*, 574 F.3d 447 (7th Cir. 2009). In *Martino*, the employer undertook an analysis of its needs and the skills of its employees to support a reduction in force. The employee was deemed to have "an obsolete skill set" and his position was ultimately eliminated, which formed the basis of his federal lawsuit. The court specifically stated that while choosing to terminate someone on the basis of age is impermissible, choosing to let someone go because they have an "obsolete skill set" is not discriminatory. The court also noted that the Supreme Court's recent decision in *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343 (2009), made this case especially difficult for the employee.

The employer's success in *Martino* was based on its independent evaluation of employees' skills and value to the company. This decision makes clear that employers should ensure that independent investigations and decisions are fully documented and that analyses are based on the needs of the employer. Further, employers should undertake training and counseling of supervisors and managers to avoid the appearance of impropriety that is raised by remarks that could be interpreted as discriminatory.

Constructive Discharge

While a member of the protected class can successfully argue that s/he was constructively discharged on the basis of his/her age, a mere loss of prestige associated with a particular position is not sufficient to support such a finding under the ADEA. *Serrano-Cruz v. DFI Puerto Rico, Inc.*, 109 F.3d 23 (1st Cir. 1997). The court in *Serrano-Cruz* stated that employees must not be overly sensitive to changes in their job responsibilities, and that in order to state a claim for constructive discharge, the conditions must be so unpleasant that a reasonable person would be compelled to leave. The court noted in this case that the plaintiff's pay remained the same after the change in position.

Reverse Discrimination

Reverse discrimination does not exist under the ADEA. *General Dynamics Land Systems v. Cline*, 124 S. Ct. 1236 (2004). In *Cline*, the Supreme Court rejected a circuit court decision which held that younger workers who were over the age of 40 (and thereby within the ADEA's protected class) had been discriminated against in favor of older workers. As the Court plainly stated, "the enemy of 40 is 30, not 50." The Court held that the language of the ADEA and its legislative history clearly evidenced that the purpose of the ADEA was to protect relatively older workers from discrimination that works to the advantage of the relatively young. As a consequence, where two employees are both within the ADEA's protected class, *i.e.*, over the age of 40, the younger employee would have no claim under the ADEA for favorable treatment by the employer toward the elder employee. *See also Mock v. University of Pittsburgh at Johnstown*, No. 3:04-314, 2007 WL 2253602 (W.D. Pa. Aug. 3, 2007) (unlike Title VII, which prohibits gender discrimination in both directions, the ADEA only prohibits age discrimination in one direction, *i.e.*, discrimination which favors the young and disfavors the old).

Filing a Claim

An employee alleging an ADEA violation is required to file a complaint with the EEOC prior to filing a lawsuit. *Bost v. Fed. Express Corp.*, 372 F.3d 1233 (11th Cir. 2004). The statute of limitations for filing an ADEA claim with the EEOC depends on whether the state is a "deferral state," meaning it has a state agency similar to the EEOC. 29 U.S.C. § 626(d). In deferral states, an employee alleging age discrimination in violation of the ADEA must file a claim with the EEOC within 300 days following the alleged unlawful practice. 29 U.S.C. 626(d)(2). In states that do not have a state commission or state agency equivalent to the EEOC, the employee is required to file a charge within 180 days after the conduct in violation of the ADEA occurred.

Reductions in Force

Courts have held that employers may reduce the size of their workforce, commonly referred to as a "reduction-in-force," for economic or other legitimate business reasons. While it is possible for a plaintiff to show that the selection process for eliminating employees was discriminatory, as long as the reduction was based on legitimate business criteria, the plaintiff will have a difficult time prevailing. This general tendency of the courts to defer more to the employer in reduction-in-force situations stems from the recognition that under the well-

established business judgment rule, which is premised on the notion that businesses must be free to make business decisions. Courts also recognize that older workers generally command higher salaries.

WARN Act

The Worker Adjustment and Retraining Notification ("WARN") Act requires non-governmental employers with 100 or more employees to provide 60-days advance notice to employees in the event of plant closings and mass layoffs. 29 U.S.C. § 2101, *et seq.* To determine whether the employee threshold is met, qualifying employees include those that have worked at least 6 months out of the past 12 months and who work at least 20 hours per week. Under the WARN Act, the employer must provide notice to all hourly and salaried workers, as well as managerial and supervisory employees; however, business partners are not entitled to notice. Notice must be provided to either the affected workers or their representatives (such as a labor union), to the state dislocated worker unit, and to the appropriate unit of local government.

Illinois WARN Act

The Illinois Worker Adjustment and Retraining Notification ("Illinois WARN") Act applies to employers with 75 or more full-time employees, excluding part-time workers. It mirrors the federal statute in many respects, but it defines the notice-triggering events differently and contains broader notice requirements. While the Illinois WARN Act similarly requires employers to provide 60-days advance notice of pending plant closures or mass layoffs, it has a lower threshold for defining what constitutes a "mass layoff". The Illinois WARN Act also requires employers to give advance notice of a "relocation", which is not a notice-triggering event under the federal WARN Act.

Whenever making a downsizing decision, it is important for all employers to know whether they are covered under the WARN Act, and for Illinois employers to consider whether the Illinois WARN Act applies to their particular circumstances. For example, Illinois employers with 77- 99 employees will need to comply with the Illinois WARN Act even though they are exempt from complying with the federal WARN Act.

Releases of Liability

An employer may ask an employee to waive his/her rights or claims under the ADEA either in the settlement of an ADEA administrative or court claim or in connection with an exit incentive program or other employment termination program. However, the ADEA, as amended by the Older Worker Benefit Protection Act (OWBPA), sets forth specific requirements that must be met in order to create a valid release of claims under the ADEA. Among other requirements, a valid ADEA waiver must:

- ☐ be in writing and be understandable;
- ☐ specifically refer to ADEA rights or claims;
- ☐ not waive rights or claims that may arise in the future;
- ☐ be in exchange for valuable consideration;

- ☐ advise the individual in writing to consult an attorney before signing the waiver; and
- ☐ provide the individual at least 21 days to consider the agreement and at least 7 days to revoke the agreement after signing it.

The 21-day period is waivable by the employee, but the 7-day revocation period is not waivable by either party. If an employer requests an ADEA waiver in connection with an exit incentive program or other employment termination program, the minimum requirements for a valid waiver are more extensive.

These requirements vary slightly when the separation offer and release of claims is made to a group as opposed to an individual employee. For instance, the employer must distribute a list of the job category and age of each individual included in the group of individuals receiving the separation offer, in addition to the job titles and ages of the individuals in the same job classification or unit who were not eligible for the offer. 29 U.S.C. § 626(f)(1)(H). *See also Burlison v. McDonald's Corporation Corp.*, 455 F.3d 1242 (11th Cir. 2006) (clarifying that to comply with the OWBPA disclosures, employers implementing a reduction in force need only give terminated employees the specified information about their own "decisional unit," as opposed to nationwide information). In addition, the employer must allow the individuals to consider the agreement for 45 days (as opposed to the 21-day period required for a release for a single employee). 29 U.S.C. § 626(f)(1)(F)(ii).

Because of the various factors that must be considered, employers should consult with counsel familiar with employment law when drafting ADEA releases.

Damages

The favored remedy under the ADEA is reinstatement with back pay damages to allow the plaintiff to be put in the position that he/she would have been in but for the discrimination. According to the majority of federal circuit courts, in cases where reinstatement is not appropriate, such as when there is significant hostility between the former employee and the former employer, a court may award front pay to the employee. Most courts will not allow the employee to recover front pay or future wages significantly into the future, but many will allow recovery of five or six years of future pay.

If the employer is found to have acted willfully or with a reckless disregard for the employee's right to not be discriminated against on the basis of age, the court may also award liquidated damages. *Appelbaum v. Milwaukee Metropolitan Sewerage District*, 340 F.3d 573 (7th Cir. 2003). An employer willfully violates the ADEA when the employer knows that its conduct is prohibited by the ADEA or acts with reckless disregard for the possibility that its actions are in violation of the ADEA. However, if the "employer incorrectly, but in good faith, and non-recklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). This semi-punitive aspect of the ADEA allows the court to double the amount of back pay damages established in the case.

As with Title VII, the plaintiff may also recover attorneys' fees if successful. Punitive damages in the strictest sense and compensatory damages are not available under the ADEA.

THE FAMILY AND MEDICAL LEAVE ACT

Congress enacted the Family and Medical Leave Act of 1993 ("FMLA") in order to address employees' ongoing concerns of "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." *Miller v. AT & T*, 250 F.3d 820 (4th Cir. 2001). The FMLA's expressed purpose is to "entitle employees to take reasonable leave for medical reasons in a manner that accommodates the legitimate interests of the employer." The FMLA is administered by the Employment Standards Administration's Wage and Hour Division within the Department of Labor.

In addition to other requirements, the FMLA requires certain employers to provide up to 12 work weeks of unpaid leave to an employee under the following circumstances:

- ☐ the birth of a child and to care for the newborn child within one year of birth;
- ☐ the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- ☐ to care for the employee's spouse (including same-sex spouses), child or parent (including children or parents of a same-sex spouse) who has a serious health condition;
- ☐ a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
- ☐ any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty."

Employers are also required to provide up to 26 work weeks of unpaid leave to employees who are qualified servicemembers or care for qualified servicemembers. Employers must also improve their efforts to educate employees, and employees must improve their efforts to communicate their need for FMLA leave and supplying appropriate and timely medical certifications.

Who is an Employer

Under the FMLA, an employer is defined as including:

- ☐ any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year;
- ☐ any person who acts directly or indirectly in the interest of an employer to any of the employees of such employer;
- ☐ any successor in interest of an employer; and
- ☐ any "public agency" as defined by the FLSA.

However, if a particular worksite employs fewer than 50 people, an employer may still be required to provide FMLA leave if that employer employs 50 or more employees within a 75-mile radius of the worksite. Moreover, public and private elementary and secondary schools are subject to the FMLA, regardless of whether they employ fewer than 50 people. 29 CFR § 825.600(b). State employers must also comply with the mandates of the FMLA.

Joint Employers

The joint employer theory applies where two or more separate entities exert control over the work or working conditions of an individual whose work benefits both entities. Under such circumstances, courts employ the joint employer theory in finding that both entities are employers of the individual for purposes of the FMLA. *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2003). Generally, courts will find joint employers to exist in the following situations: (1) where the employers reach an arrangement to share an employee's services or interchange employees; (2) where one employer acts directly or indirectly on behalf of the employer in relation to the employee; or (3) where the employers are not completely removed from the individual's employment and share control of the employee.

What is a Serious Health Condition

A serious health condition is defined by the FMLA as an illness, injury, impairment or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider. If an employee is taking leave involving more than three consecutive calendar days of incapacity and two visits to a health care provider, the two visits must occur within 30 days of the period of incapacity, and the first must occur within seven days of the start of the incapacity. The same is true for a serious health condition occasioned by three consecutive days of absence plus a regimen of continuing treatment, and the first visit must again occur within seven days of the start of the incapacity.

Continuing treatment is defined in Section 825.115 as a period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: (1) treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or (2) treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

The DOL's guidelines define the following as serious health conditions: heart attack; heart conditions requiring bypass or valve operations; most cancers; back conditions requiring extensive therapy or surgery; strokes; severe respiratory conditions; spinal injuries; appendicitis; pneumonia; emphysema; severe arthritis; severe nervous disorders; injuries caused by serious accidents; ongoing pregnancy; severe morning sickness; the need for prenatal care; childbirth; and recovery from childbirth.

Courts have construed the following conditions as serious health conditions:

- ☐ The flu, in cases where inpatient care or continuing treatment is required.
- ☐ Chicken pox, when it required the continuing treatment of a physician.
- ☐ A peptic ulcer, under certain circumstances.

Courts have construed the following conditions to <u>not</u> be serious health conditions:

- ☐ Carpal tunnel syndrome, because the plaintiff did not receive inpatient care, nor was she advised to be off work.
- ☐ An asthmatic condition of an employee's adult daughter, where the daughter did not require inpatient care, did not have a continuing asthma condition, and was capable of self-care.

Who is Eligible

To be eligible under the FMLA, an employee must have been employed by the employer for at least 12 months and must have worked for at least 1,250 hours during those 12 months. The 12-month period of employment need not have been worked consecutively.

The FMLA regulations specifically address eligibility requirements with respect to situations where an employee has satisfied the 1,250 hours requirement, but has not met the 12 months of service requirement. When employees are on leave at the time they meet the 12-month eligibility requirement, the period of leave prior to meeting the statutory requirement is non-FMLA leave and the period of leave after meeting the statutory requirement is FMLA leave. Furthermore, when an employee's work schedule varies from week to week, employers are now directed to use a weekly average over the 12 months preceding the leave period when calculating an employee's leave entitlement, rather than considering only the prior 12 weeks.

For purposes of determining an employee's eligibility, FMLA regulations state that the worksite of a jointly employed employee is the primary employer's office from which the employee is assigned or reports.

How Can Leave be Taken

Leave can be taken in a block of time of up to 12 weeks during a 12-month period. Leave may also be taken intermittently or on a reduced leave schedule if the employer agrees. Further, if the employee requests leave on an intermittent or reduced leave schedule, the employer may request that the employee transfer temporarily to an available alternative position with equivalent pay and benefits which better accommodates recurring periods of leave. However, an employee who is unable to perform the essential functions of a job is not entitled to an intermittent or reduced schedule leave under the FMLA.

If leave is taken due to the birth or placement of a son or daughter, the employee's entitlement for leave expires at the end of the 12-month period beginning on the date of the birth or placement of the son or daughter. If the leave is taken for the illness of a family member, the employee's entitlement to leave to care for the sick relative expires upon the relative's death.

The FMLA does not require an employer to grant an employee intermittent leave unless the employer and employee expressly agree to the intermittent leave of absence. Where the leave is taken to care for a covered relative with a serious medical condition or because of the employee's own serious health condition, leave may be taken intermittently when medically necessary.

Under the regulations, an employer must grant FMLA leave in its smallest payroll increment, and an employer is now free to use the shortest increment (not to exceed one hour) it uses to account for other forms of leave.

Calculating the Year for FMLA Purposes

The employer may choose one of four methods for determining the 12-month period during which 12 work weeks of leave may be taken:

(1) the calendar year;
(2) any fixed 12-month year, such as a fiscal year;
(3) the 12-month period measured from when an employee first takes leave; or
(4) a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. Under this method, each time an employee takes FMLA leave, the remaining leave to which that employee is entitled will consist of any balance of the 12 weeks that has not been used during the immediately preceding 12 months.

An employer has an affirmative duty to advise its employees regarding how it will calculate the 12-month period. Failure to do so will allow the employee to select the 12-month period most advantageous to him or her. Once an employer has selected the 12-month period of its choosing, employees must be given 60 days' notice before any change in the method of calculation can occur. Additionally, any change to this method must be transitioned in a way that is of the greatest benefit to employees.

Paid or Unpaid Leave

Generally, FMLA leave is unpaid leave. However, eligible employees are permitted to substitute accrued paid leave for FMLA leave. If an employee chooses not to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave.

The sections of the FMLA covering the substitution of paid leave for unpaid leave do not apply when employees receive disability benefits during FMLA leave. However, by agreement between an employer and employee, paid leave and FMLA leave can run concurrently to supplement disability benefits. Similarly, this can also be done to supplement workers' compensation benefits.

Employer Notice Requirements

Every employer covered by the FMLA is required to post a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act. Covered employers must post a general FMLA notice even if they do not have FMLA-eligible employees. Employers may provide the general FMLA notice describing benefits and leave to their employees via employee handbooks or policies. Employers that do not have an employee handbook or policies must provide FMLA notice to each employee when he/she is hired.

If a significant portion of an employer's staff is not literate in English, the employer is obligated to provide the general notice in a language in which the employees are literate. Employers may satisfy their posting requirements through an electronic posting, as long as the posting otherwise meets the regulatory requirements. However, paper notices must be posted in locations readily visible to employees who do not have access to company computers and to applicants who do not apply via electronic means. Thus, electronic-only posting is not permitted unless all employees and applicants have access to electronic information.

Employee Notice Requirements

Employees must give at least 30 days' notice when the need for FMLA leave is foreseeable. When leave is unforeseeable, employees' notice must be given as soon as practicable. This also applies when the leave is foreseeable but 30 days' notice is not practicable. However, employees who provide less than 30 days' notice may be required by their employer to explain why it was not practicable to do so.

Where an employee becomes aware of the need for FMLA leave less than 30 days in advance, the regulations assume it is "practicable" for the employee to provide notice of the need for leave either the same day or the next business day, absent emergency situations. Employers may require that employees requesting FMLA leave comply with usual and customary notice and procedural requirements. Such requirements may include providing written notice of the following with respect to the leave: the reasons, the anticipated start, and the duration of the leave. Employers may also require that employees contact a specific individual to request leave.

The regulations make clear that employees must specifically reference the qualifying reason for leave or the need for FMLA leave when seeking leave for an FMLA-qualifying reason for which their employers have previously provided FMLA-protected leave.

What if a Husband and Wife Employed by the Same Employer

Where a husband and wife are employed by the same employer, they are only entitled to a total of 12 work weeks of FMLA leave if the leave is taken for the birth, adoption, or placement of a child in foster care, or to care for a sick parent. However, employers are not permitted to aggregate the workweeks of spouses who need time off for their own serious health conditions, or to care for a sick spouse or a child.

Supporting Documentation

An employer may require that a request for FMLA leave be supported by a certification provided by the health care provider of the employee or of the son, daughter, spouse or parent of the employee.

Employers are required to give employees notice of the certification requirement and the consequences of failing to provide sufficient documents of certification. Generally, an employee's certification is sufficient if it identifies the following:

(1) the date that the serious health condition began;

(2) the probable duration of the serious health condition;
(3) the medical facts within the knowledge of the health care provider; and
(4) a statement that the employee is unable to perform the duties of his/her position.

Even if the employee signs a waiver enabling the employer to speak with a health care provider, it is still the employee's responsibility to provide the employer with complete and sufficient certification, and failure to do so may result in the denial of FMLA leave. Further, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official to communicate with the employee's health care provider. Under absolutely no circumstances may the employee's direct supervisor contact the employee's health care provider.

Enforcement

It is unlawful under the FMLA for an employer to interfere with, deny or restrain any right provided under the FMLA. An action for damages for an FMLA violation may be brought in any federal or state court of competent jurisdiction by or on behalf of the employee alleging the violation. It is also possible to state a claim of retaliation under the FMLA where a plaintiff can show that an employer discharged the plaintiff for exercising his/her rights under the FMLA.

An employer will be held liable if it is shown that an employee was terminated for exercising his/her rights under the FMLA. However, the FMLA does not protect ineligible employees who improperly attempt to invoke their right to protection from retaliation.

Recordkeeping Requirements

An employer is required to preserve records pertaining to its obligations under the FMLA for a minimum of three years. The DOL may not require any employer to submit its books and records more than once over any 12-month period unless the DOL has reasonable cause to believe that a violation exists.

Records kept in accordance with the FMLA must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA-eligible employees (available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under state law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under the FMLA, if in writing, and copies of all general and specific written notices given to employees as required under the FMLA and these regulations (see Sec. 825.301(b)). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leave.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee regarding the reasons for the designation and for the disagreement.

Any records regarding medical certifications pursuant to the FMLA must be maintained in separate files and treated as confidential medical records.

Returning After the Leave Period Expires

After a period of FMLA leave expires, the employee must be restored to the same position or to a position that is equivalent and offers the same benefits, pay, and terms and conditions.

There is an exception, however, for certain highly compensated employees. If restoration to the same or an equivalent position would cause substantial or grievous economic injury to the operations of the employer, the employer may deny restoration to the same or equivalent position, provided that the employer gives notice to the employee when the employer determines that such injury would occur. This exception applies to a salaried employee who is among the highest-paid 10% of the employees employed by the employer within a 75-mile radius.

The new FMLA regulations clarify that an employee's right to FMLA leave and job restoration are not affected by light-duty assignments. Essentially, the employee's right to job restoration is on hold during the period of time the employee performs a light-duty assignment. To be clear, time spent performing light duty does not count toward FMLA entitlement. At the conclusion of the voluntary light-duty assignment, the employee has the right to be restored to the position he or she held at the time the employee's FMLA leave commenced, or the employee may use the remainder of his/her FMLA leave entitlement.

Health Benefits during the Leave

The employer must maintain health coverage for the employee under any group plan under the same terms and conditions as if the employee had continued in employment for the duration of the leave. If, however, the employee fails to return from leave, the employer may recover the premium paid for maintaining coverage for that employee for the duration of the leave. This does not apply if the employee fails to return from leave due to the continuance,

recurrence or onset of a serious health condition that would entitle the employee to leave under the FMLA.

If the employer provides a benefit program that is more generous than the FMLA, the employer must observe that program. An employer's benefit program cannot diminish rights allowed under the FMLA. Further, if the employer provides rights more generous than the FMLA, the employer is not required to extend as additional rights those afforded by the FMLA. If an employee takes unpaid leave or fails to designate a period of leave as FMLA leave, the employee is not entitled to an additional 12 weeks of leave under the FMLA.

The FMLA does not supersede any state or local law that provides for greater family or medical leave rights.

Military-Related FMLA Leave

The National Defense Authorization Act of 2008 ("NDAA") amended the FMLA to extend leave to families of servicemembers. The NDAA provides eligible employees working for covered employers with two important rights related to military service: (1) "qualifying exigency leave" and (2) "military caregiver leave."

Qualifying Exigency Leave

Eligible employees are entitled to up to 12 weeks of leave for "a qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty, or has been notified of an impending call to active duty status in support of a contingency operation. The regulations define the term "qualifying exigency" to include the following situations: (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities to address other events which arise out of the covered servicemember's active duty or call to active duty status, provided the employer and employee agree that such leave shall qualify as an exigency and agree to both the timing and duration of such leave. Also important, a new optional WH384 form has been adopted to allow employees to self-certify the reasons to support their claims of qualifying exigencies.

Military Caregiver Leave

In order to be eligible for FMLA leave to care for a covered servicemember, an employee must be the spouse, son, daughter, parent, or next of kin of the covered servicemember who is recovering from a serious illness or injury sustained in the line of duty on active duty. This "military caregiver leave" is available during a single 12-month period, during which an eligible employee is entitled to a combined total of 26 weeks of all types of FMLA leave. As evidenced, for this type of leave, the legislation expands the definition of "covered employee" to include "next of kin" of the covered servicemember.

A son or daughter of a covered servicemember is defined as any biological, adopted or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood *in loco parentis*, and who is of any age. A parent of a covered servicemember is defined as any biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the covered servicemember. The next of kin of a covered servicemember is the nearest blood relative other than the spouse, parent, son, or daughter, in the following order of priority:

- ☐ blood relatives who have been granted legal custody
- ☐ brothers and sisters
- ☐ grandparents
- ☐ aunts and uncles
- ☐ first cousins

Under the regulations, servicemembers are permitted to specifically designate – in writing – another blood relative as his/her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. An employer is permitted to require an employee to provide confirmation of family relationship to the covered servicemember, which may be done by a simple statement by the employee, a child's birth certificate, or a court document.

Special Considerations for Schools

The FMLA contains special rules with respect to schools. First, the FMLA broadly applies to all schools. Again, regardless of whether an organization employs fewer than 50 people, the FMLA applies to: (1) any "local educational agency;" and (2) any private elementary or secondary school.

Next, instructional employees' rights are more limited with respect to intermittent leave or leave on a reduced schedule. When instructional employees request intermittent FMLA leave that is foreseeable and would require employees to be on leave for greater than 20% of the total number of working days in the period during which the leave would be extended, the agency or school may require such employees to either: (1) take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment; or (2) transfer temporarily to an available alternative position for which the employee is qualified but that has equivalent pay and benefits and better accommodates recurring periods of leave.

Moreover, school employees' rights are also limited with respect to taking FMLA leave near the conclusion of an academic term. If an employee's leave begins more than five (5) weeks before the end of an academic term, the agency or school may require the employee to continue taking leave until the end of such term if the leave is at least three (3) weeks long; and the return to work would occur during the three (3) week period before the end of an academic term.

If an employee's leave begins less than five (5) weeks before the end of an academic term because of:

- ☐ the birth of a son or daughter and in order to care for such son or daughter;
- ☐ the placement of a son or daughter with the employee for adoption or foster care;
- ☐ the serious health condition of a spouse, son, daughter, or parent; or
- ☐ the need to care for a covered servicemember;

the agency or school may require such an employee to continue taking leave until the end of such term if the leave is more than two (2) weeks long and the return to work would occur during the two (2) week period before the end of a term.

And, if an employee's leave begins less than three (3) weeks before the end of an academic term because of:

- ☐ the birth of a son or daughter and in order to care for such son or daughter;
- ☐ the placement of a son or daughter with the employee for adoption or foster care;
- ☐ the serious health condition of a spouse, son, daughter, or parent; or
- ☐ the need to care for a covered servicemember;

the agency or school may require such an employee to continue taking leave until the end of such term if the leave is more than five (5) days long.

With respect to the right restoration of an equivalent employment position after taking FMLA leave, employees of local educational agencies and primary elementary and secondary schools' rights are limited to established school board policies and practices, private school policies and practices, and collective bargaining agreements.

Finally, local educational agencies and private elementary and secondary schools may be entitled to a reduction in liability for violating the FMLA, if a court determines that there was a reasonable ground for thinking that an act or omission was not an FMLA violation.

Common FMLA Forms

In order to assist employers in implementing the new FMLA regulations, the DOL updated its optional forms to reflect the changes. Forms used to administer the new Military Family Leave Amendments are available online at https://www.dol.gov/whd/fmla/forms.htm. The optional FMLA forms include:

(1) WH-380E: New Certification of Health Care Provider for Employee's Serious Health Condition; WH-380F: New Certification of Health Care Provider for Family Member's Serious Health Condition;

(2) WH-381: Notice of Eligibility and Rights & Responsibilities;

(3) WH-382: Designation Notice;

(4) WH-384: Certification of Qualifying Exigency for Military Family Leave; and

(5) WH-385: Certification for Serious Injury or Illness of a Covered Servicemember for Military Family Leave.

The DOL also updated its FMLA poster, WH-1420: Notice to Employee of Rights Under FMLA, which is available online at:
https://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

USERRA is a federal employment law designed to provide protections for veterans returning from duty or training in the armed forces. It is administered by the U.S. Department of Labor's Veterans' Employment and Training Service (VETS). Subject to certain rules and exceptions, USERRA guarantees an employee returning from military service or training the right to be reemployed at his or her former job (or as nearly comparable a job as possible) with the same benefits.

What employers are covered under this law?

Any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities are covered under the law. There are no exceptions to coverage for the type of organization (*i.e.*, charitable or government) or for small employers. Therefore, USERRA applies to virtually all employers, regardless of size, including the Federal Government.

What employees are covered under this law?

Any person employed by an employer. This includes any person who is a citizen, national or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States. It also applies to temporary, part-time, probationary, and seasonal employees.

What does the law provide?

The law provides reemployment rights to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty and active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty

- Absence from work for an examination to determine a person's fitness for any of the above types of duty
- Funeral honors duty performed by National Guard or Reserve members
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Health and Human Services, when activated for a public health emergency, and approved training to prepare for such service (added by Pub. L. 107-188, June 2002). See Title 42, U.S. Code, Section 300hh-11(d).
- To qualify for USERRA's protections, a servicemember must be available to return to work within certain time limits. These time limits for returning to work depend (with the exception of fitness-for-service examinations) on the duration of a person's military service.

The requirements for reemployment of covered employees vary with respect to their length of service:

Service of 1 to 30 Days

- The person must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an 8-hour rest period. For example, an employer cannot require a servicemember who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning.
- If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible after the expiration of the 8-hour period.
- The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

Service of 31 to 180 Days

- An application for reemployment must be submitted to the employer no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible on the next day when submitting the application becomes possible.

Service of 180 or More Days

- An application for reemployment must be submitted to the employer no later than 90 days after completion of a person's military service.

What documentation may an employer request from a covered employee?

An employer has the right to request that a person who is absent for a period of service of 31 days or more provides documentation showing that:

- the person's application for reemployment is timely;
- the person has not exceeded the five-year service limitation; and
- the person's separation from service was other than disqualifying under Section 4304.

What position must a covered employee be restored to?

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service:

Service of 1 to 90 Days

- A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:
    - (A) In the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer; or
    - (B) in the job in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.
    - If the employee cannot become qualified for either position described in (A) or (B) above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person must be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is qualified to perform, with full seniority.

Service of 91 or More Days

- The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:
    - (A) In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer; or
    - (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

- If the employee cannot become qualified for either position described in (A) or (B) above: in any other position that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority.

"Escalator" Position

- The escalator principle requires that each returning servicemember be reemployed in the position the person would have occupied with reasonable certainty if the person had remained continuously employed, with full seniority.
- The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, depending on economic circumstances, reorganizations, layoffs, etc., the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status. In other words, the escalator can move up or down.

What if the covered employee has become disabled while in military service?

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in military service:

- The employer must make reasonable efforts to accommodate a person's disability so that the person can perform the duties of the reemployment position.
- If, despite reasonable accommodation efforts, the person is not qualified for the position due to his or her disability, the person must be reemployed in a position of equivalent seniority, status, and pay, to the escalator position. The employee must be qualified to perform the duties of this position or be able to become qualified to perform them with reasonable efforts by the employer.
- If the employee cannot become qualified for the position, the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position described in the second bullet in terms of seniority, status, and pay. Such a position may be a higher or lower position, depending on the circumstances.

What specific rights and benefits do covered employees have?

Seniority Rights

- Reemployed servicemembers are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.
- A right or benefit is seniority-based if it is determined by or accrues with length of employment. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is made available without regard to length of employment.

Rights Not Based on Seniority

- During a period of service, the employees must be treated as if they are on a furlough or leave of absence. Consequently, during their period of service they are entitled to participate in any rights and benefits not based on seniority that are available to employees on comparable nonmilitary leaves of absence, whether paid or unpaid. If there is a variation in benefits among different types of nonmilitary leaves of absence, the servicemember is entitled to the most favorable treatment so long as the nonmilitary leave is comparable.
- Employees are entitled not only to non-seniority rights and benefits available at the time they left for military service, but also those that become effective during their service and that are provided to similarly situated employees on furlough or leave of absence.

Waiver of Rights

- If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority. At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. The employer bears the burden of proving that the person knowingly waived entitlement to the specific rights and benefits.
- A notice of intent not to return can waive only leave-of-absence rights and benefits. It cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights after service.

Funding of Benefits

- Servicemembers may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence are so required.

Protection from Discharge

- Under USERRA, a reemployed employee may not be discharged without cause: (1) For one year after the date of reemployment if the person's period of military service was for 181 days or more; (2) For 180 days after the date of reemployment if the person's period of military service was for 31 to 180 days.
- Cause for discharge may be based on conduct or the application of legitimate nondiscriminatory reasons. Persons who serve for 30 or fewer days are not protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

Protection from Discrimination and Retaliation

Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- Hiring
- Promotion
- Termination
- Benefits

The law prohibits discrimination against past members, current members, and persons who apply to be a member of any of the branches of the uniformed services.

What notice requirements do employers have?

Employers, regardless of size, are required to provide to persons entitled to the rights and benefits under USERRA, a notice of their rights, benefits and obligations. Employers may provide the notice "Your Rights Under USERRA" by posting it where employee notices are customarily placed. Employers are also free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (*e.g*., by handing or mailing out the notice, or distributing the notice by e-mail).

THE FAIR LABOR STANDARDS ACT

On Tuesday, November 22, 2016, the U.S. District Court for the Eastern District of Texas entered an order enjoining the U.S. Department of Labor from implementing and enforcing the new DOL Overtime Rule that was to take effect on December 1, 2016. Per this rule, employees need to earn at least $913/week or $47,476/year in order to be considered an exempt employee, even if the employee's duties qualify as executive, administrative or professional. The rule further provides that these new salary amounts will increase every three years effective January 1, 2020. The Texas court's order essentially invalidates the Overtime Rule. The court's decision has been appealed, and that appeal is pending, *State of Nevada, et al v. LABR, et al*, No. 16-41606 (5th Cir.).

The Texas court's decision, however, does not impact exempt and non-exempt classifications that employers make due to the nature of the duties performed by employees. Thus, for those employers who have reclassified exempt positions to non-exempt positions based upon the duties performed, those reclassifications are not impacted by the court's decision and should remain in place.

What is the FLSA

The FLSA provides an exemption from the minimum wage and overtime requirements for the executive, administrative and professional staff of an organization. The FLSA was enacted in 1938 to ensure employees were adequately compensated for their work. The law established a 40-hour work week, a minimum hourly wage and a requirement that employers pay time and a half for all hours over 40 worked per week. The FLSA also requires employers to maintain time sheets for its nonexempt employees, to provide equal pay for equal work and to post FLSA signage in the workplace. The Department of Labor (the "DOL") enforces the FLSA and adopts rules, such as the Overtime Rule, to implement the FLSA.

Liability under the FLSA

When Congress enacted the FLSA, it wanted employers to take the law seriously; therefore, the law includes provisions that make violating the FLSA costly for employers. Employers who do not pay a nonexempt employee the minimum wage, or overtime, or do not maintain time sheets for their nonexempt employees are subject to liability for back pay, an equal amount for liquidated damages, civil penalties in some cases, and payment of the employee's attorneys' fees. Damages can be assessed for up to three years of violations. Moreover, the FLSA exemptions are very narrowly construed, which means if an employer misclassifies an employee as exempt, the employer can be subject to liability for unpaid overtime and other damages. Therefore, properly classifying your employees as exempt or nonexempt is critical to avoiding liability under the FLSA.

Who is an Exempt Employee

In most cases, an employee is considered exempt if he/she meets all of the following three tests:

Salary Basis Test - An exempt employee must be paid a predetermined and fixed salary. Because of this test, an exempt employee can be expected to work more than eight hours a day to complete their tasks; on the other hand, an exempt employee is not to be docked pay if he works less than a full day. Over the years, it has become customary for many employers to overlook both the "duties" test and the "salary level" test for purposes of determining whether an employee is exempt or not and instead base an exempt determination on whether or not an employee is compensated by salary or by an hourly rate. Employers will often say an employee is exempt because they receive a salary. The "salary basis" test is only one of three that must be satisfied in order for an employee to be considered an exempt employee.

Duties Test - The DOL, and the Texas court's order, has not changed the basic "duties" test for determining whether an employee is exempt or nonexempt. Consequently, the following tests still apply to determine whether someone's duties constitute executive, administrative or professional duties:

- An executive employee must have as his/her primary duty the management of at least a subdivision of an enterprise, which includes the supervision of at least two employees and the authority to make hiring and firing decisions;
- An administrative employee must have as his/her primary duty office or non-manual work directly related to the operations of the employer or its customers, and must have the responsibility to exercise discretion and independent judgment with respect to significant business matters; and
- A professional employee must have as his/her primary duty work requiring specialized knowledge acquired through prolonged education and the work must require the consistent exercise of discretion and judgment. Skilled computer employees--computer systems analysts,

programmers and software engineers--are considered professional employees.

For purposes of determining whether an employee meets one of these three tests, the job description for the position the employee is employed in is the critical factor. Make sure you have a job description for each of your employees that accurately reflect the duties, skills and minimum education required for the position in which they are employed. Make sure job titles and job descriptions match up—if you have three administrative assistants, all three should have the same job description. Also, if one of your three administrative assistants is classified as nonexempt, all three should be classified as nonexempt. If your three administrative assistants are classified differently because they have different duties and responsibilities, then they should have different job titles with job descriptions that accurately match the differences in their responsibilities.

Salary Level Test - Until the new DOL rule, employers tended to overlook this test, which was easy to do because the salary level was so low--$455 per week or $23,660 per year – and most exempt employees earned this much. The Texas court's order enjoining the new Overtime Rule means that the existing salary levels of $455/week or $23,660/year must be satisfied if an employee who is exempt based upon his/her duties is to be classified as exempt from the overtime requirements of the FLSA.

Special Rules for Certain Categories of Employees

"Outside Salesperson" Exception to the Salary Level Test: Outside salespeople are exempt employees regardless of how much they earn. To qualify as an outside salesperson, the employee must regularly and consistently work off-site and must have as his/her primary duty the responsibility for making sales or securing orders for services or the use of facilities.

"**Inside Salespeople":** Inside sales personnel are nonexempt employees based upon their job duties. If you are not already paying your inside sales staff on an hourly basis, subject to overtime and minimum wage requirements, you should be doing so.

Commissioned Employees/Retail Sales and Services Establishments: Commissioned employees are non-exempt employees; however, if your organization is a retail sales or services establishment, your commissioned employees are not subject to the overtime requirement as long as at least 50% of their compensation is from commission and their regular rate of pay is more than 1 ½ times the minimum wage. Remember, tips can never be considered commissions.

Agricultural employees: Employees who are employed in agriculture are non-exempt employees; however, while they must be paid minimum wage, they are exempt from the overtime pay provisions, although they do not need to be paid time and a half for hours over 40 worked. This exemption applies on a workweek basis, meaning that an employee who performs any activities that do not come within the definition of agriculture is not exempt from the overtime requirement in that workweek. Agriculture is defined in the FLSA to include "farming in all its branches . . . [including] the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the

raising of livestock, bees, fur-bearing animals, or poultry [primary agriculture], and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market [secondary agriculture]." Agriculture does not include operations performed off a farm if performed by employees employed by someone other than the farmer whose agricultural products are being worked on.

Highly Compensated Employees: The Final Rule also increases the salary level for a "highly compensated employee" to $134,004. Highly compensated employees are exempt from the overtime requirements if they meet the following requirements: 1) They must receive at least $47,476/year on a salary or fee basis while the balance of the annual salary amount can be made up from commissions, nondiscretionary bonuses, and other nondiscretionary compensation (but excludes the value of fringe benefits); 2) They must meet the minimum standards for the "duties" test, meaning that they must customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee; and 3) They must perform as their primary duties office or non-manual work.

Like outside salespeople, **bona fide teachers and academic administrative personnel** are exempt personnel regardless of the amount they earn.

- Bona fide teachers are employees: 1) whose primary duty is to teach, tutor, instruct or lecture; and 2) are employed and engaged in these primary duties in an educational establishment. An educational establishment is defined as an elementary or secondary school system, an institution of higher education or other educational institution. Preschool and kindergarten teachers can qualify as bona fide teachers if they are employed by an institution that qualifies as a school.

- Academic administrative personnel include school superintendents, principals and vice-principals, college and university department heads, academic counselors and advisors and employees with similar, academic-related responsibilities. To be exempt however, employees must be paid on a salary basis at least equal to the entrance salary for teachers in the same educational institution. Employees in educational institutions who perform nonacademic related duties, such as work relating to general business operations, facilities management and work relating to the health of students and staff are not considered academic administrative personnel. These employees, in order to be considered exempt, must meet the definition of an executive, administrative or professional employee and must also earn more than $47,476/year.

Special Rules for Ministers and Nonprofits: Priests, deacons and religious are not subject to the FLSA in connection with jobs they perform pursuant to their religious obligations in schools, hospitals and other institutions operated by their diocese or religious order. Also, some nonprofit organizations may not be required to comply with the FLSA, depending upon the nature of their activities; however, whether or not a particular nonprofit can claim an exclusion from the FLSA and the new Final Rule must be determined on a case-by-case basis.

Importance of Time Sheets: The law requires you to maintain accurate time records for your nonexempt employees. Some states require you to maintain them for your exempt employees too. If you do not use time sheets, now is the time to start.

FLSA Minimum Wage Requirements

Employees protected by the FLSA must receive a minimum wage not less than $7.25 per hour for the first 40 hours of work in a work week. In addition, the following states have higher minimum wages (as of January 1, 2016) than the FLSA requires:

☐ Alaska:	$9.75	☐ Montana:	$8.05
☐ Arizona:	$8.05	☐ Nebraska:	$9.00
☐ Arkansas:	$8.00	☐ Nevada:	$8.25
☐ California:	$10.00	☐ New Jersey:	$8.38
☐ Colorado:	$8.31	☐ New Mexico:	$7.50
☐ Connecticut:	$9.60	☐ New York:	$9.00
☐ Delaware:	$8.25	☐ Ohio:	$8.10
☐ DC:	$10.50	☐ Oregon:	$9.25
☐ Florida:	$8.05	☐ Rhode Island:	$9.60
☐ Hawaii:	$8.50	☐ South Dakota:	$8.55
☐ Illinois:	$8.25	☐ Vermont:	$9.60
☐ Maine:	$7.50	☐ Washington:	$9.47
☐ Maryland	$8.25		
☐ Massachusetts:	$10.00		
☐ Michigan:	$8.50		
☐ Minnesota:	$9.00		
☐ Missouri:	$7.65		

Moreover, the following states currently have $7.25 minimum wage laws applicable to employees who are not protected by the FLSA:

☐ Idaho	☐ North Carolina
☐ Indiana	☐ North Dakota
☐ Iowa	☐ Oklahoma
☐ Kansas	☐ Pennsylvania
☐ Kentucky	☐ Texas
☐ New Hampshire	☐ Utah
	☐ Virginia
	☐ West Virginia
	☐ Wisconsin

The following states currently have lower minimum wage laws applicable to employees who are not protected by the FLSA:

☐ Georgia: $5.15	☐ Wyoming: $5.15

Finally, the following states currently have no additional minimum wage laws:

☐ Alabama ☐ Mississippi ☐ Tennessee	☐ Louisiana ☐ South Carolina

Deductions

The FLSA prohibits deductions from wages for the cost of any items which are considered primarily for the benefit or convenience of the employer if the deduction would reduce the employee's earnings below the required minimum wage or overtime compensation.

Some examples of items which would be considered to be for the benefit or convenience of the employer are tools used in the employee's work, damages to the employer's property by the employee or any other individuals, financial losses due to clients/customers not paying bills, and theft of the employer's property by the employee or other individuals. Employees may not be required to pay for any of the cost of such items if, by so doing, their wages would be reduced below the required minimum wage or overtime compensation. This is true even if an economic loss suffered by the employer is due to the employee's negligence.

Hours Worked

Both minimum wage and overtime pay are based on the number of hours the employee works in a week. The calculation of hours worked often depends on what activities constitute "work" by the employee. The employee is "working" within the meaning of the FLSA when he/she is engaged in physical or mental exertion that is controlled or required by the employer and is necessary for the business.

The following activities <u>are generally included</u> in the calculation of hours worked:

- ☐ time spent changing clothes or washing up before or after work, as long as such activities are required by the nature of the employee's job;
- ☐ travel time, only if the employee is transporting equipment to a job site;
- ☐ on-call time that is primarily for the benefit of the employer;
- ☐ meal breaks, if the employee's time is spent primarily for the benefit of the employer; and
- ☐ coffee breaks of less than 10 minutes.

However, the following activities are <u>generally not included</u> in the calculation of hours worked by the employee:

- ☐ time spent traveling to and from the actual place of work;
- ☐ on-call time that allows the employee to pursue personal interests;

- ☐ bona fide meal periods of 30 minutes of more, if the time is spent primarily for the benefit of the employee; and
- ☐ voluntary meetings or training not related to the employee's work and held outside working hours.

When calculating hours worked, employers should consider time that employees spend on-call. If an employee is required to remain on-call on the employer's premises or so close that the employee cannot use time effectively for his or her own purposes, the employee is working while on-call. In that case, the time the employee is on-call is counted as hours of work that must be paid. On the other hand, if an employee is merely required to carry a paging device or leave word with company officials regarding where he or she may be reached, on-call time should not be considered hours worked unless an employee actually responds to a call back to duty. However, if such calls are so frequent that an employee is not really free to use the off-duty time effectively for the employee's own benefit, the intervening periods as well as the time spent in responding to calls would be counted as compensable hours of work.

Bona fide meal periods should not be counted as compensable hours worked. Ordinarily, 30 minutes or more is long enough for a bona fide meal period. Meal periods of less than 30 minutes during which an employee is relieved for purposes of eating a meal may be bona fide – and thus not hours worked – when certain special conditions are present. Such special conditions include only sporadic and minimal work-related interruptions to the meal period, sufficient time for employees to eat a regular meal at a time of day or shift when meals are normally consumed, an agreement between the employees and employer that a meal period of less than 30 minutes is sufficient to eat a regular meal, and applicable state or local laws do not require lunch periods in excess of the shortened meal period. The employee is not to be considered relieved if the employee is required to perform any duties, whether active or inactive, while eating. For example, an employee who is required to eat at a desk in order to answer the telephone is considered working while eating. It is not necessary that an employee be permitted to leave the premises if the employee is otherwise relieved from duties during the meal period. Coffee breaks and time for snacks are typically periods of short duration (five to 20 minutes) and must be counted as compensable hours worked.

Time that employees spend in meetings, lectures or training is considered hours worked and must be paid unless: (1) attendance is outside regular working hours; (2) attendance is voluntary; (3) the course, lecture or meeting is not job-related; and (4) the employee does not perform any productive work during attendance. If employees, by their own initiative, attend independent school, college, or independent trade school after hours, the time is not considered hours worked for their employer, even if the courses are related to their jobs.

In addition, time spent traveling for work should be taken into consideration when calculating hours worked. Compensable travel includes travel between job sites during the normal work day. If an employee is required to report to a meeting place to receive instructions, perform other work there, or pick up equipment or tools, the travel from the designated meeting place to the workplace is part of the day's work and must be counted as hours worked. For example, if an employee normally finishes his work at 5:00 p.m. and is sent to another job which he finishes at 8:00 p.m. and is required to return to his employer's premises by 9:00 p.m., all of the time is working time. However, if the employee goes home instead of returning to his

employer's premises, the travel after 8:00 p.m. is home-to-work travel and does not constitute hours worked. Special rules apply when an employee travels away from his or her home community.

Travel for a special one-day assignment in another city is not ordinary home-to-work travel. Because it is performed for the employer's benefit and at the employer's request, it is like travel that is all in the day's work. The normal home-to-work travel time may still be deducted. When an employee travels away from home and stays overnight, the travel time is work time when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-work days. For example, if an employee regularly works from 9:00 a.m. to 5:00 p.m. Monday through Friday, the travel time during these hours is work time on Saturday and Sunday as well as on the other days. Regular meal period time is not counted. As an enforcement policy, the Wage and Hour Division will not consider as work time the time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

In *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014), former hourly employees brought a class action against their previous employer, alleging violations of the Fair Labor Standards Act (FLSA) and Nevada labor laws. The employees claimed that the company required them to pass through a security checkpoint prior to leaving work. The screening process could take up to 25 minutes and the employees were not paid for this time. The FLSA precludes compensation for activities that are "preliminary" or "postliminary" to the "principal activity or activities" that the employee "is employed to perform." But preliminary and postliminary activities are still compensable if they are "integral and indispensable" to an employee's principal activities. The issue for the Court was to determine whether time spent in security screenings was "integral and indispensable" to the employees' principal activities, and therefore compensable. The Supreme Court held that the time the employees spent going through security screenings at the end of the day was a non-compensable "postliminary" activity under the FLSA. The Court found that the screenings were not "integral and indispensible" to principal activities of packaging shipments.

FLSA Child Labor Requirements

The FLSA provides for minimum wages as well as maximum working hours regulating child labor. The FLSA defines "child" as any worker who is under the age of 18. Those who are under the age of 18 are prohibited from working certain types of jobs. For example, children under the age of 13 can only babysit, deliver newspapers, and work as actors or performers. Teenagers between the ages of 14 and 15 can work in offices, grocery stores, retail stores, restaurants, movie theaters, and amusement parks. Moreover, the hours during which 14 to 15-year-olds can work are limited to the hours between 7:00 a.m. and 7:00 p.m. Hours are extended to 9:00 p.m. from June 1 through Labor Day. Fourteen to 15-year-olds are also restricted from working more than three hours on school days, 18 hours in school weeks, eight hours on non-school days, and 40 hours in non-school weeks. Teenagers between the ages of 16 and 17 can do any work so long as it has not been declared hazardous. Teenagers age 18 and older have no age-related job restrictions.

According to the new Department of Labor penalty structure, employers who violate the FLSA's child labor provisions for children between the ages of 12 and 13 will face a penalty of $6,000.00-$11,000.00 per violation, and for children under age 12, a penalty of $8,000.00 - $11,000.00 per violation.

These are the minimum requirements imposed by the FLSA. Each state has its own additional requirements, which may further limit the ability to employ minors. For example, many states have minimum rest period requirements.

FLSA Recordkeeping Requirements

The FLSA requires covered employers to keep certain records for all non-exempt employees, including records of the employees' personal information, hours worked, and payments. An employer must keep these records for either a two- or three-year period, and it must make the records available for inspection by employees.

An accurate record of the hours worked each day and total hours worked each week is critical to avoiding compliance problems. Employers may use any timekeeping method they choose. For example, they may use a time clock, have a timekeeper keep track of employee work hours, or tell their workers to write their own times on the records. Any time plan is acceptable so long as it is complete and accurate.

Payroll records, collective bargaining agreements, sales and purchase records must be preserved for at least three years. Records on which wage computations are based should be retained for two years. Such records include timecards, piecework tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages.

- ☐ The following is a list of the basic records that must be kept: employee's full name and social security number;
- ☐ employee's address, including zip code;
- ☐ employee's birth date, if younger than 19;
- ☐ employee's sex and occupation;
- ☐ time and day of week when employee's work week begins;
- ☐ hours worked each day;
- ☐ total hours worked each work week;
- ☐ basis on which employee's wages are paid (*e.g.*, "$9 an hour," "$420 a week," "piecework");
- ☐ regular hourly pay rate;
- ☐ total daily or weekly straight time earnings;
- ☐ total overtime earnings for the workweek;
- ☐ all additions to or deductions from the employee's wages;
- ☐ total wages paid each pay period; and
- ☐ date of payment and the pay period covered by the payment.

The FLSA & The Equal Pay Act

The Equal Pay Act amendment to the FLSA prohibits an employer from discriminating against employees on the basis of sex. The Act requires that employers pay employees of each sex equal wages for equal work on jobs which require equal skill, effort, and responsibility, and which are performed under the same working conditions. However, an employer may make wage differentials based on seniority systems, merit systems and incentive production systems, or any factor other than sex.

State and Local Government Employees

When the FLSA was enacted in 1938, it did not apply to public entities. Congress extended coverage to entities in 1966, and the extension was eventually upheld in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985) *superseded by statute* in *Misewicz v. City of Memphis, Tenn*, 771 F.3d 332 (6th Cir. 2014). In *Garcia*, the Supreme Court held that Congress has the power under the Commerce Clause of the Constitution to extend FLSA coverage to state and local government employees. The Court overruled its previous decision in *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976), where it held that regulation of traditional government functions would violate the Tenth Amendment.

Although FLSA coverage can extend to state and local government employees without violating the Tenth Amendment, the states themselves, as well as state entities that are considered "arms of the state," are immune to FLSA lawsuits pursuant to the Eleventh Amendment. *Alden v. Maine*, 119 S. Ct. 2240 (1999). Moreover, state employees cannot sue their supervisors in their personal capacities in an attempt to subvert the Eleventh Amendment. *Luder v. Endicott*, 253 F.3d 1020 (7th Cir. 2001). In *Luder*, Wisconsin prison employees filed a lawsuit to recover back wages pursuant to the FLSA. The employees argued that their lawsuit was not against the state because they were technically suing prison supervisors in their personal capacities. The Seventh Circuit held that this was essentially "an effort at an end run around the Eleventh Amendment" because in reality, the money they were suing for would come from the state treasury. The Eleventh Amendment immunizes states from such suits brought under federal laws.

Factors that courts consider when determining whether a state entity is an arm of the state include: (1) whether payment of a judgment from the suit would come from the state treasury; (2) the status of the entity under state law; (3) the entity's degree of autonomy; (4) the degree of control the state exercises over the entity; (5) whether the entity deals with local or statewide concerns; (6) whether the entity has the authority to sue and be sued in its own name; and (7) whether the entity has the right to hold and use property. *Chisolm v. McManimon*, 275 F.3d 315, 323 (3d Cir. 2001); *Kitchen v. Upshaw*, 286 F.3d 179, 184 (4th Cir. 2000).

Some hospitals have been considered arms of the state for Eleventh Amendment purposes. *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981). On the other hand, school districts are generally not considered "arms of the state" for Eleventh Amendment purposes. *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555 (10th Cir. 1992). Thus, state entities should not assume they are immune from FLSA lawsuits under the Eleventh Amendment.

Class Actions under the FLSA

Class actions under the FLSA have become increasingly common. Section 216(b) provides:

> [A]n action to recover the liability prescribed … may be maintained against any employer (including a public agency) in any Federal or State Court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Therefore, in class actions under the FLSA, in contrast to Rule 23 federal class actions, a plaintiff does not become a part of the lawsuit and is not bound by the outcome of the case unless the plaintiff affirmatively opts into the class by filing written consent with the court.

Arbitration Clauses

Employers commonly have employees enter into arbitration agreements in which the employee agrees to waive any right to bring an FLSA action against the employer in favor of settling the dispute through arbitration. In order for such agreements to be valid, they must contain a clear and unmistakable waiver of the employee's right to a judicial forum for an FLSA claim. *O'Brien v. Town of Agawam,* 350 F.3d 279 (1st Cir. 2003).

EQUAL PAY ACT

The Equal Pay Act ("EPA"), 29 U.S.C.A. § 206(d), is a section contained within the Fair Labor Standards Act ("FLSA"). The EPA was originally enforced by the U.S. Department of Labor, with jurisdiction being transferred to the EEOC in 1979.

The EPA prohibits discrimination on the basis of sex in the payment of wages or benefits. The employees being compared must do equal work on jobs which require equal skill, effort, and responsibility and which are performed under similar working conditions. The EPA is a "strict liability" form of Title VII (which forbids discriminatory differences in wages) because unlike in a Title VII case, an EPA plaintiff need not establish that the difference in pay is motivated by gender discrimination. Additionally, an employer who is paying a wage rate differential which violates the EPA may not, in order to comply with the EPA, reduce the wage rate of any employee. Employers found in violation of the EPA can be compelled to pay back pay, punitive relief, and liquidated damages if the violation is shown to be willful.

Definition of "Wages"

Wages include not only salary, but also health or other insurance, vacation or holiday pay, overtime pay, extra pay for hazardous work, profit sharing, expense accounts, bonuses, uniform cleaning allowances, hotel accommodations, use of company car, gas allowances and any other form of compensation.

Definition of "Employer"

The EPA applies to employers with two or more employees. The EPA also applies to state employers.

Pay Differentials

A differential in pay does not violate the EPA if it is pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex.

In order to show that a wage differential is justified by a seniority system, a merit system or a system which measures quantity and quality of production ("system defenses"), the employer must demonstrate that the system constitutes an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria. The employer must also show that the system has been communicated to employees and is applied uniformly to both sexes.

When asserting that a pay differential is based on a factor other than sex, the employer must show that there is a gender-neutral factor adopted for a legitimate business reason. When experience and education are offered as a justification for a wage differential, the employer must show that these factors are job-related qualifications for the position in question. It is not enough to show that there is a difference in experience or education; an employer must also show that certain experience or education is a specific job requirement.

It should be noted that both Title VII and the EPA bar religious educational institutions from providing greater benefits to "heads of households," where a "head of household" is defined as a single person or a married man. For example, in *EEOC v. Tree of Life Christian Schools*, 751 F. Supp. 700 (S.D. Ohio 1990), the court held that the employer could not award an extra allowance to all married male teachers with children, where the extra allowance was not also provided to married female teachers. Courts have held that adherence to religious principles does not satisfy the "basis other than sex" defense.

Stating a Claim

In order to state a claim for a violation of the EPA, a plaintiff must show that: (1) different wages are paid to employees of the opposite sex; (2) employees do equal work which requires equal skill, effort and responsibility; and (3) employees have similar working conditions. *Merrilat v. Metal Spinners, Inc.*, 470 F.3d 685 (7th Cir. 2006). A female plaintiff can do this by comparing herself to a male comparator. The plaintiff cannot compare herself to a hypothetical or composite male; she must make the comparison to a specific male comparator who is a co-worker of hers. The plaintiff must show that her comparison with the comparator is a valid one.

Defenses

Once a plaintiff establishes her *prima facie* case, the burden then shifts to the defendant to prove by a preponderance of the evidence that the wage differential is justified by: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) any other factor other than sex. Explanations for the wage differential of employees based on reasons other than gender are affirmative defenses for which the defendant bears the burden of proof.

If the employer establishes a legitimate, nondiscriminatory reason for the differential in pay, the employee must show that the employer's reason is pretextual. However, if the defendant fails to justify the wage differential under any of the four affirmative defenses set forth above, liability is automatically established. The plaintiff need not show intentional discrimination to establish liability under the EPA.

Claims under the EPA may also be brought under Title VII. The main difference is that for a claim under Title VII, the plaintiff must show intent to discriminate and show that the individual or group was paid less because of their sex.

Damages

A plaintiff may also recover back wages and/or liquidated damages in an amount equal to double the back pay award for willful violations. An employer can also be ordered to stop the unlawful practice, provide employment, reinstatement or promotion, and pay the plaintiff's attorneys' fees. However, unlike Title VII damages, front pay is not an available remedy under the EPA.

Statute of Limitations

Claims brought under the EPA must be filed within two years of the accrual of the cause of action. However, in cases where the employer has willfully violated the EPA, the limitations period is three years. Each discriminatory paycheck received by the employee constitutes a separate violation of the EPA, and a new cause of action accrues upon the employee's receipt of the discriminatory paycheck.

State Statutes

It has become increasingly common for states to pass legislation similar to the EPA in order to provide additional rights and securities to employees. For example, in 2003, Illinois enacted the Equal Pay Act of 2003. *See* 820 ILCS 112/1 *et seq.*

THE FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act ("FCRA"), as amended by the Fair and Accurate Credit Transactions Act ("FACTA"), is designed primarily to protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is accurate. 15 U.S.C. § 1681 *et seq*. The FCRA limits an employer's ability to conduct

background checks on applicants and current employees when such investigations are performed by an outside agency.

In 1997, Congress amended the FCRA and significantly increased the legal obligations of employers who use consumer reports. Congress took these steps due to concerns that inaccurate or incomplete consumer reports could cause applicants to be denied jobs or cause employees to be denied promotions unjustly. The 1997 amendments ensure that individuals are aware that: (i) consumer reports may be used for employment purposes; (ii) they agree to such use; and (iii) individuals are notified promptly if information in a consumer report results in a negative employment decision.

Who is Protected by the FCRA

The FCRA applies broadly to all employers, regardless of how few people they employ. However, the Act only protects employees who earn less than $75,000.00 per year. Moreover, the FCRA only protects employees with respect to external investigations. As such, it does not prohibit employers from asking questions in employment applications or during the interview process.

What is a Consumer Report

A consumer report contains information about an individual's personal and credit characteristics, character, general reputation, and lifestyle. To be covered by the FCRA, a report must be prepared by a consumer reporting agency ("CRA"). A CRA is a business that assembles such reports for other businesses.

According to the FCRA, the following cannot be reported:

- Bankruptcies after ten (10) years;
- Civil suits, civil judgments, and records of arrest, seven (7) years after date of entry;
- Paid tax liens after seven (7) years; and
- Any other negative information (except criminal convictions) after seven (7) years.

Key Provisions of the FCRA

<u>Written Notice and Authorization</u>

Before an employer can obtain a consumer report for employment purposes, it must notify the individual in writing – in a document consisting solely of this notice – that a report may be used. The individual's written authorization for the report to be completed must be obtained before requesting a report from a CRA.

Adverse Action Procedures

If the consumer report is relied on for an "adverse action" such as denying an individual a job, re-assigning an employee, terminating an employee, or denying a promotion, employers must:

> *Step 1*: Give the individual a pre-adverse action disclosure that includes a copy of the Individual's consumer report and a copy of "A Summary of Your Rights under the Fair Credit Reporting Act" – a document prescribed by the Federal Trade Commission, which has been amended effective January 1, 2013. These forms can be located and printed at www.gpo.gov.
>
> *Step 2*: After the adverse action, notice (orally, in writing, or electronically) must be given to the individual that the action has been taken. The notice must include: the name, address, and phone number of the CRA that supplied the report; a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his/her right to an additional free consumer report from the agency upon request within 60 days.

Certifications to Consumer Reporting Agencies

Before giving an employer an individual's consumer report, the CRA will require the employer to certify that it is in compliance with the FCRA and that it will not misuse any information in the report in violation of federal or state equal employment opportunity laws or regulations.

Employers seeking to institute pre-employment screenings that fall within the realm of the FCRA should consult with counsel familiar with these issues. Some of the requirements of the FCRA vary by industry.

Investigations Exempt from the FCRA

The Fair and Accurate Credit Transactions Act ("FACTA"), a law which amends the Fair Credit Reporting Act primarily addresses credit and identity theft issues. Nevertheless, Section 611 exempts investigations of suspected employee misconduct from the FCRA's onerous reporting and disclosure provisions, thereby making it easier for employers to investigate workplace misconduct. This provision became effective on March 31, 2004.

Employers are permitted to conduct misconduct investigations if they suspect job applicants or employees of:

- ☐ Misconduct relating to employment;
- ☐ A violation of federal, state or local laws or regulations;
- ☐ A violation of any preexisting employment policies; or
- ☐ Non-compliance with the rules of a self-regulated industry.

Despite all of this, employers should be aware that some restrictions still apply to third-party investigations of workplace conduct related to the covered activities. For example, if the investigation qualifies as exempt, employees must still be provided with a summary containing the communication upon which any adverse action was based. Employers may provide this summary after the adverse employment action has taken place. In order to protect the integrity of the investigation, the sources of the information and/or identities of witnesses need not be disclosed. This aspect of the law is intended to encourage witnesses to speak freely about the employee being investigated without fear of retaliation from that employee.

THE SARBANES-OXLEY ACT OF 2002

The Sarbanes-Oxley Act ("the Act") of 2002 was passed in order to address problems recently associated with corporate abuse and misconduct and for the purpose of protecting investors by improving the accuracy and reliability of corporate disclosures made pursuant to U.S. securities laws. 15 U.S.C. 7201. The Act has far-reaching effects on the corporate landscape and, as a result, also impacts employment-law-related issues.

Protection of Whistleblowers

Section 806 of the Sarbanes-Oxley Act provides protections for any employee of a publicly held corporation who discloses information concerning his or her company's fraudulent activity. The protections are afforded to employees who reasonably believe that the company is violating or has violated a federal securities law, a Securities and Exchange Commission rule, or any other federal law pertaining to corporate fraud against shareholders. The Act protects employees in disclosing such violations to federal investigators, Congress, or individuals within the corporation with the authority to investigate allegations of misconduct.

Any employee terminated or adversely treated in retaliation for making such disclosures may file a complaint against his or her employer with the Department of Labor. If the complainant can show that the disclosure of the information was a contributing factor to the adverse employment action, the Department of Labor will conduct a hearing. At the hearing, the employer has the burden of proving by clear and convincing evidence that the adverse employment action did not result from the protected conduct.

Requirements of the Act

Employers are prohibited from terminating or taking any adverse employment action against an employee on the basis of the employee reporting corporate misconduct.

Further, an employer is required to implement reporting procedures for employees to follow in reporting corporate misconduct. Specifically, the Act requires the employer to furnish a system allowing employees to submit anonymous and confidential disclosures concerning the company's accounting and/or auditing practices.

The Act also prohibits individuals from altering, destroying, mutilating, or concealing any record, document, or other object, or attempting to do so, "with the intent to impair the object's integrity or availability for use in an official proceeding." Any individual found to

violate this rule can face fines and/or imprisonment of up to 20 years. This prohibitory language is not restricted to accounting or auditing records and, therefore, would also apply to records concerning Equal Employment Opportunity Commission violations, employee lawsuits or any other employment matters. Therefore, under the Act, employers have an affirmative obligation to preserve and safeguard records concerning all employment matters.

Finally, the Act imposes a heightened duty on public corporations to provide notice to pension plan participants of "blackout" periods on sales of company stock. In situations where one half of the company's ERISA pension plan participants are prohibited from selling company stock for more than three consecutive days, the company must provide notice of the blackout period at least 30 days prior to the commencement of the blackout period. The company's directors and officers are also prohibited from selling or trading company stock during the blackout periods.

Arbitration Agreements

Employers commonly subject employees to arbitration agreements, which require the employees to settle any disputes with the employer in arbitration. It is permissible for an employer to require its employees to submit claims under the Sarbanes-Oxley Act to arbitration.

Filing a Claim

The Department of Occupational Safety and Health Administration ("OSHA") is responsible for enforcing the Sarbanes-Oxley Act's whistleblower provisions. Pursuant to OSHA rules and regulations, in order to file a claim under the Sarbanes-Oxley Act whistleblower provisions, an individual must first file a complaint with OSHA. After receiving the complaint, OSHA must provide the employer with written notice of the charge. After receiving notice of the charge, the employer has 20 days to respond in writing to the allegations. During this time period, OSHA will conduct an investigation to assess whether the employee's allegations have merit. At the conclusion of the investigation, OSHA will issue a preliminary ruling. The employer may appeal the preliminary ruling to an administrative law judge within 30 days. If a preliminary ruling is not appealed within 30 days, the decision becomes final and is not subject to judicial review. In the event that the administrative law judge rules against the employer, the judge will make a recommendation to the Assistant Secretary of Labor to make the ruling final. If the Assistant Secretary of Labor makes the decision final, the employer has 60 days to appeal to a United States Court of Appeals in the circuit in which the violation allegedly transpired.

A federal district court will have jurisdiction over a claim brought under the Sarbanes-Oxley whistleblower provisions so long as:

(1) The employee first filed a complaint with the Secretary of Labor;
(2) The Secretary of Labor did not issue a final decision within 180 days after the filing of the complaint;
(3) The employee filed the lawsuit in a federal district court after the 180-day period expired; and
(4) The Secretary of Labor's failure to issue a final decision was not due to the plaintiff's bad faith.

Damages

An employee prevailing in an action under the Sarbanes-Oxley Act can recover compensatory damages in the form of any of the following:

- ☐ Reinstatement with the same seniority status the employee would have had if not for the discriminatory act;
- ☐ Back pay with interest;
- ☐ Compensation for special damages, including litigation costs, expert witness fees, and reasonable attorney fees; and
- ☐ Pursuant to state law, punitive damages and damages for emotional distress.

The Act also imposes criminal penalties on individuals who retaliate against a protected employee. The Act amended 18 U.S.C. § 1513 to provide that "whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than ten years, or both."

Compliance Guidance

In order to ensure compliance with the Sarbanes-Oxley Act, employers who are covered under the Act should consider the following suggestions:

- ☐ Refrain from terminating, suspending, demoting, disciplining, or imposing any adverse employment action against an employee on the basis of the employee reporting corporate misconduct to an appropriate investigating agency.
- ☐ Implement an internal reporting mechanism to allow employees to report alleged corporate misconduct on an anonymous, confidential basis.
- ☐ Conduct investigations of all internally reported allegations of corporate misconduct.
- ☐ Avoid altering, destroying, mutilating, or concealing any records, documents, or e-mails with the intention of preventing their discovery in an official proceeding.
- ☐ Maintain, preserve, and safeguard an accurate filing system for all records, documents, or other objects pertaining to the company's operations and activities, including employment actions.
- ☐ Avoid offering or providing employment benefits to directors or officers of the company that extend, maintain, arrange, or renew credit in the form of a personal loan to a director or officer of the company.
- ☐ Provide notice of "blackout" periods (periods of time during which company stock cannot be traded or sold for three days or longer) to all pension plan participants at least 30 days prior to the blackout period.

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT

The Electronic Communications Privacy Act of 1986 ("the Act"), 18 U.S.C. § 2510 *et seq*., is an amendment to and expansion of the Omnibus Crime Control and Safe Street Act of 1968 and is commonly referred to as the "Wiretap Statute." The purpose of the Act is to afford privacy protection to electronic communications. The Act provides that persons may not

intentionally intercept, endeavor to intercept, or procure any other person to intercept any wire, oral or electronic communication, or use, endeavor to use or procure others to use any device to intercept wire, oral or electronic communications. The Act also prohibits using or disclosing the contents of any wire, oral or electronic communication obtained in violation of the Act. 18 U.S.C. § 2511(1). In general, the Act prohibits an employer from monitoring an employee's conversations or telephone calls, with some exceptions. Employers also have standing to bring claims against employees for violations of the Act. *Smoot v. United Transportation Union*, 246 F.3d 633 (6th Cir. 2001).

"Interception" occurs when the contents of a communication are captured or redirected in any way, whether or not the communication is heard by a third party. *George v. Carusone*, 849 F. Supp. 159 (D. Conn. 1994). In order to establish that an individual intercepted an electronic communication in violation of the Act, a plaintiff must prove that the defendant intentionally intercepted, endeavored to intercept, or caused another to intercept or endeavor to intercept, the contents of an electronic communication using a device. *In re Pharmatrak, Inc.*, 329 F.3d 9 (1st Cir. 2003).

"Contents" under the Act include any information concerning the substance, purport or meaning of the communication. Therefore, a party may be liable for disclosing the nature of the communication intercepted without actually disclosing the details.

The Act adopts a broad, functional definition of an "electronic communication" by defining it as including "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, photoelectric, or photo-optical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). However, this definition was amended by the U.S. Patriot Act to not include any wire or oral communication. 18 U.S.C. § 2510(12).

Exceptions to Employers' Interception of Communications

There are two basic exceptions to the general provisions of the Act as applied to employers. First, it is not unlawful to intercept a communication when the intercepting person is a party to the communication or when a party to the communication has given prior consent. 18 U.S.C § 2511(2)(d). Second, employers may be allowed to intercept telephone communications if doing so to further a legitimate business interest and in the ordinary course of business.

Consent need not be express, but may be implied when a person's behavior exhibits acquiescence or a comparable waiver of otherwise protectable rights, and may be inferred by the court where the party knowingly agreed to the surveillance. *George v. Carusone*, 849 F. Supp. 159 (D. Conn. 1994). However, consent under the Act is not to be loosely or cavalierly implied, and mere knowledge of the capability of monitoring alone cannot be considered implied consent. *Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992). The burden of establishing consent in a civil case brought under the Act is on the party seeking the benefit of the consent exception. *In re Pharmatrak, Inc.*, 329 F.3d 9 (1st Cir. 2003).

An interception is unlawful under the Act if made through the use of an electronic, mechanical or other "device." However, there is an exemption to this prohibition created by the Act's definition of "electronic, mechanical or other device" that generally excludes "any telephone equipment 'furnished by a provider of wire or communication services' or 'furnished by the subscriber or user for connection to the facilities of such service and being used by the subscriber or user in the 'ordinary course of its business.'"

Intercepting Live Conversations

The protections of the Act also cover intercepting or recording oral communications (*i.e.*, live conversations) as well as electronic communications. In this context, the person must have a justified expectation that the communication is not subject to interception under the circumstances. 18 U.S.C. § 2510 (2). That is, the person must expect that the conversation is free from interception, and such expectation must be reasonable under the circumstances. An expectation is not reasonable if the communication is readily or practicably capable of being intercepted. Thus, if a person should know that his or her comments could be artificially detected without too much trouble or that the means of artificial detection might actually be in place, the expectation of non-interception is not reasonable.

Penalties and Damages

Violators of the Act are subject to criminal prosecution and a fine or imprisonment for up to five years, or both. 18 U.S.C. § 2511 (4) & (5). In addition, any person whose communication is intercepted, disclosed or used in violation of the Act may bring a civil action for appropriate relief, including injunctive relief, actual damages, statutory damages, punitive damages, attorneys' fees and litigation costs. 18 U.S.C. § 2520.

Employers should be aware that if statutory damages will result in a larger recovery than actual damages, the violator must pay the plaintiff $100 per day for each day of violation or $10,000, whichever is greater.

Statute of Limitations

A civil action under the Act must be commenced within two years after the date that the plaintiff first has a reasonable opportunity to discover the violation under the Act. *Sparshott v. Feld Entertainment, Inc.*, 311 F.3d 425 (D.C. Dist. 2002). Therefore, the statute of limitations will bar an action if two years have passed from the date the plaintiff had notice that would lead a reasonable person to sue or conduct an investigation that would have discovered violations of the Act. *Davis v. Zirkelbach*, 149 F.3d 614 (7th Cir. 1998). However, in cases involving an employer's fraudulent concealment of a claim, it is possible that a court may toll the statute of limitations.

State "Wiretap" Statutes

Many states have enacted their own versions of the federal "wiretap statute." Some of these state statutes provide even broader protection to employees from interception or monitoring of their communications, and may thereby impose greater obligations upon the

employer. Accordingly, state statutes must be taken into consideration when assessing what types of interception or monitoring practices are allowed in any particular jurisdiction.

Tips for Employers

The best way to protect against these types of claims brought by employees to have a comprehensive technology policy in place advising all employees that they should have no expectation of privacy in the use of any employer-issued equipment, including computers, telephones, printers and smart phones. Ideally, employers should circulate the policy and obtain the signatures of each employee. These signed acknowledgement forms should be maintained in each individual's personnel file so that there can be no dispute that the employee knew that his or her activities on work-related devices could be monitored at any time.

THE VOLUNTEER PROTECTION ACT

The Volunteer Protection Act ("the Act"), 42 U.S.C. § 14501-14505, provides partial immunity for individuals who do volunteer work for nonprofit organizations or governmental entities: Specifically, the Act (1) protects volunteers from being held liable for acts of ordinary negligence done in the course of their volunteer work, and (2) limits the award of punitive damages for which a volunteer can be found liable. The Act does not protect the nonprofit organization or governmental entity which "employs" the volunteer. Therefore, the Act does not change a plaintiff's ability to sue the nonprofit organization or governmental entity for a volunteer's negligence.

The Act provides that volunteers for a nonprofit organization or governmental entity shall not be held liable for the harm caused by the volunteer's act or omission when acting on behalf of the nonprofit entity if:

(1) The volunteer was acting within the scope of the his or her responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) If appropriate or required, the volunteer was properly licensed, certified or authorized by the appropriate authorities for the activities or practice in the state in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;

(3) The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights of safety of the individual harmed by the volunteer; and

(4) The harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the state requires the operator or the owner of the vehicle, craft, or vessel to possess an operator's license or to maintain insurance.

Definition of "Volunteer"

The Act defines a "volunteer" as an individual who performs services for a nonprofit organization or governmental entity, who:

(1) does not receive compensation other than reimbursement for expenses actually incurred; or

(2) does not receive anything of value in lieu of compensation in excess of $500 per year.

"Volunteers" under the Act include, but are not limited to, volunteers serving as directors, officers, trustees, or direct service volunteers.

Definition of "Nonprofit Organization"

The Act defines a "nonprofit organization" as:

(1) any organization which holds tax-exempt status under § 501(c)(3) of Title 26 of the federal tax code and that does not practice hate crimes; or

(2) any not-for-profit organization which is organized for public benefit and operates primarily for charitable, civic, educational, religious, welfare, or health purposes and that does not practice hate crimes.

Therefore, nonprofit organizations under the Act may include organizations which have not obtained certification as a tax-exempt organization under the Internal Revenue Code. However, if the organization has not obtained a tax-exempt certification, it must be established that its activities are conducted for public benefit and that it is operated primarily for charitable, civic, educational, religious, welfare or health purposes.

Liability of Volunteers

A volunteer is not protected under the Act if the conduct engaged in by the volunteer consists of:

(1) willful conduct or criminal misconduct;
(2) gross negligence or reckless misconduct;
(3) hate crimes;
(4) sex offenses;
(5) misconduct which violates a federal or state civil rights law (*i.e.*, Title VII or the ADA);
(6) any act performed under the influence of drugs or alcohol;
(7) conscious flagrant indifference to the rights and safety of others; or
(8) conduct while operating a motor vehicle or vessel of any kind (regardless of who owns the vehicle and whether doing so for volunteer purposes).

Damages

Even if a volunteer is found to be unprotected by the Act, a plaintiff will be limited in the amount of damages he or she can recover from the volunteer. A plaintiff can recover:

- ☐ *Compensatory damages* – A plaintiff can recover economic damages, such as lost wages and medical expenses, and also non-economic damages, such as pain and suffering damages, against a volunteer.
- ☐ *Punitive damages* – A plaintiff cannot collect punitive damages from a volunteer unless the plaintiff can establish by clear and convincing evidence that the harm was proximately caused by an action which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individuals involved.

Preemption of State Volunteer Laws

The Volunteer Protection Act generally preempts the volunteer laws of individual states to the extent that such laws are inconsistent with the Act. 42 U.S.C. § 14502(a). The Act, however, does not preempt four specific types of state volunteer laws:

(1) state laws requiring a nonprofit organization to adhere to risk management procedures, including mandatory training for volunteers;
(2) state laws that make a nonprofit organization liable for acts/omissions of its volunteers to the same extent as an employer is liable for the acts/omissions of its employees;
(3) state laws that make the limitation of liability inapplicable if the civil action was brought by an officer of state or local government pursuant to state law; and
(4) state laws that make the limitation of liability applicable only if the nonprofit organization provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by the volunteer.

Recommendations for Not-for-Profit Organizations

- ☐ Have a clear written statement of the organization's mission, purpose, and job descriptions for each duty and volunteer position. This defines the scope of the official functions and duties of the volunteer and makes clear the expectations of both the volunteer and the organization.

- ☐ Make policy and procedure manuals available to all volunteers. The manuals should be easily understood and kept up-to-date at all times.

- ☐ Investigate the volunteer's temperament, education, skills, and in some circumstances, criminal records. Nonprofit organizations can be held liable for the improper selection, assignment and training of volunteers, as well as for improper supervision of the volunteers.

- ☐ Act quickly upon receipt of negative information and take the necessary steps to either remedy the problem or sever the relationship with the volunteer.

☐ Exercise care in the management of volunteers, particularly when the volunteer is in contact with the public.

VARIOUS ILLINOIS STATUTES

There are a multitude of state statutes and laws that have an impact upon employment issues. It is important to be aware of the existence of such state statutes. Therefore, this section acts as a guide to cover Illinois statutes that have an impact on employment law issues and practices. Although there are some common themes among all the states, each state's legislation may differ. As an employer, it is important to stay up-to-date regarding applicable state and local laws regarding employment issues.

The Illinois Religious Freedom and Marriage Fairness Act

As of June 1, 2014, Illinois recognized same-sex marriages and gave same-sex couples and their children equal and full access to rights, benefits, responsibilities and protections of marriage that have been available to heterosexual spouses. 750 ILCS 80/5.

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court held that same-sex couples have the fundamental right to marry in all states, and that all states must recognize a lawful same-sex marriage performed in other states.

Illinois employers should reexamine their employment policies, particularly with respect to equal employment opportunities and prohibitions against discrimination set forth in the Illinois Human Rights Act. After the Supreme Court's decision in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), Illinois employers are required to adjust their tax and health-insurance forms. Same-sex spouses will need to file new IRS and W-4 forms as well. Also, if an employer offers ERISA-covered health insurance to straight spouses, the same coverage must be extended to gay spouses as well. Gay spouses will also be the primary beneficiaries on 401(k) plans.

The Illinois Employee Credit Privacy Act

As of January 1, 2011, Illinois employers are no longer permitted to inquire into the credit history of job applicants and employees pursuant to the enactment of the Employee Credit Privacy Act ("ECPA"). Public Act 096-1426. The rationale behind this law is to protect job applicants and employees from the vicious cycle of poor credit and unemployment in one of the worst economies that this country has faced since the Great Depression.

Employers should be aware that there are exceptions to the ECPA, which permit employers to make and consider credit checks when hiring for positions that involve: (1) bonding or security under state or federal law; (2) custody of, or unsupervised access to $2,500.00 in cash or marketable assets; (3) signatory power over business assets of $100 or more per transaction; (4) management and control of the business; or (5) access to personal, financial or confidential information, trade secrets, or state or national security information.

The Illinois Human Rights Act

In 1995, the Illinois legislature enacted the Illinois Human Rights Act ("the Act"), 775 ILCS 5/1 *et seq.* Article 2 of the Act applies to employment and applies to all employers having 15 or more employees within Illinois during 20 or more calendar weeks before the alleged violation. However, with regard to handicap discrimination and sexual harassment, the Act applies to any person employing one or more employees. Pursuant to Section 5/2(b)(2), certain religious corporations are not considered employers under the Act. If an employee files a charge of discrimination under the Act, an employer should consult with counsel regarding whether the employer falls under this particular exemption.

The Act prohibits employers from discriminating against applicants and employees on the basis of race, color, religion, national origin, ancestry, age, sex, marital status, handicap, military status, sexual orientation, citizenship status, or unfavorable discharge from military service. The Act also prohibits sexual harassment in the workplace and retaliation for exercising one's rights under the Act.

In addition, in 2009, the Act was amended to protect an employee from discrimination based on his or her "order of protection status." The Act defines the term "order of protection status" to mean "a person's status as being a person protected under an order of protection issued pursuant to the Illinois Domestic Violence Act of 1986 or an order of protection issued by a court of another state." This means that employers may not make adverse employment decisions based on the fact that an employee has an order of protection.

Most recently, in August 2014, the Act was amended again to extend further protections to pregnant employees, effective January 1, 2015. The Act already included prohibitions on employment discrimination "on the basis of pregnancy." This amendment now requires employers to provide reasonable accommodations to women due to pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth. Essentially, these reasonable accommodation amendments require employers to treat pregnancy and pregnancy-related conditions like a disability, absent a showing of undue hardship on the ordinary operations of the business of the employer.

The reasonable accommodations include, but are not limited to, more frequent or longer rest breaks, assistance with manual labor, light duty, modified work schedule, or time off to recover from conditions related to childbirth. An employee who takes leave as an accommodation has reinstatement rights like those under the FMLA, where she must be reinstated to her original job or equivalent position once she has indicated intent to return or her need for accommodation ends.

However, if the employer can show undue hardship to the ordinary operation of the business, the employer is not forced to provide the accommodations. Additionally, the employer cannot force an employee who is pregnant or otherwise impacted by pregnancy, to accept an accommodation that the employee did not request. Also, an employee should not be required to take a leave if there is another reasonable accommodation available. An employer is not required to create additional employment that would have not otherwise been created, unless the employer would do so for other classes of individuals who need accommodation.

An employer may request documentation from the pregnant employee's healthcare provider, and must engage in an interactive process regarding the proposed accommodations. Employers are required to post a notice of the rights of pregnant employees and/or provide a notice in its employee handbook.

Additionally, an update that took effect January 1, 2015, Public Law 098-1037, provides that the term "employee" now includes an unpaid intern. An unpaid intern is a person who performs work for the employer when the person is not getting paid, has no guarantee of being hired by the employer, is closely supervised by existing staff, and the work performed by the person is to educate the person for future employment and does not replace a regular employee. This update to the Illinois Human Rights Act extends sexual harassment and harassment retaliation protections to unpaid interns.

Section 2-102 of the Act prohibits employers from imposing a restriction that has the effect of prohibiting a particular language from being spoken by an employee in communications that are unrelated to the employee's duties.

Section 2-103 of the Act prohibits employers from inquiring into or using the fact of an arrest or criminal history record information ordered expunged, sealed or impounded as a basis to refuse to hire, as a basis to segregate or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges, or conditions of employment. Nevertheless, employers are entitled to request and use sealed felony conviction information obtained from the Department of State Police under state or federal laws that require criminal background checks in evaluating the qualifications and character of an employee or prospective employee. Moreover, the prohibition against the use of the fact of an arrest does not prohibit employers from obtaining or using other information which indicates that a person actually engaged in the conduct for which he or she was arrested.

Section 5 of the Act prohibits discrimination in higher education. It applies to any publicly or privately operated university, college, community college, junior college, business or vocational school, or other educational institution offering degrees and instruction beyond the secondary school level. Specifically, this section prohibits any higher education representative from committing or engaging in sexual harassment in higher education or for any institution of higher education to fail to take remedial action, or to fail to take appropriate disciplinary action against a higher education representative employed by such institution, when such institution knows that such representative was committing or engaging in, or committed or engaged in sexual harassment.

Individuals may file charges of discrimination with the Illinois Department of Human Rights ("IDHR") within 180 days of the violation of the Act. The IDHR will attempt to resolve the matter through mediation. If mediation is unsuccessful, the IDHR will investigate the charge and conduct a fact-finding conference.

The IDHR has 365 days to conclude its investigation, unless the parties agree in writing to an extension. After the investigation, a written report is prepared, indicating whether or not the investigator found "substantial evidence" of a violation of the Act.

If the IDHR files a dismissal order based on a determination that there is no substantial evidence of a violation, the complainant has the right to either seek review of the dismissal order by the Illinois Human Rights Commission ("the Commission") or file a civil action in circuit court, which will be conducted in accordance with the Illinois Code of Civil Procedure. The deadlines are as follows:

- ☐ If the complainant chooses to seek review with the Commission, he must file his request within 30 days of receipt of the IDHR's notice of dismissal.

- ☐ If the complainant chooses to file a civil action, he must do so within 90 days after receipt of the IDHR's notice of dismissal. If the complainant files a request for review with the Commission, he is barred from later commencing a civil action in the circuit court.

If the IDHR determines that there is substantial evidence of a violation of the Act, the complainant has the right to file a civil action in circuit court or request that the IDHR file a complaint with the Commission on his behalf. The deadlines are as follows:

- ☐ If the complainant opts to file a civil action, he must do so within 90 days after receipt of the IDHR's notice.

- ☐ If the complainant chooses to have the IDHR file a complaint with the Commission, he must request such in writing within 14 days after receipt of the IDHR's notice.

- ☐ If the complainant fails to timely request that the IDHR file the complaint, the complainant may only commence a civil action in circuit court.

If the IDHR does not issue its report determining whether there is substantial evidence of a violation of the Act within 365 days after the charge is filed (or after any extension period agreed to in writing by the parties), the complainant has 90 days to either file his own complaint with the Commission or commence a civil action in circuit court. However, a complainant who files a complaint with the Commission is barred from later commencing a civil action in circuit court. In a civil action in circuit court, either the plaintiff or defendant may demand a trial by jury.

Although employees must still initially file their discrimination complaints under the Act with the IDHR, the amended Act provides employees several opportunities during the course of the administrative proceedings to take their claim directly to circuit court. The significance of this amendment is that employees now have, for the first time, the opportunity to have a jury decide their case.

Under the law, claimants must file their suits in the circuit court for the county in which the alleged job discrimination occurred. While they are still entitled to all of the same remedies previously available before the Commission alone, they now also have the enhanced procedural right to a jury's decision of all contested fact issues, including discriminatory intent.

The Victim's Economic Security and Safety Act

The Victims' Economic Security and Safety Act ("VESSA"), enacted in 2003, is designed to promote the State's interest in reducing domestic violence, dating violence, sexual assault, and stalking, by enabling victims of domestic or sexual violence to maintain the financial independence necessary to leave abusive situations, achieve safety, minimize physical and emotional injuries from domestic or sexual violence, and reduce the devastating economic consequences of domestic or sexual violence to employees. 820 ILCS 180/1 *et seq.*

VESSA requires covered employers to provide leave and other accommodations to employees and their family members who are victims of domestic abuse or sexual violence. Under the 2009 amendments to VESSA, the definition of "family or household member" was expanded to include any person related by blood, or by present or prior marriage, and any other person who shares a relationship through a son or daughter.

VESSA requires employers with 50 or more employees to allow employees who are victims of domestic or sexual violence to take up to 12 weeks of unpaid leave to seek medical attention, psychological or other counseling, legal assistance, or relocation. Additionally, under the 2009 amendments to VESSA, these protections are expanded to employees who work for smaller businesses. Under the new law, employers with 15 to 49 employees must provide up to eight weeks of unpaid leave to such victims, while employers with 50 or more employees must still provide up to 12 weeks of unpaid leave to victims.

Unlike the FMLA, the 2009 amendments to VESSA provide that employers may <u>not</u> require that employees substitute other forms of paid or unpaid leave, such as vacation, personal leave, or FMLA, instead of using VESSA leave. Consequently, employees could utilize their maximum allocation of VESSA leave and then, in the same 12-month period, use any accrued paid time off. Employees, however, may elect to use those other forms of paid or unpaid leave if they so choose. Moreover, unlike the FMLA, substitution must be allowed even if the leave would not ordinarily be available under the applicable policy. For example, an employee must be permitted to substitute paid sick leave for VESSA leave even in situations where the employee is taking VESSA leave for a reason for which sick leave is not normally available.

VESSA applies to all employees, regardless of their length of employment. Thus, VESSA is viewed as an improvement to the leave provided under the FMLA. However, VESSA does not provide additional time if the request for leave also qualifies under the FMLA. When an employee takes leave for a reason that would qualify under both the FMLA and VESSA (for instance, to recover from injuries sustained as a result of domestic violence), the employee's VESSA and FMLA leave may run concurrently. Further, FMLA leave time counts against an employer's unpaid leave time available under VESSA.

If feasible, prior to taking any leave, employees must provide their employers with 48 hours' notice. However, employees need not provide notice where it is not "practicable" to do so.

Leave may be taken in increments of hours, days, or weeks, as needed. Employers may require evidence that leave is being requested for one of the following VESSA reasons:

- ☐ To seek medical attention for, or recovery from, physical or psychological injuries caused by domestic or sexual violence to the employee or the employee's family or household member;

- ☐ To obtain victim services for the employee or the employee's family or household member;

- ☐ To obtain psychological or other counseling for the employee or the employee's family or household member;

- ☐ To participate in safety planning, including temporary or permanent relocation or other actions to increase the safety of the victim from future domestic or sexual violence; or

- ☐ To seek legal assistance to ensure the health and safety of the victim, including participating in court proceedings related to the violence.

Certification or evidence of the need for leave can be obtained via a sworn statement from the employee as to the reason for needing leave, documentation from a victim services organization, attorney, clergy member, or medical or other professional from whom the employee or the employee's family or household member has sought assistance, and/or a police record or other reasonably corroborating evidence. This certification must be provided within "a reasonable period" of time after the employer requests the certification.

Like the FMLA, VESSA requires employers to provide health benefits to an employee on VESSA leave. Also, upon return from leave, employees are entitled to be restored to the position held when the leave commenced or to an equivalent position with equal pay, benefits, and other conditions of employment. Further, when an unscheduled absence occurs, an employer may not take any action against an employee if the employee, upon request of the employer, provides certification under VESSA within a reasonable time after the absence.

Employers must maintain the confidentiality of all information pertaining to the use of VESSA leave, the notice of an employee's intention to take VESSA leave, and the leave certification provided by the employee.

VESSA further provides that employers (defined as the State or any agency of the State, any unit of local government or school district, or any person that employs at least 50 employees) may not discharge or discriminate against an employee who is a victim of domestic violence or who has a family or household member who is a victim of domestic violence, for taking up to a total of 12 weeks of leave from work during any 12-month period to address domestic violence.

VESSA also prohibits employers from discriminating against employees who are or are perceived to be victims of sexual or domestic abuse. This includes any retaliatory acts against employees who attempt to exercise their right to leave under the Act. Discrimination is further defined to include employers who refuse to make reasonable accommodations for employees who qualify under VESSA. Examples of accommodation include modification of an employee's job requirements, changes to physical workplace conditions, and implementation of certain safety precautions.

In addition, VESSA requires employers to provide "reasonable accommodations" to the known limitations of employees who are victims of domestic or sexual violence. The amendments specify that a reasonable accommodation must be timely and that "any exigent circumstances or danger facing the employee or his or her family or household member shall be considered in determining whether the accommodation is reasonable." The 2009 amendments expand VESSA's reasonable accommodations to include an "adjustment to a job structure, workplace facility, or work requirement, including a transfer, reassignment, or modified schedule, leave, a changed telephone number or seating assignment, installation of a lock or implementation of a safety procedure, or assistance in documenting domestic or sexual violence that occurs at the workplace or in work-related settings, in response to actual or threatened domestic or sexual violence."

VESSA requires employers to notify employees of VESSA's existence. Therefore, employers must post a notice in the workplace summarizing the requirements under VESSA. The 2009 amendments provide that employers who fail to post the Illinois Department of Labor's mandatory poster may not rely on an employee's failure to provide the required notice to deny leave.

Employees who are refused unpaid leave may file complaints with the Illinois Department of Labor. If an employer is found to have violated VESSA, the Illinois Department of Labor may require the employer to pay damages equal to the amount of wages, salary, employment benefits, public assistance, or other compensation denied or lost, with interest, or to provide equitable relief, including but not limited to reinstatement, promotion and reasonable accommodations. If warranted, attorney fees and court costs may also be collected by an employee.

An employee has up to three years after an alleged violation of the Act to file a complaint with the Illinois Department of Labor.

Illinois Equal Pay Act

The Illinois Equal Pay Act ("IEPA"), which prohibits employers from discriminating against employees in terms of compensation on the basis of gender, has been amended, effective January 1, 2016, to cover all Illinois employers of any size. Additionally, effective January 1, 2016, IEPA provides for increase in civil penalties for violations of the law. It prohibits employers from paying unequal wages to men and women doing the same or substantially similar work, requiring equal skill, effort, responsibility, and under similar working conditions. 820 ILCS 112/10(a).

An employer is also prohibited from reducing the wages of other employees in order to comply with the IEPA. The IEPA prohibits an employer from acting in a manner that would interfere with, restrain, or deny the exercise or the attempt to exercise any right under the IEPA. Specifically, the IEPA provides that it is unlawful for an employer to discharge or otherwise discriminate against an employee who has:

- ☐ filed a charge or caused a proceeding to be instituted under the IEPA;
- ☐ given or intends to give information in connection with any inquiry or proceeding relating to any right provided under the IEPA; or
- ☐ testified or intends to testify in any inquiry or proceeding relating to a right provided under the IEPA. 820 ILCS 112/10(c)(1)-(3).

However, the statute allows discrimination to exist where the payment is made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (3) a differential based on any other factor other than (i) sex or (ii) a factor that would constitute unlawful discrimination under the Illinois Human Rights Act. 820 ILCS 112/10(a)(1)-(4).

Under the 2009 amendments to the IEPA, employees are now required to file a wage complaint. Also significant, employees previously had only 180 days from the date the employee learned of the violation to file an administrative complaint. Now, employees may file a complaint within one year of the underpayment. Further, an employee now has four years (rather than three) from the date of underpayment to file a lawsuit against the employer.

The amendments also change the method for determining when a wage violation has occurred in light of the Lilly Ledbetter Fair Pay Act. Previously, the limitations period began running on the date the employee learned of the underpayment, but it now starts on the date of the underpayment, which occurs each time an employee is underpaid. Therefore, an employee may sue an employer based upon a compensation decision made many years before, as long as that decision has affected the employee's paycheck within the past four years.

The recent amendments to the IEPA also impose greater recordkeeping requirements on employers. Employers now must "make and preserve records that document the name, address, and occupation of each employee, the wages paid to each employee, and any other information the Illinois Department of Labor Director may deem necessary and appropriate for enforcement" for at least five years. Previously, employers had to maintain records for only three years.

The Illinois Department of Labor is responsible for enforcing the provisions of the IEPA by conducting investigations, inspecting records, and determining whether violations of the IEPA have occurred. 820 ILCS 112/15. If an employer is found in violation of the IEPA, the following damages may be imposed:

- ☐ The entire amount of any underpayment together with interest and the costs and reasonable attorneys' fees as may be allowed by the court and as necessary to make the employee whole;

- ☐ For employers with four or more employees, for each employee affected: For a first offense, a fine not to exceed $2,500; for a second offense, a fine not to exceed $3,000; and for a third or subsequent offense, a fine not to exceed $5,000;

- ☐ For employers with fewer than four employees, for each employee affected: For a first offense, a fine not to exceed $500; for a second offense, a fine not to exceed $2,500; and for a third or subsequent offense, a fine not to exceed $5,000;

- ☐ An employer or person who violates subsection (b) or (c) 820 ILCS 112 is subject to a civil penalty not to exceed $5,000 for each violation for each employee affected;

- ☐ In considering the amount penalized, the size of the employer's business and the gravity of the violation will be considered;

- ☐ After the expiration of 15 days from being ordered by the Director of Labor to pay wages due to an employee, the employer is liable to pay 1% per calendar day in arrears of the date ordered to pay the employee; and

- ☐ In situations involving knowing discrimination for purposes of retaliation against an employee exercising rights under the IEPA or participating in proceedings under the IEPA, the employer may be subject to any equitable relief, and to pay damages for the value of any lost benefits, back pay, and front pay that is necessary to effectuate the purposes of the IEPA, so long as the employee has taken steps to mitigate the damages. 820 ILCS 112/30 & 112/35.

Privacy in the Workplace Statutes

It has become increasingly common for state legislatures to enact statutes granting employees a certain amount of privacy from their employers. For example, the Illinois Right to Privacy in the Workplace Act ("the Act") provides that employers are precluded from implementing employment actions on the basis of an employee's or applicant's private activities. 820 ILCS 55/5. The Act provides that it is unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the employee uses lawful products (*i.e.*, cigarettes or alcohol) off the employer's premises during non-working hours. The Act does provide an exception to nonprofit organizations whose primary purpose or objective is to discourage use of the lawful product.

An employer is also in violation of the Act if the employer terminates or negatively responds toward an employee exercising his or her rights under the Act or assists another in bringing or proving a claim under the Act. 820 ILCS 55/15.

Additionally, an employer is prohibited from inquiring into whether a prospective employee has ever filed a claim for benefits under a Worker's Compensation Act or Worker's Occupational Diseases Act or received benefits under either of these Acts. 820 ILCS 55/10.

Employers are also prohibited from requesting passwords to social networking sites from current employees and applicants. *Id*. However, employers may promulgate and maintain policies that govern employee Internet, social network, and e-mail use. *Id*. Employers may also monitor employee use of electronic equipment so long as the employer does not obtain passwords to do so. *Id*.

The Illinois Director of Labor is responsible for enforcing and administering the provisions of the Act. In doing so, the Director of Labor may issue rules and regulations necessary to enforce the Act. An employee may file a complaint alleging a violation of the Act with the Department of Labor. The Department of Labor is responsible for investigating the complaint, and it may issue search warrants or subpoenas to inspect records. The Department of Labor will attempt to resolve the dispute through conciliation. If the claim is not resolved and the Department of Labor determines that the employer violated the Act, the Department of Labor may commence a civil action in circuit court to enforce the provisions of the Act and compel compliance. The circuit court in the county in which the employer resides or is employed shall have jurisdiction over claims brought under the Act. If the Department of Labor does not bring a civil lawsuit after the conciliation process, the employee may bring a lawsuit should he or she choose to do so.

However, an employee may bring a claim under the Act in circuit court only when the Department of Labor fails to resolve the claim and the Department does not file its own suit in any circuit court. *Hampton v. Village of Washburn*, 317 Ill. App. 3d 439 (4th Dist. 2000). Therefore, if the Department of Labor resolves the conflict or if the Department fails to settle the matter and brings the claim to a circuit court, the employee is not entitled to bring the claim to a civil circuit court on his or her own.

A court may punish an employer who fails to comply with a court order by holding the employer in contempt of court. An individual found to violate the Act is guilty of a petty criminal offense. If an employee succeeds in his or her claim, the court may award:

- ☐ Actual damages and costs; or
- ☐ Reasonable attorneys' fees, actual damages, or $200, plus costs, if there is a willful and knowing violation of the Act.

However, an employee's claim will be dismissed if it is shown that alleged violations of the Act are based solely on an employer's offering health, disability, or life insurance policies that make a distinction between employees for the type of coverage or the price of coverage based upon the employee's use of lawful product. 820 ILCS 55/20.

Personnel Record Review Act

It is also common for states to enact legislation that entitles an employee, under certain circumstances, to review his/her personnel records possessed by the employer. An example of such legislation is the Illinois Personnel Record Review Act ("the Act"). 820 ILCS 40/1 *et seq.*

This legislation only applies to employers with five or more employees exclusive of the employer's parent, spouse, or child or other members of the employer's immediate family, and includes an agent of the employer. To be covered under the Act, an employee must be a person currently employed, subject to recall after layoff or leave of absence, with a right to return to a position with the employer, or a former employee who has terminated service within the preceding year.

The Act took effect in 1984, and provides that every employer shall, upon an employee's request, permit the employee to inspect any personnel documents which are, have been, or are intended to be used in determining the employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action. The employer may require the employee to provide a request in writing on a form furnished by the employer. This right extends to any personnel records of the employee that the employer maintains or contracts with others to maintain. The employee may inspect all or part of the file.

The employer shall grant an employee at least two inspections in one calendar year when the requests are made at reasonable intervals, unless a collective bargaining agreement provides otherwise. The employer shall allow the inspection within seven working days after the request is made. However, if the employer is capable of showing that the request could not be satisfied within seven working days, an additional seven working days will be permitted to comply with the request.

The inspection shall occur at a location reasonably near the place of employment and during normal working hours. The employer may allow an inspection to take place in a location other than where the records are maintained or at a time other than during normal working hours if it would be more convenient for the employee.

There are several exceptions to the application of the Act. An employee is not given a right to inspect his or her personnel file regarding:

- ☐ letters of reference for that employee;
- ☐ documentation of external peer reviews for academic employees of institutes of higher education;
- ☐ materials concerning the employer's staff planning, such as records of business developments, expansion, closing or operational goals;
- ☐ test documents or any portion of a test document;
- ☐ information of a personal nature about a person other than the employee, if releasing the information would constitute a clearly unwarranted invasion of privacy;
- ☐ employers who do not maintain personnel records;
- ☐ records relevant to a pending claim between the employer and the employee that may be discovered through judicial process; and

- ☐ investigatory or security records which, if disclosed, may reasonably be expected to harm the employer's property, operations, or business.

820 ILCS 40/10.

After the review period, an employee may obtain a copy of the information in the employee's personnel record. The employer may charge the employee a fee for the copy services, but the fee must be limited to the actual cost of duplicating the information in the record. 820 ILCS 40/3.

The Act also punishes employers for not including information or documents in the employee's record which are required by the Act to be in the employee's file. If an employer fails to include information in an employee's personnel record, the employer will not be permitted to use such information in any subsequent judicial or quasi-judicial proceeding. However, if it is found that the information was not intentionally excluded from the personnel file, the information may be used if the employee is allowed to inspect the documents or has been given a reasonable time to perform an inspection. 820 ILCS 40/4.

If an employee disagrees with the contents of his or her personnel file, he or she may seek to have the information removed upon a mutual agreement with the employer. If an agreement is not reached, the employee may submit a written statement explaining the employee's argument, and the statement shall be included in the employee's file. If either the employer or employee places any information in an employee's file that is false, either party shall have a remedy available through legal action to have the false information expunged from the file.

The Act also prohibits an employer from releasing a disciplinary record or reprimand from the employee's file to an external third party, except a labor organization representing the employee, unless the employer first provides written notice to the employee. The written notice must be sent by first-class mail to the employee's last known address and mailed on or before the day the information is disclosed. However, this requirement does not apply if: (1) the employee has waived notice as required under this Act in a signed employment application with another employer; (2) disclosure is ordered to a party in a legal action or arbitration; or (3) the information is requested by a government agency due to a claim or complaint by an employee, or as a result of a criminal investigation by a government agency.

A court has held that the Act also prohibits the dissemination of information in an employee's personnel file via oral statements in addition to written records. *Bogosian v. Board of Educ. of Community Unit School Dist. 200*, 134 F. Supp. 2d 952 (N.D. Ill. 2001). The court also held that an elementary school teacher did not waive his right to notice by discussing incidents of his employment with the press and his parents prior to the school district holding its own press conference where such information was disclosed. The court concluded that an employee can only waive the right to notice under this section through a written job application.

When an employer is permissibly releasing information from an employee's personnel file to a third party, the employer is also required to delete any disciplinary reports, letters of reprimand, or other records of disciplinary action that are over four years old. 820 ILCS 40/8.

The Act also mandates the types of information an employer may keep in an employee's personnel file. For instance, an employer is not allowed to maintain records of an employee's associations, political activities, publications, communications or non-employment activities, unless the employee submits such information in writing to the employer or authorizes the employer in a written statement to gather such information. 820 ILCS 40/9.

The Illinois Department of Labor is responsible for enforcing the provisions of the Act; thus, in raising a violation, an employee is required to file a complaint with the Department of Labor. The Department of Labor will conduct an investigation of the employee's allegations and attempt to resolve the complaint by conference, conciliation, or persuasion. If the complaint is not resolved, the Department may file an action in the circuit court in the county in which the employee resides, is employed, or where the personnel record is maintained.

The employee may commence an action in the circuit court, including an action to compel compliance, where efforts to resolve the conflict with the Department of Labor have failed and the Department has not commenced an action to rectify the alleged violations. 820 ILCS 40/12.

Failure to comply with a court order may be punished by contempt of court. If an employer is held in violation of the Act, a court may award an employee the following:

(1) Actual damages plus costs; and/or
(2) $200, plus costs, reasonable attorneys' fees, and actual damages if it found that the employer violated the Act willfully and/or knowingly.

Further, any individual who violates the Act is also guilty of a petty criminal offense.

Wage Payment and Collection Act

The Illinois Wage Payment and Collection Act ("the Act") establishes when, where, and how often wages must be paid, and prohibits unilateral deductions from wages or final compensation without the employee's consent. 820 ILCS 115/1 *et seq.* Notably, the Act also prohibits company policies requiring employees to accept direct deposit of paychecks. The Act requires employers to pay each employee his or her wages in a form that may readily be converted into cash (without the need for a personal bank account), unless the employee volunteers to be paid by direct deposit in an account at a bank or financial institution of the employee's choice. 820 ILCS 115/4; 56 Ill. Adm. Code 300.600.

Also, it is important to note that Sections 13 and 14 of the Act state that officers of a corporation or agents of an employer who knowingly permit an employer to violate the Act shall be treated as the employer and may be subject to personal financial liability or may be convicted of a Class A misdemeanor.

Further, Section 11 of the Act allows employees to file complaints alleging violations of the Act with the Department of Labor. On August 16, 2007, Illinois amended its Wage Payment and Collection Act to allow employees to file a complaint with the Department of Labor alleging violations of the Act by submitting a signed, completed wage claim application on the form provided by the Department of Labor and by submitting copies of all supporting documentation. Complaints must be filed within five years after the wages, final compensation, or wage supplements are due to be paid. The amendment further provides that the Department of Labor shall review applications to determine whether there is cause for investigation and shall limit its investigation to reviewing the three years prior to the date the wages, final compensation, or wage supplements were due. This amendment also amends the Illinois Code of Civil Procedure to provide that actions brought under the Illinois Wage Payment and Collection Act shall be commenced within 10 years after the cause of action accrues. It should be noted, however, that the statute does not prevent employees from filing a lawsuit in lieu of a complaint with the Department of Labor.

On January 1, 2015, Public Act 098-0862 took effect, which made updates to an employer's use of payroll cards to pay wages to an employee under the Act. The update allows wages to be paid via payroll debit card if certain requirements are met. 820 ILCS 115/14.5.

Illinois Minimum Wage Law

The Illinois Minimum Wage Law ("IMWL") is a wage, hour, and record-keeping law applicable to employers with 4 or more employees, excluding the employer's immediate family. The IMWL's federal counterpart is the FLSA, discussed *supra*. If both the FLSA and the IMWL are applicable, the employee is entitled to earn the higher of the minimum wages set forth in these statutes. Under the IMWL, the current adult minimum wage is $8.25 an hour, which exceeds the current FMLA of $7.25. However, the IMWL also expressly provides that it does not amend or rescind any other state laws that provide for more *favorable* minimum wage or maximum hour standards. 820 ILCS 105/4, 105/13.

Under the IMWL, tipped employees must still be paid at least a minimum wage. However, the IMWL allows the employer to pay $4.95 per hour, taking the "tip credit" for not more than 40% ($3.30) of the minimum wage. To take advantage of the "tip credit," the employers must have documentation showing that tip credit was received by the tipped employees. 805 ILCS 105/4(c).

Pursuant to the IMWL, 820 ILCS 105/4(a), all non-exempt employees must be paid time and one-half for the hours worked in excess of 40 hours during a single seven-day week. Under IMWL, the following are identified as employees, who are exempt from overtime pay:

- ☐ Salesmen and mechanics involved in selling or servicing cars, trucks or farm implements at dealerships,
- ☐ Agricultural labor,
- ☐ Executive, administrative or professional employees as defined by the Fair Labor Standards Act,

☐ Certain employees involved in radio/television in a city with a population under 100,000,

☐ Commissioned employees defined by Section 7(i) of the Fair Labor Standards Act,

☐ Employees who exchange hours pursuant to a workplace exchange agreement,

☐ Employees of certain educational or residential child care institutions.

The IMWL also has a record creation and retention provision which obligates the employer to make and keep records for each employee, for the period covering at least three years, with the records identifying the rate of pay, the amount paid, each pay period for each employee, the hours worked each day in each week by each employee. 820 ILCS 108/8.

The employer may be subject to either an individual or class civil action for violation of the IMWL. The employee has three years from the date of the alleged underpayment to bring a lawsuit. The employee is entitled to recover an amount equal to the unpaid wages as well as reasonable attorneys' fees and costs. The IMWL expressly provides that an agreement between the employer and employee to work for less than provided for under the IMWL is not a defense to action for underpayment. Additional damages in the amount of 2% of any underpayments can be assessed against the employer for each month following the month that such pay was due. The employer may also be liable to the Illinois Department of Labor for up to 20% of the total underpayment if the employer's conduct is proven to be willful, repeated, or done with reckless disregard of the IMWL and its rules. 820 ILCS 105/12.

The question of "who" should be held liable for an alleged violation of the FLSA, and IMWL, is an issue often litigated in courts. In deciding liability under both statutes, the courts generally apply the same analysis due to the similarities between the FLSA and the IMWL. *Morgan v. SpeakEasy, LLC*, 625 F. Supp. 2d 632, 650 (N.D. Ill. 2007) ("Courts have held that the IMWL parallels the FLSA, and that the same analysis generally applies to both statutes.").

For example, under the FLSA, an "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). More than one person may be an employer and liable for FLSA and consequently IMWL violations. Courts evaluating wage and hour claims have imposed liability on individuals in a range of corporate positions, including general managers, provided such individuals acted on behalf of the corporation to cause the violations. *Dole v. Simpson*, 784 F. Supp. 538, 545 (S.D. Ind. 1991); *Villanueva v. Falcon Construction. Co., Inc.*, No. 2:09–CV–107–PPS–PRC, 2011 WL 1114430, at *2 (N.D. Ind. Mar. 24, 2011). In some circumstances, even another employee may be liable, so long as that employee had supervisory authority over the unpaid worker and was responsible in whole or part for the alleged violation. *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987). The United States Department of Labor has promulgated regulations under the FLSA recognizing that an employee may have more than one employer under the statute's broad definitions.

Whether an entity is an employer for purposes of the FLSA turns on the "economic reality" of the working relationship. *Goldberg v. Whitaker House Coop., Inc.*, 81 S. Ct. 933 (1961).

In applying this "economic reality" test, courts consider "all the circumstances of the work activity." *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987). Those factors include whether the defendant identified as an employer "(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Babych v. Psychiatric Solutions, Inc.*, No. 09 C 8000, 2011 WL 5507374 (N.D. Ill. Nov. 9, 2011).

The ultimate question is whether the individual had "supervisory authority over the complaining employee" and is "responsible in whole or part for the alleged violation." *Hernandez v. City Wide Insulation of Madison, Inc.*, No. 05–C–303, 2006 WL 1993552 (E.D. Wis. July 14, 2006). No one factor is dispositive. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988). Instead, the court considers the totality of the circumstances that underscore the economic reality of the employment relationship. *Villareal v. El Chile, Inc.*, 776 F. Supp. 2d 778, 785 (N.D. Ill. 2011); *Donovan v. Sabine Irrigation Co., Inc*., 695 F.2d 190, 194 (5th Cir. 1983) *abrogated by Reich v. Bay, Inc*., 23 F.3d 110 (5th Cir. 1994).

Beyond application of the four-factor analysis, the courts put great weight on the alleged employer's ability to bring about the violations of the FLSA. An individual may be deemed an employer even if he is not solely responsible for determining the rates and methods of payment, however; "significant participation" in those decisions may be sufficient. *Hernandez v. City Wide Insulation of Madison, Inc*., No. 05–C–303, 2006 WL 1993552 (E.D. Wis. July 14, 2006); *see also Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (stating that "[c]ontrol may be ... exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitation on control does not diminish the significance of its existence").

On January 1, 2016, Public Act 99-0017 takes effect. It allows a collective bargaining unit to negotiate and contractually exempt themselves from the hourly wage requirements imposed by the IMWL. Instead, the union can agree to an alternate shift schedule as allowed under federal law. Currently, the Minimum Wage Law requires all employers to pay 1 1/2 times the regular rate of pay when working over 40 hours in a week.

Veterans Preference in Private Employment Act

As of January 1, 2016, the Veterans Preference in Private Employment Act ("Veterans Preference Act") will go into effect in Illinois. The statute is not mandatory; rather, it is a program that allows private employers to voluntarily give preference in employment decisions such as hiring, promoting or retaining to certain veterans over another equally qualified applicant or employee. 330 ILCS 56/15. Illinois law had already provided for a veteran preference policy for public employers and protections against discrimination based on military status. The Veterans Preference Act applies to veterans of the five service branches, their reserve components, and the Illinois National Guard. 330 ILCS 56/10. A "private employer" is defined

broadly as any non-public sole proprietor, corporation, partnership, limited liability company, or other private, non-public entity employing one or more employees within Illinois. 330 ILCS 56/10.

If an employer chooses to adopt a veterans hiring preference policy, the employer must be careful to satisfy certain conditions set forth in 330 ILCS 56/15:

- ☐ The veterans' preference employment policy must in writing;
- ☐ The veterans' preference employment policy must be publicly posted by the private employer at the place of employment or on any website maintained by the private employer;
- ☐ The private employer's job application should inform all applicants of the veterans' preference employment policy and where the policy may be obtained; and
- ☐ The private employer must apply the veterans' preference employment policy uniformly for all employment decisions regarding the hiring or promotion of veterans or the retention of veterans during a reduction in force.

Illinois One Day Rest In Seven Act (ODRISA)

This is an Illinois state law that provides for employees a minimum of twenty four hours of rest in each calendar week and a meal period of 20 minutes for every 7.5 hour shift beginning no later than 5 hours after the start of the shift. The law allows employers to secure permits from the Illinois Department of Labor to work employees the 7th day provided that the employees have voluntarily elected to work.

Illinois Right of Publicity Act

The Illinois Right of Publicity Act essentially controls an individual's ability to control the use or "publicity" of their identity for commercial purposes. Identity means any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to: name, signature, photograph, image, likeness, or voice. This is important for employers to understand because they may have a current practice of not properly using or obtaining permission to publicize an individual's identity.

Here are the limitations regarding use of an individual's identity:

- A person may not use an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent from the appropriate person or persons.
- If an individual's death occurs after the effective date of the Act, a person may not use that individual's identity for commercial purposes for 50 years after the date of the individual's death without having obtained previous written consent from the appropriate person or persons.

However, the law does not apply to the following circumstances:

- Use of an individual's identity in an attempt to portray, describe, or impersonate that individual in a live performance, a single and original work of fine art, play, book, article, musical work, film, radio, television, or other audio, visual, or audio- visual work, provided that the performance, work, play, book, article, or film does not constitute in and of itself a commercial advertisement for a product, merchandise, goods, or services;
- Use of an individual's identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign;
- Use of an individual's name in truthfully identifying the person as the author of a particular work or program or the performer in a particular performance;
- Promotional materials, advertisements, or commercial announcements for a use described in the bullets above; or
- Use of photographs, videotapes, and images by a person, firm, or corporation practicing the profession of photography to exhibit in or about the professional photographer's place of business or portfolio, specimens of the professional photographer's work, unless the exhibition is continued by the professional photographer after written notice objecting to the exhibition has been given by the individual portrayed.

In the event that a dispute arises in relation to this law, the plaintiff is required to prove the damages or gross revenue attributable to the unauthorized use; and the defendant is required to prove properly deductible expenses.

Illinois Child Bereavement Leave Act

Employees otherwise eligible to take leave under the Family and Medical Leave Act ("FMLA"), who suffer the loss of a child, are eligible to take up to 10 work days of unpaid leave. Leave must be used within 60 days after the employee receives notice of the death of his or her child. Employees may use unpaid bereavement leave to attend the funeral, or an alternative to a funeral of a child, to make arrangements necessitated by the death of a child, or to grieve the death of a child.

If an employee suffers the death of more than one child in any 12-month period, the employee is entitled to take up to 6 weeks (30 work days) of unpaid bereavement leave in the 12-month period. Child is defined as an employee's son or daughter who is a biological, adopted, or foster child, a stepchild, legal ward, or a child of a person standing *in loco parentis*. Employees may elect to substitute available paid leave, but are not required to use available paid time off concurrently with leave available under this Act.

Illinois Pregnancy Accommodation Act

The Pregnancy Accommodation Act is an amendment to the Illinois Human Rights Act. It applies to any employer who has 1 or more employees and covers part-time employees, full-time employees and applicants. The law covers employees who are pregnant, have recently given birth, or who have a medical or common condition related to their pregnancy or childbirth. The law prohibits employers from discriminating, refusing to hire, promote, or train employees covered under this law. Additionally, the law requires employers to make reasonable accommodations at the employee's request to allow the employee to perform their job duties. A reasonable accommodation is a reasonable modification or adjustment to the job application process or work environment, or to the manner or circumstances under which the position desired or held is customarily performed, that enable an applicant or employee affected by pregnancy to be considered for the position or to perform the essential functions of that position.

ARBITRATION AGREEMENTS

General Principles

In recent years, arbitration has developed into a widely used and favored means of resolving employment disputes. Arbitration is much less expensive and more expedient than litigating in courts or administrative agencies. Employers maintain a certain degree of control over the dispute resolution process when utilizing arbitration as opposed to other methods. For example, employers can choose the arbitrator and structure the rules that govern the process. Moreover, by using arbitration, employers are afforded a higher degree of confidentiality, and they avoid the often-backlogged judicial system.

The Federal Arbitration Act

In order to support a national policy favoring resolution of disputes through arbitration, Congress enacted the Federal Arbitration Act ("FAA" or "the Act") in 1925. Under the FAA, written agreements to arbitrate are generally valid and enforceable except when contained in "contracts of employment of seamen, railroad employees, or any other class of workers engaged in … interstate commerce." 9 U.S.C. § 1 *et seq.* The Supreme Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), ruled that the FAA compels courts to enforce arbitration clauses in employment agreements, and the exclusionary language in the FAA applies solely to transportation employees.

What Types of Arbitration Agreements are Unenforceable

Although the FAA creates a substantive law as to what claims are subject to arbitration within the Act, courts must consider state law principles in determining whether the parties have, in fact, entered into a valid and enforceable arbitration agreement. *Stawski Distributing Co., Inc. v. Browary Zywiec S.A.*, 349 F.3d 1023 (7th Cir. 2003). Therefore, courts have applied state contract laws in determining the validity and enforceability of arbitration agreements.

A court will not enforce an arbitration agreement if it finds that the agreement is procedurally or substantively unconscionable.

Procedural unconscionability focuses on how the parties negotiated the contract and the circumstances of the parties at the time. Generally, an agreement is procedurally unconscionable when there is oppression or unfair surprise. An agreement is not procedurally unconscionable so long as the employees have a meaningful opportunity to negotiate or reject the terms of the contract.

Substantive unconscionability is concerned with the actual terms of the agreement and asks whether the terms are "so one-sided as to shock the conscience." The relevant timeframe for substantive unconscionability is the time at which the contract was entered into.

The Supreme Court has held that an employer's failure to disclose the costs and fees imposed upon an employee in the event that a claim is arbitrated was not alone a sufficient justification to hold that the arbitration agreement is unenforceable. *Green Tree Financial Corp.-Alabama v. Randolph*, 121 S. Ct. 513 (2000). The Court noted that a party seeking to invalidate an arbitration agreement on the basis that the arbitration process would be excessively expensive bears the burden of proving the probability of the parties incurring such expenses or that Congress intended to prohibit arbitration of the particular type of claim at issue. The Court did not believe the employee met this burden and affirmed the enforcement of the arbitration agreement.

Additionally, a court will not enforce an arbitration agreement it finds the agreement is illusory. *Dumais v. American Am. Golf Corp.*, 299 F.3d 1216 (10th Cir. 2002). In *Dumais*, the arbitration agreement at issue was ambiguous because it contained two conflicting provisions concerning the employer's right to unilaterally alter the agreement. The court determined that because the agreement was ambiguous, it should be construed against the drafter/employer. The court therefore held that the arbitration agreement was unenforceable because "an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory."

Courts will not enforce arbitration agreements that are embodied in collective bargaining agreements that waive employees' statutory right to a judicial forum unless the language of the agreement is clear and unmistakable. *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391 (1998).

Arbitrator's Decisions

Upon the arbitrator's rendering of a decision, a party may appeal the finding on the basis of the arbitrator's error. However, in order to favor arbitration of claims, courts will generally give deference to an arbitrator's decision regarding factual findings and interpretations of contracts. A court cannot overturn an arbitrator's decision because its interpretation of a contract is different from that of the arbitrator. *International Chemical Workers Union v. Columbian Chemical Co.*, 331 F.3d 491 (5th Cir. 2003).

It is also the role of the arbitrator to determine procedural questions that arise from the dispute and affect the final disposition of the matter.

Appealing an Arbitrator's Decision

As stated above, a party unsatisfied with the decision of an arbitrator may appeal the decision. However, pursuant to the FAA, a review of an arbitration decision is extremely narrow. A court will not reverse an arbitration decision unless:

- ☐ The award was procured by corruption, fraud, or undue means;
- ☐ There is evidence of partiality or corruption among the arbitrators;
- ☐ The arbitrators were guilty of misconduct which prejudiced the rights of the parties;
- ☐ The arbitrators exceeded their powers; or
- ☐ The arbitrator acted with manifest disregard of the law.

9 U.S.C. § 10(a).

State Statutes

In response to the increasing use of arbitration, many states have passed their own legislation regarding arbitration agreements. Employers should therefore check applicable state laws to determine whether their state imposes any further duties or obligations.

For example, Illinois passed the Employee Arbitration Act, 820 ILCS 35/2 *et seq.* The Illinois Arbitration Act is applicable "when a controversy or difference not involving questions which may be the subject of a civil action exists between an employer, whether an individual, co-partnership or corporation, employing not less than twenty-five persons, and his employee in the State of Illinois, the Department of Labor shall upon application visit the locality of the dispute and make a careful inquiry into the case thereof, hear all persons interested who may come before it, advise the respective parties what ought to be done or adjust the dispute if submitted by the parties and issue a written decision." 820 ILCS 35/2.

The Illinois Employee Arbitration Act also provides the procedure and notice requirements for employment arbitrations. Under the Illinois Act, the parties are required to submit an application that must be signed by the employer or a majority of its employees in the department in which the controversy exists, or by both parties. The application must contain a short and concise statement of the grievances complained of and a promise to continue on with business without a strike until a decision is reached, if the decision will be made within three weeks of the date the application is filed. Upon filing the complaint, the Department of Labor shall give public notice of the time and date of the hearing; however, public notice is not required where both parties join in the application and present a written request that no public notice be given. In such a situation, the Department of Labor may give private notice to the parties as it deems proper.

Further, the Department of Labor may issue subpoenas for witnesses or experts and require documents to be produced. After the hearing, the Department of Labor shall render a decision, which may be published in an annual report to the governor. The decision is binding upon the parties who join in the application for six months or until either party gives the other notice of his or her intention not to be bound by the decision at the expiration of 60 days after the decision is rendered. Notice by the employer of its intention may be provided to employees by postings in three conspicuous locations in the place of employment.

Upon a party's failure to abide by the decision of the Department of Labor, a party may file a petition seeking compliance with the circuit court of the county in which the offending party resides or in the county of the employment. The circuit court may then rule against a party or require cause to be shown within 10 days. The court may then rule and secure compliance and/or punish the offending party with contempt.

The Illinois Employee Arbitration Act is an example of state legislation which requires employers' compliance with specific rules and procedures in arbitrating claims with employees. Employers who are not subject to Illinois statutes should check their state statutes regarding arbitration with employees to ensure compliance with such state-specific regulations.

Suggestions for Drafting and Executing Arbitration Agreements

Consider:

- ☐ Providing notice to the employee of the arbitration clause and having the employee sign a form acknowledging the arbitration clause.
- ☐ Ensuring that the employee realizes what is being agreed to and what the arbitration agreement entails.
- ☐ Allowing employees to negotiate terms of the agreement.
- ☐ Allowing employees to reject terms of the agreement.
- ☐ Requiring arbitration for all disputes and claims.
- ☐ Making the terms of the arbitration agreement fair and reasonable for both the employer and the employee.
- ☐ Drafting the arbitration agreement in a clear and concise manner to avoid any confusion or ambiguity.
- ☐ Stating specifically in the arbitration agreement whether the agreement is applicable to class action lawsuits.
- ☐ Detailing in a specific and precise manner the procedures the employer will follow in altering the agreement (*i.e.*, notice to employees, bilateral agreement, vote, etc.).

- ☐ Ensuring that the steps and procedures used in implementing the policy and in arbitrating the claims are fair and reasonable for both parties.

- ☐ Following the procedures set forth in the arbitration agreement in every dispute with every employee.

- ☐ Consulting counsel in drafting, implementing, or altering an arbitration agreement.

Avoid:

- ☐ Surprising employees with an arbitration agreement subsequent to commencement of employment.

- ☐ Including fixed terms and provisions which are non-negotiable.

- ☐ Pressuring, forcing, or oppressing an employee into consenting to the arbitration agreement.

- ☐ Permitting employees' lack of knowledge as to the existence or scope of the arbitration agreement.

- ☐ Requiring arbitration only for employees' claims and disputes against the employer.

- ☐ Drafting the terms and conditions of the agreement in a one-sided manner or in a way that solely benefits the employer.

- ☐ Drafting the arbitration agreement in a confusing or ambiguous manner.

- ☐ Enforcing the terms and procedures of the arbitration agreement in a selective or inconsistent manner.

- ☐ Failing to address whether the agreement is applicable to class actions.

- ☐ Restricting the types of damages available to employees in arbitrated claims.

- ☐ Permitting the employer the right to unilaterally cancel or alter the arbitration agreement.

EMPLOYEE HANDBOOKS

An "employee handbook" generally refers to a collection of personnel and benefits policies written by an employer and disseminated to its employees. Employee handbooks are often the source of an implied contract between the employer and employee, and may limit the employer's ability to discharge an otherwise at-will employee. Currently, over half of the 50 states have found employee handbook language to be contractually binding on the employer.

Careful wording of employee handbooks and manuals will decrease the risk of a finding that an implied contract exists, thus protecting an employer from liability. Fortunately for employers, there is a considerable amount of state case law which cites examples of language that do not give rise to an implied contract.

At-Will Employment

"Employment-at-will" means that an employer may discharge an employee for a good reason, no reason, or even a bad reason, as long as the reason is not unlawful (*i.e.*, discriminatory). If a state is an employment-at-will state, then as a general rule, courts will presume that an employment relationship is an at-will relationship. If, on the other hand, the state does not follow the employment-at-will doctrine, an employer's ability to discharge an employee for no reason may be limited.

In employment-at-will states, this presumption of an employment-at-will relationship may be overcome if the employee can demonstrate that he or she and the employer had agreed otherwise. Usually, this means the employer and employee entered into an agreement that the employer may only discharge the employee "for cause" or pursuant to certain agreed-upon conduct. Furthermore, the employer and employee may agree that the employee is entitled to certain procedures before discipline and discharge can take place.

Such an agreement between the employer and employee often takes the form of a written contract. However, even without a written contract, courts will, at times, find that an implied contract arose out of the employer's conduct (oral promises and representations), out of the course of dealing between the parties, or from employee handbooks and manuals. Such implied contracts may limit the employer's ability to discharge an otherwise at-will employee.

If the employer and employee have contracted (either expressly or by implication), then employment is not at-will, and a discharged employee may have a cause of action against the employer. Therefore, if the employer does not follow the terms of the contract, the employee may have a breach of contract claim against the employer. Nonetheless, employers must keep in mind that regardless of the relationship between the employer and the employee, employees can always choose to pursue a cause of action against an employer for statutorily prohibited conduct (*i.e.*, discrimination, retaliation, harassment, etc.).

Handbooks & Implied Contracts

If a court determines that an employer's handbook gives rise to an implied contract between the parties, an employer cannot then discharge or discipline an employee without following the terms of the handbook. For example, if the handbook contains a systematic discipline procedure, the employer may be liable for breach of contract if it disciplines the employee in a manner that is inconsistent with the expressed procedure. Likewise, if the handbook states that an employee can only be discharged for specific, articulated conduct, the employer may be found in breach of contract if it discharges the employee for conduct which is not one of the reasons articulated as leading to discharge in the handbook.

In determining whether certain terms in an employee handbook contractually bind the employer, the most common thread among court decisions is the existence of a definite promise by the employer to not discharge the employee except "for cause" or for the reasons articulated in the handbook.

Whether or not a court finds the existence of an implied contract is heavily dependent on the specific language contained in the employee handbook. Therefore, it is important that employers carefully draft their handbooks to ensure that no promises are made. Use of terms such as "*may*" and "*could*" as opposed to "*shall*" and "*will*" help avoid the appearance that a promise has been made.

Courts have taken many different approaches toward determining when an employment handbook constitutes an implied contract. In *Duldulao v. Saint Mary of Nazareth Hospital Center*, 505 N.E.2d 314 (Ill. 1987), the Illinois Supreme Court found that an employee could defeat the presumption of employment-at-will by establishing three factors relative to a handbook:

(1) The handbook language contains a promise clear enough that an employee would reasonably believe an offer was made;

(2) The handbook is disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer; and

(3) The employee accepts the offer by commencing or continuing to work after learning of the policy statement.

According to the *Duldulao* court, "when these conditions are present, then the employee's work constitutes consideration for the promises contained in the statement, and under traditional principles a valid contract is formed." In sum, the court found that "an employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present."

These three factors were restated in the matter of *Ross v. May Co.*, 377 Ill.App.3d 387 (Ill. App. Ct. 2007). If the employee is capable of establishing the above elements, the employee must also show a breach of the promises contained in the handbook and damages as a result of the breach.

Another approach was followed in *Lewis v. Equitable Life Assurance Society of the U.S.*, 389 N.W.2d 876 (Minn. 1986), *superseded by statute as stated in, Emery v. Ne. Ill. Regional Commuter R.R. Corp.*, 377 Ill.App.3d 1013 (Ill. App. Ct. 2007), where the court held that to create an employment contract, a promise of employment on particular terms must be presented in the form of an offer and must be accepted by the employee. The offer must be definite in form and must be communicated to the employee. Acceptance by the employee is satisfied by the employee's continued employment.

Before a court in an employment-at-will state will find that an employee handbook gives rise to an implied contract, there must be a promise clear enough that an employee would reasonably believe an offer has been made. In *Helland v. Kurtis A. Froedtert Memorial Lutheran Hospital*, 601 N.W.2d 318 (Wis. Ct. App. 1999), the court held that the "at-will" employment relationship is only altered when a handbook contains express provisions from which it can be reasonably inferred that the parties intended to bind each other to a different employment relationship.

Generally, if the language contained in the handbook makes specific promises to the employee, it is likely that a court will find the existence of an implied contract. Therefore, if the employer uses language such as "*promise(s)*", "*the employer will…*", "*the employer shall…*", *or* "*the employee has the right(s),*" a court may find that the employer made specific promises to the employee.

Courts have construed the following instances to constitute an employment contract:

- ☐ An employer's handbook containing language that was sufficiently clear to lead an employee to believe that reasonable cause must exist before discharge. *Wood v. Wabash County*, 722 N.E.2d 1176 (Ill. App. Ct. 1999). The handbook contained detailed steps the employer would take prior to discharge and the actions that would be taken in each step. The handbook also stated that dismissals would be for "*reasonable cause"* and, if such reasonable cause for dismissal existed, a written notice of such cause would be issued and a hearing scheduled. The court found that the employer only reserved discretion not to use all the steps of the disciplinary procedure and not the use of the procedure in general.

- ☐ A letter stating: "*tenure is achieved after the successful completion of 6 (six) months of service with our agency*" and a handbook stating: "*[p]ermanent employment status is attained upon successful completion of the tenure probation period with the Agency.*" *Robinson v. Ada S. McKinley Community Services*, 19 F.3d 359 (7th Cir. 1994). The handbook also described disciplinary procedures in mandatory language using the terms "*shall*", "*must*", and "*requires*" when describing actions that would be taken by the employer. This language gave rise to a reasonable belief that employees could not be terminated without certain protections.

- ☐ An employment manual that employees were required to read and be "*thoroughly familiar with the personnel policies contained*" therein within 10 days and sign a signature page because it was "*extremely important.*" *Vajda v. Arthur Andersen & Co.*, 624 N.E.2d 1343 (Ill. App. Ct. 1993). The manual also stated that employment decisions were to be based on qualifications and merit alone, and the manual contained a clearly established three-warning policy that prescribed specific disciplinary procedures to be used prior to discharging an employee.

- ☐ An employment handbook containing the following provision: "*Except for misconduct serious enough to warrant immediate dismissal, no employee will be discharged without previous warning and a period in which to bring performance up*

to a satisfactory level." The court held that this language was definite enough because it limited the right to freely dismiss employees.

Because a court in an employment-at-will state must find that there is a clear promise by the employer for there to be a contract, if the employer uses vague and non-promissory language, the at-will relationship will not be altered. Therefore, if the employer uses language such as "*may*," "*possibly*," or "*including, but not limited to…*," a court is much less likely to find that the employer made specific promises to the employees and the at-will employment relationship is not likely to be inadvertently altered. Furthermore, if the handbook clearly states that the employer retains the right to discharge the employee at any time and without notice, a court is not likely to find reasonable reliance by the employee that he or she would only be discharged for cause.

Courts have construed the following suggestive or discretionary language to not give rise to an employment contract:

- ☐ An employee handbook describing conduct that "*may be*" subject to employee discipline and describing certain types of disciplinary action that might be taken. *Frank v. South Suburban Hospital Foundation*, 628 N.E.2d 953 (Ill. App. Ct. 1993). The employee manual contained no promise to follow that course of progressive discipline in every situation, and the policies expressly provided that the type of discipline depends entirely upon the severity of the offense, as determined by the employee's supervisor. The court found that because the language was not mandatory, but discretionary, no contract for employment was formed.

- ☐ An employee handbook stating: "*[V]iolations of the rules and regulations <u>may</u> result in disciplinary action for the offender. . . Violations will be grounds for progressive disciplinary action, which <u>may</u> include a correction interview, written warning, probation, suspension without pay, <u>or</u> termination.*" *Rudd v. Danville Metal Stamping Co.*, 550 N.E.2d 674 (Ill. App. Ct. 1990). Since there was no specific description of disciplinary procedures and the handbook did not promise that specific disciplinary procedures would ever be used, no employment contract was formed.

Courts have construed the following to not constitute employment contracts, based on lack of specificity in the description of disciplinary procedures:

- ☐ A handbook containing the following provisions: "*in most cases disciplinary action will begin with…*" and "*dismissal may occur immediately*." *Orr v. Westminster Vill. N., Inc.*, 689 N.E.2d 712 (Ind. 1997). Furthermore, the handbook stated that the articulated list of dischargeable violations was "*not intended to be all inclusive*." The court held that these statements were vague, general, and gave the employer broad discretion so as to keep the handbook from becoming an implied contract.

- ☐ A handbook advising employees that "*[t]o continue working at [the company], each employee must meet [the company's] performance expectations. For the few employees who do not make that commitment, progressive discipline and/or discharge may result*." *St. Peters v. Shell Oil Co.*, 77 F.3d 184 (7th Cir. 1996). Since

the provision did not require the employer to follow prescribed procedures of progressive discipline, the court held that the plaintiff had no enforceable contract right to progressive discipline.

☐ A handbook which stated that employees would only be discharged for "just cause" and listed specific grounds for an employee's discipline or dismissal, stating, "*violation of policies. . . may result in dismissal. . .[and] [i]f an employee's work is unsatisfactory, he will be informed of this. . . and encouraged to improve.*" *Tolbert v. St. Francis Extended Care Ctr.*, 545 N.E.2d 384 (Ill. App. Ct. 1989). The court found that the lack of articulated procedures for dismissal prevented the handbook from becoming an employment contract.

Courts have construed the following to not constitute employment contracts based on their non-exclusive list of reasons for termination:

☐ A handbook stating: "*dismissal of an employee <u>may</u> result because of . . .*" and setting forth five reasons. *Toombs v. City of Champaign*, 615 N.E.2d 50 (Ill. App. Ct. 1993). The court held that the employer was not limited to firing an employee only for the reasons listed in its handbook because the list was not exhaustive and other reasons for dismissal were permissible.

☐ An employee handbook asserting six examples of discharge "for cause." *Johnston v. Panhandle Coop. Ass'n*, 408 N.W.2d 261 (Neb. 1987). The court reasoned that because the handbook did not limit the reasons for discharge to the six examples or state that there were any restrictions on the employer's right to discharge, the employment-at-will status had not been altered.

☐ A handbook stating, "*in the event of a serious offense, an employee will be terminated immediately*." *Hunt v. IBM Mid Am. Emps. Fed. Credit Union*, 384 N.W.2d 853 (Minn. 1986). The court held that because the handbook neither defined "*serious offense*" nor gave examples, such vagueness fell short of the specificity necessary for a contractual offer.

Acceptance of the Handbook

Because an implied contract is based on general contract law, courts will require that there be acceptance by the employee of the promises made by the employer. In states that recognize employee handbooks as contracts, court decisions clearly indicate that for there to be acceptance by the employee, the employee must, at a minimum, be aware of the existence of the employee handbook which has been disseminated by the employer. For example, in *Hohmeier v. Leyden Community High School District 212*, 954 F.2d 461 (7th Cir. 1992), the court held that because the plaintiff did not receive a copy of the policy manual provision regarding termination until her discharge, and she had no idea that such a provision existed until after her discharge, no contract existed. The court held that the plaintiff could not have reasonably believed that a document given to her at the time of termination constituted an offer of employment. Thus, she could not have based her employment on the language in the policy.

Similarly, in *Harrison v. Sears, Roebuck & Co*., 546 N.E.2d 248 (Ill. App. Ct. 1989), the court found that since the plaintiff did not know the manual existed prior to her termination and the manual was not disseminated to employees, the plaintiff did not rely on the manual. Therefore, no contract for employment existed.

Disclaimers

If a state has adopted the employment-at-will doctrine, one of the most effective tools to ensure that an employee handbook does not give rise to an implied contract is a written disclaimer in the handbook that states that the handbook does not alter the employment-at-will relationship. However, the mere existence of a disclaimer statement does not automatically lead to the preservation of the at-will employment relationship.

Whether a particular disclaimer is effective in preserving the at-will relationship is heavily dependent on the applicable state's court decisions. However, a disclaimer is generally considered effective if it is printed in a manner that is prominent. For the disclaimer to be sufficiently prominent, the text should be set off from other handbook language by use of larger type, contrasting print, and/or capitalized letters. The disclaimer should also be placed so that a reasonable person should notice it. For example, the disclaimer should be on a separate page and in the front of the handbook. Furthermore, the language of the disclaimer should be clear and unambiguous so that a reasonable person would understand that the handbook is not a contract and that the employment relationship remains at-will.

Court decisions reveal that the most effective disclaimers are those that are acknowledged and signed by the employee. As long as there is no language in the handbook that contradicts the disclaimer, courts will generally give effect to the disclaimer. Courts generally require that for a disclaimer to be effective, it must be conspicuous, unambiguous, and contain language disclaiming the formation of a contract. *Hardy v. S.F. Phosphates Limited*, 185 F.3d 1076 (10th Cir. 1999). In *Hardy*, the court held that the following bold-print disclaimer which the employee signed was sufficiently conspicuous and unambiguous: "*… I understand that employment and compensation can be terminated at will, with or without cause, and with or without notice, at any time, either at the option of the employee or the company…*" (emphasis altered).

Similarly, in *Chesnick v. Saint Mary of Nazareth Hospital*, 570 N.E.2d 545 (Ill. App. Ct. 1991), upon receiving a handbook, an employee signed a disclaimer stating: "*I understand that the employment relationship between myself and the Hospital is not contractual in nature.*" The handbook also provided that personnel policies were "*subject to change without my prior notification and I am subject to policy changes as they are made*." The court found that even if the disclaimer was ambiguous when viewed in isolation, the second provision cited made it reasonably clear that the employee handbook was not intended to promise anything.

However, the opposite result was reached in *Hicks v. Methodist Medical Center*, 593 N.E.2d 119 (Ill. App. Ct. 1992), where the court found that the employer's disclaimer did not prevent its handbook from becoming the basis of a contract. The disclaimer was under a section entitled "Revisions," rather than a section entitled "Disclaimer." The provision was on page 38 of the handbook, not highlighted, not printed in capital letters, and not in any way prominently

displayed. As a result, the court found that it was not conspicuous enough to negate the promises made, and the handbook did form a contract.

It is a wise policy to clearly disclaim somewhere near the beginning of a handbook that the handbook is not intended to create contractual obligations. Also, remember that disclaimers should be designed to "catch the attention of the reader" – altering font size and type is recommended, as is underlining, highlighting and **bolding** the text. Sample language is provided below:

Disclaimer

> The provisions of this handbook do not create any legal rights. Employment relationships that are not subject to a specific, signed contract between the individual employee and _____ are considered "employment at will," meaning the relationship is voluntarily entered into and has no specified term or length. The employee is free to resign at will at any time, with or without cause. Similarly, _____ may terminate the employment relationship at will at any time, with or without advance notice or cause**.**
>
> The nature of employment for some employees of _____ is contract-based. The terms and conditions of such employment are defined solely by each employee's individual contract, and are not added to or subtracted from by any other document or policy. Employment is governed exclusively by the terms and conditions set forth in applicable contractual provisions. Nothing in this handbook can be read to alter the terms or conditions of an employee's contract.
>
> This handbook only serves to highlight _____'s policies, practices, and benefits for your personal education and cannot be construed as a legal document. Additionally, no procedure outlined in this handbook can be read to constitute the precise methodology which will be followed in every situation. These policies merely outline the procedures and actions the company will strive to follow in order to resolve those grievances which may arise from time to time.

Modification of an Existing Employee Handbook

Whether an employer can modify a handbook is determined by each individual state. Illinois courts hold that for an employer's modification to be valid, the modification must either result in a detriment to the employer or give some benefit to employees. *Doyle v. Holy Cross Hospital*, 708 N.E.2d 1140 (Ill. 1999). The court in *Doyle* held that the employer's unilateral modification of its employee handbook was not binding on its existing employees. The mutual agreement of the parties that was needed to form a contract was lacking because the employer made unilateral modifications that were detrimental to existing employees. The court held that

for there to be sufficient evidence of a mutual agreement to change the handbook so that the modification is binding, the employer must also suffer a detriment or give employees something in return. However, if the modification is of benefit to the employees, the employer must suffer no such detriment and the modification is binding. The court noted that the modified handbook was binding on employees who began employment after the date of the modification.

Similarly, in a recent Illinois case, *Ross v. May Co.*, 880 N.E.2d 210 (Ill. App. Ct. 2007), the Illinois Appellate Court reversed a lower court decision to dismiss the plaintiff's breach of contract claim against his employer. The plaintiff claimed that he was unfairly terminated when his employer failed to follow the terms set forth in a 1968 employee handbook, which the plaintiff claimed created an implied-in-fact employment contract. The lower court dismissed the case, finding that disclaimers contained in revised editions of the employee handbook served to invalidate the employee's previously existing employment contract. The Illinois Appellate Court, however, ruled that the defendant acted unilaterally, not in a bargained-for exchange, when it revised the handbook and that no consideration flowed from the defendant to the plaintiff to compensate him for relinquishing the protections he enjoyed under the 1968 handbook. Under these circumstances, the court found that there was no consideration for the unilateral modification of the handbook.

Other courts look to whether the employer reserved the right to unilaterally modify the employment handbook. For example, in *Helland v. Kurtis A. Froedtert Memorial Lutheran Hospital*, 601 N.W.2d 318 (Wis. Ct. App. 1999), the court held that because the employer reserved the right to unilaterally modify policies and procedures, the employee could not assert that a contractual relationship existed. In addition, the court held that the employee could not have reasonably relied on the employer's handbook because the handbook declared that it was a "*working guide*," provided that it was not a replacement for the employer's policies, used language such as "*may result*," stated that the standards of conduct were not all-encompassing, and stated that the employer "*reserve[d] the right to take necessary and reasonable action, including discharge*."

Another requirement some courts consider in order for handbook modifications to be valid is that the employer provides the employees with notice of any modifications to the employee handbook. *Fleming v. Borden*, 450 S.E.2d 589 (S.C. 1994). In *Fleming*, the court held that an employer has the right to unilaterally modify an existing employee handbook to return employees' status to employment "at-will" only if the employer gives actual notice of the modification to the employees.

Finally, some courts require that an employer's modifications satisfy the requirements of a valid contact in order to be valid. In *Chambers v. Valley National Bank of Arizona*, 721 F. Supp. 1128 (D. Ariz. 1988), the court held that any modification or termination of an existing employee handbook will only be effective if all the requirements for a contract are met. Therefore, a subsequent modification is characterized as an offer for modification, which the employee must accept by continuing employment.

Drafting an Employee Handbook

Employee handbooks can be an excellent way to communicate the company's policies and expectations to employees. However, awkwardly drafted employee handbooks can lead to lawsuits alleging breach of contract. Therefore, when drafting employee handbooks, some general guidelines should be followed, and employers should have a draft of the handbook reviewed by an attorney familiar with the employment laws of their state before distributing the final draft of the handbook to employees.

Consider:

- ☐ Including a disclaimer in a prominent position (page 1) in the handbook which states that the handbook does not create any type of contractual relationship between the employer and employee, and that the employee is an "at-will" employee who may be terminated at any time, with or without notice, and for any reason. The disclaimer should also state that the employer "*reserves the right to modify, change or eliminate any policy contained in the handbook with or without notice*."

- ☐ Having the printed language of the disclaimer in a larger font, **bolded**, *italicized*, <u>underlined</u>, highlighted, and/or in CAPITAL LETTERS.

- ☐ Having the employee sign a written acknowledgment that includes disclaimer language verifying receipt of the handbook, which will be retained by the employer.

- ☐ Drafting procedural policies (such as discipline and termination policies) using discretionary terms such as "*the employer may*" or "*might*" or "*could*", rather than affirmative terms like "*will*" or "*shall.*" The reason for the use of permissive language is so that the employer is not a victim of its own policy statement in situations where policies are not followed to the letter.

- ☐ Providing a grievance procedure. However, use permissive language such as "*the employer **may** investigate grievances in the following manner...*" Additionally, state at the beginning of the grievance procedure that "*this procedure does not change the 'at-will' nature of the employment relationship*."

- ☐ Including a statement or provision stating that the employee agrees to all of the terms and/or conditions, which the employer shall decide to implement through a unilateral modification of the handbook.

- ☐ Following the procedures as specified in the manual.

- ☐ Keeping detailed records for all procedural matters (*i.e.*, hiring, leaves, promotion, discipline, reviews, termination, etc.)

- ☐ Including a policy statement indicating that you are an equal opportunity employer and that you do not discriminate on the basis of race, color, religion, national origin,

sex, disability, or other prohibited basis. However, if you are a religious entity, after consultation with your attorney, you may decide to omit "religion" as a part of the nondiscriminatory practices.

☐ Including a policy prohibiting sexual harassment, in addition to all other forms of harassment, which clearly indicates that employees are encouraged to report claims of harassment, and that such claims will be promptly and thoroughly investigated, and instances of harassment will be punished with disciplinary measures including termination.

☐ Including language in your harassment and discrimination policies stating that retaliation for reporting harassment and discrimination is prohibited, but indicating that individuals who intentionally make false report of harassment or discrimination may be disciplined, up to and including termination of employment.

Avoid:

☐ Broadly disseminating policies that are meant for management use only.

☐ Using exclusive language like "*will*," "*shall*" or "*must*" when drafting procedures to be followed.

☐ Using exclusive lists when articulating reasons an employee can be discharged and state that the list of reasons is "*non-inclusive.*"

☐ Failing to include a clear and prominent disclaimer.

☐ Failing to include a provision allowing for the employer's unilateral modification of the policies and provisions of the handbook.

☐ Allowing supervisors or other personnel to override policies set forth in the handbook.

PRACTICAL EMPLOYMENT CONSIDERATIONS

EMPLOYMENT LIABILITY INVESTIGATIONS

Conducting a proper investigation into employee complaints regarding workplace conduct is a critical issue for employers, especially with respect to allegations of sexual harassment. Supreme Court precedent imposes an affirmative duty on employers to provide an effective mechanism for reporting and resolving complaints of sexual harassment. Employers also have an affirmative duty to train their employees regarding what is and what is not appropriate behavior in the workplace, and to inform employees how they can avail themselves of their employer's preventative or remedial apparatus. What this means is that an employer must have a written no-tolerance policy in place with regard to sexual harassment and also must set forth a complaint and resolution mechanism. Employers must disseminate this policy to their employees and should have their employees sign a statement indicating that they have received and read this policy.

The basic tenets of an effective investigation into complaints of sexual harassment can also be applied to investigations into other improper conduct, such as discrimination on the basis of race, sex, national origin, age, disability, or other prohibited basis.

Internal investigations are appropriate whenever an employer becomes aware of actual or potential discrimination through a complaint or through the observations of supervisors or other persons. A prompt, well-conducted investigation can serve to:

- ☐ avoid or limit the time and expense of responding to subsequent, more formal charges of harassment or discrimination;
- ☐ limit the employer's liability for damages that accrue with the passage of time;
- ☐ promote the settlement of disputes on terms more favorable to the employer at a time when parties are more inclined to do so;
- ☐ help the employer prepare a more effective defense for more formal proceedings, should they become necessary;
- ☐ place supervisors and employees on notice that the employer will not tolerate unlawful harassment, discrimination or bias; and
- ☐ encourage employees to bring potentially illegal practices and circumstances to the employer's attention.

An investigation is considered to be effective if it:

- ☐ begins promptly after a harassment complaint is brought to the employer's attention;
- ☐ is conducted by a knowledgeable and objective person;
- ☐ follows specific guidelines;

- ☐ concludes with a finding as to whether the alleged harassment occurred; and

- ☐ results in an appropriate remedy if one is necessary.

Promptness in commencing an investigation is imperative. Employers should have procedures in place designed to trigger an investigation as soon as reasonably possible after information regarding a potential or actual claim is received. Promptness is also helpful in preserving witnesses' memories of the events.

Thoroughness is another key element of an effective investigation. A thorough investigation is one that:

- ☐ protects the complaining employee from retaliation for filing the complaint;

- ☐ includes interviews with all parties and all other persons having information about the alleged harassment;

- ☐ adheres to a predictable schedule;

- ☐ keeps information as confidential as possible;

- ☐ ends with a finding of whether or not the harassment occurred, with an explanation; and

- ☐ recommends further corrective action to end or deter harassment.

An investigation should be as lengthy as necessary to determine whether the complained-of conduct actually occurred. This length of time may vary from case to case.

Employer's Duty to Investigate

An employer has a duty to investigate workplace harassment claims whenever it learns that harassment may have occurred. The importance of this duty cannot be overstated.

An employer should not wait for a formal complaint to be filed if it has witnessed behavior it suspects is inappropriate and warrants further investigation. Enforcement agencies such as the EEOC assume that once an employer knows that harassment may have occurred, it has legal notice of possible illegal conduct and is therefore under a duty to investigate. If an employer fails to conduct an investigation after being made aware of the possible harassment, the EEOC and/or courts may conclude that the employer tacitly approved of or tolerated the conduct. Launching an investigation is the most significant immediate measure an employer can take in response to a complaint. An investigation can also be a powerful factor in deterring future harassment, as it puts all employees on notice that the employer takes such allegations seriously and will not tolerate harassment in the workplace.

Even if an employee requests that the employer not investigate, the employer should assume it has a duty to investigate for several reasons:

(1) an employer is liable for harassment when it knew or should have known of the harassment;

(2) the burden is on the employer, not the employee, to remedy the situation; and

(3) it is the employer's duty to create a harassment-free work environment for the benefit of all employees.

Depending on the allegations, an effective investigation may help an employer avoid liability for workplace harassment. An effective investigation is a valid defense against a charge of hostile work environment harassment when the employer takes corrective action based on the results of its investigation. On the other hand, the adequacy of an investigation will have no effect on liability for quid pro quo harassment by a supervisor, since in that situation, an employer is considered responsible for the harassment whether or not it had actual knowledge of it.

Harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability. However, the employer will be shielded from liability for harassment by a supervisor only if it proves that it exercised reasonable care in preventing or correcting the harassment and that the employee unreasonably failed to avoid all the harm. This means that the employer has disseminated its no-tolerance sexual harassment policy to all employees, but the complaining employee failed to avail him or herself of the complaint mechanism. However, if both parties exercise reasonable care, the defense will fail. In some cases, the employer will be unable to avoid liability completely, but may be able to establish the affirmative defense as a means of limiting damages.

How Should an Employer Plan an Investigation

Before launching an investigation, the employer must appoint an investigator and plan an effective investigation.

<u>Designating an Investigator</u>

Designating an investigator may be the most important part of the investigation process. This person must be able to approach the case objectively and must not have a stake in the outcome of the investigation.

Persons who would be considered appropriate investigators include:

☐ Members of the employer's Human Resources department;

☐ In-house attorneys;

☐ Line managers;

- ☐ Members of the internal audit, ethics or security department;
- ☐ Private investigators or outside consultants; or
- ☐ Regular or special outside counsel.

Characteristics of an appropriate investigator include:

- ☐ Competent and able to understand the purpose of the investigation;
- ☐ Knowledgeable of company policies, procedures, practices, and rules;
- ☐ Skilled in conducting interviews;
- ☐ Able to develop a rapport with the persons being interviewed;
- ☐ Credible and objective;
- ☐ Able to take notes well;
- ☐ Able to maintain some degree of confidentiality;
- ☐ Able to instill confidence in and work with participants of the investigation; and
- ☐ Able to keep an open mind and not draw conclusions based on incomplete facts.

When selecting an attorney to conduct an investigation, the employer must carefully weigh this decision. On one hand, an attorney knowledgeable in this area of the law and in investigatory techniques provides the benefit of professional expertise. However, under the Code of Professional Responsibility, the attorney who conducts the internal investigation, and possibly his or her entire firm, may be disqualified from representing that employer in a lawsuit concerning that investigation, especially where it is obvious that the attorney will become a witness on a substantive issue material in subsequent litigation. In addition, the attorney-client and work-product privileges may be waived by counsel's participation in or supervision of the investigation.

Planning a Reasonable and Effective Investigation

To be most effective, an investigator should prepare a written investigative plan that identifies the issues and sources of evidence and information needed to resolve them. The plan should include an outline of key questions regarding:

- ☐ The facts necessary to establish unlawful discrimination;
- ☐ The identity of witnesses with knowledge of the facts, the sources of information that bear on the facts, and the credibility of other witnesses; and

☐ The existence of documentary or other physical evidence that bears on the facts. The plan should also be designed to take into account:

☐ The need to exhaust readily available sources of documentary and testimonial evidence before interviewing third parties;

☐ The need to minimize the influencing of crucial testimony by witnesses who have already testified; and

☐ The need to accommodate the work schedules of witnesses who may have out-of town assignments, vacations or plans to resign or retire.

Confidentiality

During the investigative process, employers should assure employees that the investigation will be kept as confidential as possible; however, employers should not promise complete confidentiality, as this is often impossible. Nonetheless, the assurance that the employer will maintain some degree of confidentiality enables the employer to obtain the cooperation of the participants more easily and increases their confidence in the fairness of the investigation. However, this does not equate to complete secrecy because at a minimum, the accuser and the accused will have to be told what each other said.

Keeping the contents and/or results of the investigation confidential is also an additional protection against a claim of libel or defamation in connection with the investigation. An accused harasser who has been exonerated of harassment could have a cause of action for libel or defamation if the investigation results are improperly publicized beyond those persons with a legitimate need to know.

Avoid any e-mail regarding the investigation or its results and make sure that only other employees with a "need to know" are informed of the investigation and/or decision. Employers can also insulate themselves against potential defamation claims by ensuring that sexual harassment policies contain a statement or caveat that the employer will take steps to repair the reputation of any employee falsely accused of harassment.

Conducting an Investigation

Fact-Finding

Facts to be sought during an investigation include:

☐ When and where the incidents occurred;

☐ How the incident came to the employer's attention;

☐ The identity of the alleged harasser;

- ☐ The work history of the complaining employee, the accused harasser, and key witnesses;
- ☐ The reporting, work, and personal relationships of the parties and witnesses;
- ☐ The context of each incident and what was said and done;
- ☐ What occurred to suggest that the conduct was welcome or unwelcome;
- ☐ Identity of witnesses to each incident and whether the witnesses have relevant information;
- ☐ The chronology of the alleged misconduct or other key events such as discipline or change in supervision;
- ☐ Whether the incident was isolated or part of a pattern of misconduct;
- ☐ The effect of the incident on the complaining employee;
- ☐ Whether the employee complained previously about the conduct;
- ☐ Whether there is any documentation of the incident, such as calendars, diaries, notes or tape recordings;
- ☐ Whether the complaining employee knows of other persons who were subjected to inappropriate conduct; and
- ☐ Whether other employees have complained about the accused harasser.

Documents to Procure

The investigator should obtain documentary evidence from the appropriate departments or offices of the employer, which should include:

- ☐ Employee personnel files;
- ☐ Employee performance appraisals; and
- ☐ Employee handbooks/policy manuals.

Interviewing Parties and Witnesses

Interviews are the second most important part of the investigation process. Interviews should include one-on-one sessions with the complaining employee, the alleged harasser, and other persons who may have information relevant to the claim. Prior to interviewing parties and witnesses, the investigator should review applicable laws, policies, and guidelines and should understand what facts need to be gleaned in order to reach a suitable conclusion. The investigator

should have a detailed outline of key questions to ask during the interview and be prepared to improvise as necessary. The investigator also should explain to every party and witness interviewed:

- ☐ The purpose of the interview and underlying investigation;
- ☐ The investigator's relationship to the employer and the witness;
- ☐ The confidentiality of the matters discussed;
- ☐ The seriousness of the investigation;
- ☐ The consequences for those who do not cooperate;
- ☐ The importance of accurate information;
- ☐ The obligation of the person being interviewed to provide truthful and complete information;
- ☐ The necessity for the information to remain confidential; and
- ☐ That no adverse action will be taken against those who cooperate with the investigation.

Interviewing Techniques

An investigator should employ the following techniques in conducting interviews to ascertain facts:

- ☐ Thank the participants for their time and cooperation.
- ☐ Use neutral terms such as "possible misconduct," "workplace problems," and "possible rule violations," rather than judgmental terms such as "harassment" or "victim."
- ☐ Questions should be designed to elicit specific facts regarding the alleged incident without suggesting particular responses, identifying sources or leads or disclosing investigative strategies.
- ☐ Convey that the employer wants its investigation to be effective, without promising specific results.
- ☐ Take contemporaneous notes not only about the content of the witnesses' accounts, but also their demeanor.

☐ Consider recording the interviews, with the consent of the person being interviewed; however, be aware that this could have a chilling effect on the employee's responses.

☐ Note observable facts about the witnesses' demeanor and behavior.

☐ If the interview is being memorialized via written notes, ask the witness to review the notes and sign them to indicate that the notes accurately depict the witness's recollection.

☐ Request clarification when needed.

☐ Anticipate questions about the next steps in the investigation.

☐ Explain that no conclusions will be drawn until the investigation is completed.

The complaining employee should be the first person interviewed. When interviewing the complaining employee, the investigator should assure the employee that:

☐ The employer will not retaliate against him or her for making a good-faith complaint of harassment under the company's procedure or in a government agency or court.

☐ Information obtained during the interview and investigation will remain confidential and only be shared with the complaining employee, the alleged harasser and others with a need to know.

The investigator should obtain the following information from the complaining employee:

☐ Complete list of acts and statements the employee claims to constitute harassment.

☐ His/her response to each act or statement.

☐ The date he/she learned of the harassment policy or complaint procedure.

☐ To whom he/she first reported the offensive incident or statement.

☐ Whether he/she did anything to let the alleged harasser know that the conduct was unwelcome.

☐ Whether this was an isolated incident or part of a pattern or history.

☐ Whether he/she is aware of the accused harasser targeting other employees.

☐ Whether the employee has spoken with anyone else about the alleged conduct.

☐ How the alleged conduct affected him/her, including work habits, physical problems, depression, anxiety, etc.

☐ The demeanor of the employee and his/her emotional state.

☐ Whether there are any witnesses to any of the incidents.

The alleged harasser should be interviewed after the complaining employee. When interviewing the alleged harasser:

☐ First, confront the alleged harasser with the general allegations and observe and note his/her response to the allegations, such as his/her demeanor and whether he/she knows the identity of the accuser without being told.

☐ Identify each allegedly improper act or statement and give the alleged harasser an opportunity to respond.

☐ Determine the extent and nature of his/her interactions with the complaining employee.

☐ Ask for any facts suggesting that other persons had a motive to fabricate the accusations.

☐ Provide the alleged harasser an opportunity to provide any alibis or mitigating circumstances.

☐ Ask the alleged harasser to identify all persons who should be interviewed as part of the investigation and what relevant information each person is likely to have; no character witnesses should be included, only other witnesses who have firsthand knowledge of facts relating to the alleged conduct.

☐ Ask the alleged harasser to provide all relevant documents and other evidence.

☐ Ask the alleged harasser what steps should be taken to ensure a thorough investigation.

☐ If alleged harasser makes a blanket denial:
- o explore ill-motives: “Why would he/she make this up?”
- o uncover new issues; for example, if the alleged harasser was recently given a poor performance evaluation
- o make a mental note of credibility

☐ If the alleged harasser refuses to cooperate:
- o explain your obligation to investigate and that it is in his/her best interest to cooperate
- o explain that the investigation will proceed anyway and that unwillingness to cooperate will be a factor in your decision

☐ In the event that the accused wants to confront his/her accuser:

- tell him/her that if they have questions, he/she should provide them to you and you will present them to the accused

After the complaining employee and the alleged harasser have been interviewed, the next interviews should be with anyone who may have relevant information, such as any individuals identified by the complaining employee and the accused harasser.

Credibility

One of the most critical aspects of interviewing parties and witnesses is assessing their credibility. The EEOC has set out five factors to be considered in making credibility determinations:

☐ *Inherent plausibility*: Is the testimony believable on its face and does it make sense?

☐ *Demeanor*: Did the person seem to be telling the truth or lying?

☐ *Motive to falsify*: Did the person have a reason to lie?

☐ *Corroboration*: Is there witness testimony available that corroborates the parties' testimony?

☐ *Past record*: Did the alleged harasser have a history of similar behavior in the past?

Concluding an Investigation: The Investigative File and Report

Documentation

An employer will have an easier time defending the results of the investigation if it adequately documents the entire process. This means keeping contemporaneous notes of witness interviews and reviewing notes for accuracy after each interview. By doing so, a written record will be in place establishing why the employer drew its factual conclusions. Having a written record also preserves witnesses' recollections before their memories fade.

Investigation of a workplace harassment complaint should conclude with a report to top management containing the investigator's findings, some factual background on the incident that gave rise to the complaint, and the relevant documentation that was gathered during the investigation.

Contents of the report should be reviewed with human resources and management representatives before being put into final form. Most importantly, the report should state whether there was a finding of harassment and explain why or why not. If the investigator was unable to make a determination of the truth or falsity of the allegations, the report should also indicate this.

This investigative report is the employer's first line of defense against allegations that it conducted an ineffective investigation or that the findings did not justify the proposed remedy.

The report should thoroughly document the history of the case and all relevant findings, including:

- ☐ The complaint or event that prompted the investigation;
- ☐ The issues that were investigated;
- ☐ The factual findings regarding each issue;
- ☐ The dates of each of the interviews and all other investigatory steps taken;
- ☐ Critical information obtained from each interview;
- ☐ Relevant policies and other evidence;
- ☐ Injuries suffered by the complaining employee;
- ☐ Any actions taken in response to the complaint; and
- ☐ Recommendations to prevent a recurrence of the alleged misconduct.

When drawing conclusions from the investigations, certain facts should be considered, including:

- ☐ Evaluation of the credibility of each witness;
- ☐ What factual conclusions can be drawn and why;
- ☐ What factual issues remain unresolved and why;
- ☐ Whether a judgment can be made about whether a violation of a company policy occurred;
- ☐ What has the company done in the past to remedy similar violations; and
- ☐ The extent to which the investigator's qualifications to make a legal decision are limited by education or experience.

For example, an investigative report may provide a legally acceptable basis for discharging the alleged harasser; however, the investigator's summary conclusions alone are not a valid basis for discharging an alleged harasser when the credibility of a witness is in doubt. Instead, the actual decision-maker reading the report should read the actual interview notes, declarations or other statements and documents before deciding whom to believe.

Should the investigation conclude that the harassment did not occur and that the complaining employee filed a false report, the decision-maker should also consider the following:

- ☐ The distinction between an honest difference in interpretation, which may be protected by federal and/or state law, and a deliberately dishonest allegation;

- ☐ The nature of the conduct, the context in which the alleged conduct occurred, the frequency of the conduct, the severity and pervasiveness of the conduct, whether it was physically threatening or humiliating, whether it was unwelcome, and whether it unreasonably interfered with the employee's work performance; and

- ☐ The appropriate level of discipline to be applied for types of dishonest conduct similar to that of the complaining employee.

Ultimately, whatever decision is made, the decision-maker should ensure that the parties are notified of the decision-maker's conclusions, reiterate to the parties the company's commitment to being an equal opportunity employer, ensure that the persons adversely affected by the company's actions based on the investigation have an opportunity to respond, and advise the parties that retaliation against the complaining employee will not be tolerated.

Corrective Action

Once an employer has concluded the investigation and prepared a report, **it must take action that is reasonably calculated to end any harassment found in the report, prevent harassment from recurring, and restore job opportunities or benefits that were denied to the victim(s) of the harassment**.

Employers should be aware that corrective action may even be appropriate before the investigation is concluded. Supervisors should immediately warn the alleged offender that his/her conduct may be sexual harassment and, if possible, separate the alleged harasser from the complaining employee so their contact is minimized. This may mean that the accused wrongdoer is placed on either a paid or unpaid suspension pending the investigation. It should be kept in mind, however, that the degree of separation imposed must be commensurate with the severity of the alleged harassment and weight of evidence provided in support of the complaint. The employer has broad discretion in choosing how to minimize contact between the two employees, so long as the accuser is not moved to an objectively less-desirable position. If the complaining employee is being transferred, the transfer should be to a position of equivalent pay, seniority or other benefits, so as to not be seen as retaliation for filing a complaint. Also, the position should not be a less-desirable one, such as one with a longer commute.

If harassment is found to have occurred, disciplinary remedies may include termination of the harasser, unless there are mitigating circumstances, or issuing a strong written warning to the harasser, emphasizing that he/she used poor judgment and may be discharged if the conduct occurs again.

Factors to be considered in applying discipline include:

- ☐ The severity and frequency of the misconduct;

☐ Whether the harasser had prior notice of the employer's harassment policy or was issued warnings after prior behavior;

☐ The effectiveness of prior corrective action;

☐ Whether the harasser is apologetic or defiant;

☐ The harasser's past employment records;

☐ Collective bargaining agreement requirements;

☐ The employer's past practice in imposing discipline for similar violations; and

☐ Whether the discipline complies with policies concerning progressive discipline or written employment agreements.

If the harassment has not occurred or if the employer reasonably concludes that a disciplinary action less severe than discharge is appropriate, the employer may:

☐ Issue a written memorandum to the participants in the investigation explaining that it was unable to determine whether any unlawful action occurred, but restating its policy against workplace harassment, or

☐ Transfer one or both of the persons involved to a different job or facility, so long as the complaining employee is not being transferred in retaliation for the complaint.

PREVENTATIVE EMPLOYMENT MEASURES

This section is meant to provide suggestions for an employer's course of conduct, as well as preventative measures that employers should consider implementing in the following employment practice areas:

Job Postings

When posting job listings, an employer should be certain that it is clear that applications are being sought from persons regardless of age, sex, race, national origin, disability, religion, or any other prohibited basis. This can be accomplished by stating directly in the job advertisement that the employer is an equal opportunity employer. However, a less direct but effective message is sent when positions are posted in an advertising medium that has widespread readership. The following are helpful suggestions to bear in mind when posting job listings:

Consider:

☐ Listing jobs with newspapers and/or other advertising media that are circulated to a widespread readership with varied demographics.

☐ Advertising jobs in gender-neutral language.

☐ Stating in job postings that the employer is an equal opportunity employer.

Avoid:

☐ Limiting job postings to advertising media that have limited circulation. For instance, do not post a job advertisement only with a Christian newspaper. Instead, make sure the job posting is received by a broad readership (See ADA and Title VII sections regarding religious exemptions).

☐ Making job descriptions specific to one gender (*i.e.*, do not advertise a job opening for a cleaning woman or a maintenance man).

☐ Restricting job applicants to a certain age or using descriptive language which would imply that only younger applicants will be considered.

Pre-Employment Screening

Investigating the background of a potential employee through pre-employment screening can minimize the risk of negligent-hiring lawsuits. Companies can be held liable for the actions of a new employee especially if the employer did not perform a background check. Employers often use screening mechanisms when hiring new employees and when evaluating employees for promotion, reassignment, and retention. See the section of this manual which discusses the Fair Credit Reporting Act ("FCRA") for a discussion of an employer's responsibilities when using consumer reports for employment purposes. In 2012, the EEOC approved new federal enforcement guidelines related to the use of arrest and conviction records by employers. Essentially, the new guidelines state that most employers cannot deny a job simply because a person has been arrested or even convicted. Instead, employers should develop targeted screens taking into account the nature of the conviction, the particular duties of the job, and the time that has passed since the conviction. It is wise to consult with counsel familiar with your state and local laws before delving too deeply into the criminal past of an employee or an applicant for employment.

Since these new guidelines were approved in 2012, there has been a tide of litigation against various large companies with regard to their alleged misuse of criminal background information. Most recently, there has been a movement called "Ban the Box," named for the box on many employment applications asking if the applicant has ever been convicted of a crime. "Ban the Box" calls for employers to wait until after an initial interview or conditional job offer before inquiring about the applicant's criminal past, instead of automatically excluding the applicant based on his or her checking the box. The reasoning is that ex-offenders will have a better chance of obtaining jobs if they are not eliminated at the very beginning of the job search.

In July 2014, Illinois joined the growing number of states and cities that have passed "Ban the Box" legislation with its Job Opportunities for Qualified Applicants Act, taking effect on January 1, 2015. Itprohibits certain private employers and employment agencies from

considering or inquiring into criminal history until the applicant has been determined qualified for the position and selected for an interview, or a conditional job offer has been extended. This legislation does not apply to certain employers, such as those that are required under law to exclude applicants with certain criminal convictions.

Consider:

- ☐ Implementing pre-employment screening to verify employment references, personal references and academic degrees.

- ☐ Outsourcing the pre-employment screening to a consumer reporting agency. In hiring an outsider, the employer will receive assistance with finding accurate, complete information regarding job candidates. An outsourcing partner should be able to steer you through the legal requirements as well as federal and state regulations regarding background screening.

- ☐ Centralizing the background checking process (or the results received from an outside background checking agency) in one department, such as Human Resources.

Avoid:

- ☐ Allowing widespread access to pre-employment screening results to individuals who are not directly involved in the process for a business-related reason.

- ☐ Implementing a system of pre-employment screening that is not administered evenhandedly.

- ☐ Using pre-employment screening to discover negative information on isolated employees or groups of employees.

Hiring

The interview and hiring process can be intimidating not only for the potential employee, but also for the employer – especially in light of the requirements imposed by federal statutes. Therefore, familiarity with Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Civil Rights Act of 1991, and the Equal Pay Act is essential for all those involved in the interview and hiring process. An employer's policy of nondiscrimination must carry over from the job posting process to the hiring process. Even when intentions are good, often the wrong impression may be conveyed by interview questions that are inappropriately posed. The following suggestions may be of assistance in avoiding the use of inappropriate interview questions and other pitfalls during the hiring process:

Consider:

- ☐ Periodically educating supervisors and others making hiring decisions as to the requirements of the ADA, Title VII, the ADEA, the Civil Rights Act of 1991, the Equal Pay Act, and any relevant state or local statutes.

☐ Soliciting and accepting applications from persons from all walks of life.

☐ Conducting interviews that focus on the individual's abilities and qualifications in addition to the requirements of the job.

☐ Asking potential employees whether they feel they can perform the requirements of the job.

☐ Hiring individuals based on their qualifications and legitimate employer requirements.

☐ Striving for a diverse workforce.

Avoid:

☐ Leaving supervisors to fend for themselves when making hiring decisions.

☐ Restricting interviews and hiring to a particular age, sex, race, religion, or national origin.

☐ Excluding persons with disabilities from the hiring process.

☐ Asking an individual's age in an interview.

☐ Asking questions that are specific to an applicant's personal life. (*i.e.*, "Are you married?" or "Do you intend to have children?"). Instead, ask the individual to relay something about him or herself.

☐ Asking the individual if he or she has a disability or any work restrictions. Instead, describe the essential functions of the position, and ask the individual if he or she can meet the requirements.

☐ Asking about an individual's health. This may be construed as an ADA violation if the individual has a disability or is perceived to have a disability.

☐ Asking an individual to disclose his or her national origin during an interview. If the individual volunteers the information, that is fine. If not, the information is not relevant to the hiring process.

☐ Asking an applicant about his or her religion, unless the employer falls within one of the statutory exemptions discussed previously in this manual. Seek legal advice first.

Performance Reviews

Performance reviews are essential for a number of reasons. Reviews provide employers with an opportunity to evaluate the proficiency and productivity of their workforce. They also provide employees with useful information regarding their performance. Written performance reviews also provide critical documentation that can assist in an employer's defense if and when an employee alleges claims of discrimination. Therefore, it is in the employer's best interest to ensure performance reviews are periodically given and documented in an employee's personnel file.

Consider:

- ☐ Conducting reviews on a set schedule and sticking to it (*i.e.*, every six months or yearly).
- ☐ Having each employee reviewed by more than one source to ensure objectivity.
- ☐ Having a pre-printed form for reviews indicating specific areas to be critiqued.
- ☐ Ensuring that reviews are fair and accurate, highlighting both the good and the bad.
- ☐ Having reviewers meet with employees to explain the evaluations.
- ☐ Clearly conveying to employees the areas that need improvement and drafting a plan for improvement.
- ☐ Showing employees the written reviews.
- ☐ Allowing employees to make written comments on the review form.
- ☐ Having the employee sign the form, indicating that he or she was apprised of its contents.
- ☐ Keeping review forms as part of employee personnel files.

Avoid:

- ☐ Procrastinating or failing to provide timely reviews.
- ☐ Leaving supervisors to fend for themselves regarding how and when to conduct reviews. Prohibiting employees from examining written reviews.
- ☐ Refusing to accept employee comments regarding reviews.
- ☐ Reviewing certain employees but not others.

Disciplinary Action

It is essential that employers have a uniform system of disciplinary action in place. Often, it becomes necessary to terminate an employee who does not comply with the employer's policies or rules. However, if no documentation regarding disciplinary infractions or corrective action is contained in an employee's personnel file, it becomes more difficult to defend wrongful termination suits. Therefore, a written system of progressive discipline should be in place, distributed to employees and followed by the employer.

Consider:

- ☐ Having a written system of progressive discipline in place (*i.e.*, oral warning, written warning, suspension and termination).
- ☐ Making sure that the established disciplinary action policy is followed.
- ☐ Advising employees of the disciplinary action policy.
- ☐ Keeping written records of any disciplinary action taken and the reasons for the action, including a record of oral warnings.
- ☐ Having pre-printed forms for each step of disciplinary action.
- ☐ Counseling employees when any disciplinary action is taken and advising them as to how they can improve.
- ☐ Having the employee sign a form indicating that a meeting regarding the infraction was held. The form should detail any corrective suggestions and actions taken by the employer.
- ☐ Enforcing the progressive discipline policy evenhandedly (*i.e.*, no extra chances for favorite employees).
- ☐ Providing an exemplary list of actions for which discipline may result (*i.e.*, tardiness, absenteeism, poor performance).
- ☐ Ensuring that supervisors are aware of and follow the disciplinary policy.
- ☐ Informing the employee and documenting that the employee was advised that further infractions may result in additional disciplinary action up to and including termination of employment.

Avoid:

- ☐ "Papering the file" after the fact.
- ☐ Letting supervisors devise their own system of progressive discipline.

☐ Overlooking offenses when committed by favorite employees.

☐ Enforcing disciplinary policies selectively.

☐ Refusing employees the opportunity to review their disciplinary records.

Leave of Absence Policies

An employee may request a leave of absence for a variety of reasons, such as pregnancy, illness, disability, illness of a family member, etc. It is important when formulating a policy regarding leaves of absence to ensure that consideration is given to the ADA, the FMLA, and Title VII, as well as any state or local ordinances. As a general rule, leave of absence policies should be uniform, regardless of the reason for the leave. For example, the maternity leave policy should not be less favorable than the policy for disability leave, in order to avoid pregnancy discrimination claims.

Consider:

☐ Drafting a leave of absence policy and advising employees of the policy in writing upon hiring.

☐ Making sure the policy complies with the ADA, the FMLA, and Title VII, provided the company meets the threshold number of employees for each of these statutes.

☐ Making sure leaves taken for one particular reason (*i.e.*, maternity) are fair when compared to leaves taken for other reasons, in order to avoid discrimination claims (*i.e.*, pregnancy discrimination).

☐ Ensuring that the policy is enforced evenhandedly.

☐ Educating supervisors with respect to the policy.

☐ Maintaining accurate records when leaves are requested and taken.

Avoid:

☐ Subscribing to the policy of "making it up as we go along."

☐ Bending the rules for favorite employees or tightening the rules for less-favored employees.

☐ Changing policies without notice to employees.

☐ Applying different standards and policies based on the purpose for the requested leave of absence.

Advancements or Promotions

Federal employment statutes (as well as many state and local statutes) prohibit discrimination with respect to advancement and promotion. Therefore, common sense dictates that the best policy to follow when seeking to promote an employee or fill a vacant spot within the organization is to choose the most qualified individual without regard to race, sex, national origin, age, religion, disability or any other prohibited basis. It is important that employment decisions regarding promotions have a clear, legitimate basis. Thus, an employer should always be able to clearly articulate a well-founded, nondiscriminatory reason for its choice to promote or advance one candidate over another.

Consider:

- ☐ Clearly stating the requirements for the job.
- ☐ Advancing or promoting individuals who have the requisite qualifications, without regard to sex, age, race, national origin, religion, disability or any other prohibited basis.
- ☐ Choosing the most qualified candidate.
- ☐ Documenting interviews and reasons for granting or denying advancement or promotion.

Avoid:

- ☐ Restricting applications for advancement to a particular class (*i.e.*, men or those under the age of 40).
- ☐ Circulating the word about open positions only to favorite or selected employees.
- ☐ Considering only members of a certain class or race for advancement or promotion.

Layoffs and Terminations

As with all other employment decisions, layoffs and terminations should be effected without regard to age, sex, race, national origin, religion, disability or any other prohibited basis. Therefore, it is imperative that employers have a clear policy regarding layoffs and terminations. A policy that has both a nondiscriminatory intent and a nondiscriminatory impact should be enacted (*i.e.*, last hired, first laid off).

If applicable in the employer's state, employee handbooks should clearly indicate that employees are "at-will," meaning that they may be terminated at any time, with or without notice, and for any reason. Although this policy may seem harsh, it protects employers against lawsuits alleging breach of contract for termination in violation of a handbook provision. Furthermore, when employees are terminated for cause, a clear record should be maintained in the employee's personnel file showing progressive discipline leading up to the termination.

Consider:

- ☐ Having a nondiscriminatory written policy regarding layoffs and terminations, and following it.
- ☐ Having a legitimate reason for all termination decisions.
- ☐ Making sure that if the termination decision relates to discipline or performance, the employee's personnel file has been properly documented before the fact.
- ☐ Advising employees of all adverse termination decisions in person.
- ☐ Advising the employee of the real reason for the adverse action. Keeping this information from the employee may create an inference that the employer has "something to hide" and can lead to a discrimination suit.
- ☐ Providing supervisors with a pre-printed form for terminations with a space for the reason for termination. Have the employee sign the form and keep it in the employee's personnel file.

Avoid:

- ☐ Playing favorites when it comes to layoffs.
- ☐ Letting factors such as race, age, sex, disability, national origin, religion or other prohibited bases play a role in layoff or termination decisions.
- ☐ Keeping the reason for the layoff or termination from the employee.
- ☐ Failing to properly document the employee's personnel file regarding the reason for the termination.
- ☐ Papering the file" after the fact with documents regarding the reasons leading up to the termination. Instead, make sure the file is properly documented ahead of time.

Severance Agreements

There have been recent developments in the area of severance agreements as well. Severance agreements have several purposes. For instance, they can be used as an incentive to obtain a voluntary resignation. The most common type is an early retirement incentive, which can be useful in reducing the size of your workforce without having to select employees for termination. However, if this process is implemented, all employees who fit selected criteria must be offered the option of taking the package, so that it is purely voluntary.

Another reason to utilize a severance agreement is when an employer is eliminating a position due to no fault of the employee. For instance, if a long-term employee's position is eliminated, the employer can offer severance to soften the blow of discharge and recognize the

many years of service to the company. On the other hand, severance pay can be offered to avoid liability in connection with a discharge decision. For instance, an employee who seems litigious and is in multiple protective classes can be offered severance. If the employer obtains a release of all claims, the company can take steps to eliminate the risk of a lawsuit. Even if the company believes it has done everything by the book, a lawsuit can be costly to defend.

The most critical aspect of offering severance is obtaining a full release of claims in exchange. No employer should give away money and, thereafter, be served with a lawsuit for wrongful discharge. However, there are several laws that impact the use of severance packages, including what information must be disclosed to all employees when offering voluntary incentive packages. Essentially, there is no such thing as a boilerplate severance agreement, which is why it is strongly recommended that employers seek counsel before offering a severance package.

References for Former Employees

Many employers find it difficult to deal with providing references for former employees, especially for those employees who left the employer under difficult circumstances. The most trying circumstances are those involving terminations or situations where the employee left as part of an agreed separation and/or in exchange for some form of compensation or consideration.

In situations where the employer is considering entering into a separation agreement with an employee, the agreement should address how references will be handled. This can be negotiated and agreed to at the time of the employee's separation so that problems are unlikely to arise later.

Consider:

- ☐ Implementing a policy that designates a person or department, most likely Human Resources, to handle references.
- ☐ Indicating within the policy that supervisors and other employees are prohibited from responding to reference requests.
- ☐ Limiting reference information to dates of employment; the position held; a basic description of the duties associated with the position; and a confirmation of the employee's final salary.

Avoid:

- ☐ Leaving supervisors to fend for themselves when giving references, especially for employees who were terminated or separated under negative circumstances.

APPENDIX

EMPLOYEE HANDBOOK ACKNOWLEDGEMENT FORM

By signing below, I, _____ (insert printed name),

1) acknowledge that I have received a copy of EMPLOYER Handbook dated _____ __, _____ on the date set forth below and understand that it is my responsibility to read, understand, and comply with its policies and procedures. I understand that nothing within the Employee Handbook can be interpreted to create any contractual obligations between EMPLOYER and its employees;

2) acknowledge receipt of The EMPLOYER's Sexual Harassment and Discrimination and Harassment policies contained in the Employee Handbook and agree to abide by the policies as a condition of employment during my employment with EMPLOYER; and

3) acknowledge receipt of EMPLOYER's Computer Usage and Social Media contained in the Employee Handbook and agree to abide by the policy as a condition of my employment during my employment with EMPLOYER.

Signed: _____

Dated: _____

AMERICANS WITH DISABILITIES ACT (ADA) STATEMENT

In accordance with the Americans with Disabilities Act (ADA), EMPLOYER prohibits discrimination against a qualified applicant or employee on the basis of a qualified disability. Consistent with this policy of nondiscrimination, EMPLOYER will provide reasonable accommodations to a qualified individual with a disability, as defined by the ADA, who has made EMPLOYER aware of his or her disability, provided that such accommodation does not constitute an undue hardship on EMPLOYER.

Under the ADA, the term "disability" means: (a) A physical or mental impairment that substantially limits one or more of the major life activities of an individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment. A qualified applicant or employee is an individual who can perform the essential functions of the job in question, either with or without a reasonable accommodation.

The goal of a reasonable accommodation is to enable an employee to perform his or her job within the expectations of the position. As such, the essential functions of the job cannot be eliminated as a form of accommodation. Rather accommodations should help an employee meet the expected performance goals of his or her position.

Should an employee need an accommodation to assist him or her in the completion of his/her job duties, a request for an accommodation is required and must be submitted to the employee's supervisor or to Human Resources. While a request can be made verbally or in writing, it is the employee's responsibility, not EMPLOYER's responsibility, to initiate the request. The employee, in this request, should indicate the specific type of accommodation required and the estimated duration of the accommodation. In most cases, verification from the employee's physician will be required. Any medical records or health information received by EMPLOYER will be kept separate from the employee's personnel file.

The employee's supervisor, in collaboration with Human Resources, will make every reasonable attempt to meet the specific request. Once the request has been submitted, the employee is required to engage in an interactive process to determine what, if any, accommodation should be provided. This means the employee and EMPLOYER must communicate with each other about the request, the precise nature of the problem that is generating the request, and alternative accommodations that may be effective in meeting an individual's need. Communication is a priority throughout the entire process, but particularly where the specific limitation, problem, or barrier is unclear, where an effective accommodation is not obvious, or where the parties are considering different forms of reasonable accommodation. Both the employee making the request and the employee's supervisor should work together to identify effective accommodations.

EMPLOYER will determine the feasibility of a potential accommodation by considering various factors, including, but not limited to, the nature and cost of the accommodation, outside funding, EMPLOYER's overall financial resources and organization, and the accommodation's impact on EMPLOYER's operations, including its impact on the ability of other employees to perform their duties and on EMPLOYER's ability to conduct business. Upon receipt of a request

for an accommodation, EMPLOYER will provide a determination regarding the request within a reasonable period of time. Once an accommodation is offered and made, the employee's supervisor will work with the employee to make sure that the accommodation is enabling him or her to perform the job within expected standards. If the accommodation is not allowing the employee to perform the job with the expected standards, the employee will re-engage in the interactive process with EMPLOYER to determine whether another reasonable accommodation is feasible, under the ADA.

Reporting Disability Discrimination

EMPLOYER prohibits any discrimination or retaliation against any applicant or employees on the basis of a disability, a request for a disability accommodation, or participation in a complaint or investigation of disability discrimination. There is an "open-door" policy. This means any employee has the right to make a complaint if: (i) he or she feels that he or she may have been or is subjected to discrimination; or (ii) he or she witnessed what is believed to be discrimination towards any employee by any other employee, including but not limited to, supervisors and co-workers. This prohibition against discrimination and retaliation applies to everyone, from top management on down.

The following procedure should be followed by employees who wish to register a complaint regarding any job-related discrimination based on age, disability (physical and mental), genetic information, national origin, race, color, sex, pregnancy, religion, and any other protected status under federal, state, and local law.

If any employee feels that he or she is being discriminated against by, including, without limitation, a co-worker, a supervisor, a manager, a volunteer, a vendor, or a client, an employee may choose, but is not required to, make an effort to immediately tell the person who is believed to be discriminating to stop the discriminatory behavior.

To ensure that complaints of discrimination can be thoroughly and promptly investigated and addressed, the employee should immediately and personally report incidents of what he or she believes to be discrimination, whether the discrimination is directed against the employee personally or another employee, to Human Resources. An employee is not required to first report discrimination to his or her supervisor. This alternative way for making a complaint allows the employee to avoid using the ordinary chain of command and to bypass anyone who the employee believes caused or is responsible for the discrimination.

WHISTLEBLOWER PROTECTION

It is contrary to the values of EMPLOYER for anyone to retaliate against any employee or volunteer who in good faith reports a violation of a policy in this Handbook, an ethics violation, or a suspected violation of the law, such as a complaint of discrimination, or suspected fraud, or suspected violation of any regulation governing the operations of EMPLOYER. An employee who retaliates against someone who has reported a violation in good faith is subject to discipline up to and including termination of employment.

DRUGS AND ALCOHOL – ZERO TOLERANCE POLICY

EMPLOYER urges employees with possible alcohol or drug problems to seek voluntary counseling and treatment. No employee will be penalized or discriminated against for seeking help. Employees are responsible for seeking assistance before an alcohol or drug problem affects work performance or results in a violation of this policy. The time to seek help is before a problem becomes apparent, not after.

The use, possession, sale, distribution or manufacturing of either non-medically prescribed controlled substances or alcohol by anyone while on business for EMPLOYER or on the property of EMPLOYER is prohibited. Further, employees are prohibited from being at work under the influence of either drugs or alcohol, including impairment of otherwise lawful substances. Violation of this policy by an employee while on the EMPLOYER premises or on business for EMPLOYER will result in disciplinary action up to and including termination.

Depending on the circumstances, other action, including notification of appropriate law enforcement agencies, may be taken with respect to a violation of this policy. Any illegal substances found in the workplace will be confiscated and turned over to the appropriate law enforcement agency.

Any employee who is involved in a serious on-the-job accident (including injury to self, a customer, or others, or damage to property) and any employee whose on-the-job behavior indicates that he or she may be under the influence of drugs or alcohol in violation of this policy will be tested for the use of drugs and alcohol. If the tests indicate evidence of illegal drugs or the improper use of other drugs or that the employee is under the influence of alcohol (defined as a BAC of 0.02 or higher), appropriate disciplinary action will be taken up to and including termination.

EMPLOYER requires a consent form to be signed by the individual prior to testing. Any employee who refuses to sign or submit to testing will be questioned as to the reason(s) for refusal. Unless there is a valid reason for refusal, the employee will be subject to disciplinary action, up to and including termination.

Drug tests will be conducted by a qualified laboratory, and proper chain of custody procedures will be observed for bodily fluid samples. When employment status will be affected, confirmatory testing will be carried out. Records and information about testing and test results will be treated as private and confidential to the extent possible.

IF APPLICABLE:

EMPLOYER recognizes that the State of _____ allows the use of marijuana [through a valid prescription or physician recommendation] / [for non-medicinal purposes]. **However, cannabis remains an illegal substance under Federal law.** Therefore, in accordance with all applicable laws and recognizing developing legal trends, and in order to maintain a safe, efficient, and effective workforce, employees may not use or possess marijuana

(including medical marijuana, or derivatives of marijuana) on the property of EMPLOYER or in the course of their employment.

EMPLOYER also prohibits employees from reporting to work under the influence of marijuana (including medical marijuana or derivatives of marijuana) to any extent that may have any effect on the employee's ability to safely, effectively, and productively perform work functions or job duties as determined by an independent medical review officer chosen by EMPLOYER. *EMPLOYER will not discriminate against registered medical marijuana patients on the basis of their status as such.*

EQUAL EMPLOYMENT OPPORTUNITY (EEO) POLICY

EMPLOYER provides equal employment opportunity for all qualified persons and does not discriminate against an employee or applicant because of race, color, religion, national or ethnic origin, ethnicity, ancestry, military status, sex, gender, pregnancy, sexual orientation, physical or mental disability, age, marital status, citizenship status, unfavorable military discharge, genetic information, order of protection status, arrest or criminal history record information ordered expunged, sealed, or impounded, or any other status protected by law. This policy applies to all terms and conditions of employment, including, without limitation, hiring, promotion, training, transfer, retention, layoff, return from layoff, compensation, benefits, and termination.

IF APPLICABLE:

There are certain positions at EMPLOYER for which it is necessary to be Catholic, and some positions for which preference in hiring shall be given to people who are Catholic and who evidence an understanding of the Catholic faith and a commitment to living that faith.

IMAGE CONSENT AND RELEASE FORM

I, the undersigned, do hereby understand and consent to the use of my image, likeness, appearance, name, and voice (hereinafter "Image") by _____ (hereinafter "the COMPANY") and its officers, employee, agents, successors, and assigns in promotional and marketing materials used for a commercial or fundraising purpose for the benefit of the COMPANY. This consent will apply to all Images taken or commissioned by the COMPANY during the period of my employment with the COMPANY, and will apply to the use of those Images at all times both during and after my period of employment with the COMPANY.

I consent to the use of my Image in the following forms: photographs, audio recordings, video recordings, and similar images taken in the course of my employment with the COMPANY.

I consent to the use of my Image by the COMPANY in marketing and promotional materials meant for a commercial purpose or a fundraising purpose, including but not limited to: any website or social media account operated, managed, or maintained by the COMPANY; any publication, magazine, brochure, newsletter, catalogs, or advertisement created or commissioned by the COMPANY; any presentation, advertisement, or sales video created or commissioned by the COMPANY; and any similar materials created or commissioned by the COMPANY for a commercial or fundraising purpose.

I waive all claims to compensation or damages based on the use of my Image by the COMPANY for commercial or fundraising purposes.

I waive any right to inspect or approve the finished photograph, video recording, or audio recording.

I understand that I will not receive compensation for the use of my Image by the COMPANY for commercial and fundraising purposes.

I understand that this consent is perpetual, that I may not revoke it, and that it is binding on me, my heirs and assigns.

I warrant that I have the full right and authority to grant this consent.

I warrant that I am at least 18 years of age and that I am competent in my own name insofar as this consent is concerned. I further attest that I have read this consent form and fully understand its contents.

_____

Printed Employee Name:

_____ _____

Employee Signature: Date:

SOCIAL MEDIA POLICY

Social Media includes any website or medium (including video) that allows for electronic and digital communications in cyberspace, including, but not limited to Facebook, Twitter, LinkedIn, YouTube, Instagram, Snapchat and blogs.

The use or accessing of social media at work is not permitted without the express written consent of your supervisor or Human Resources.

When using social media with that consent, or when using social media outside of working hours on your own time, any use must be consistent with our mission, purpose and values. You are personally responsible for what you post and remember that what you post can often be viewed by both personal and professional contacts. Post responsibly. If you publish content related to EMPLOYER on any non-EMPLOYER operated or sponsored site, you must state that "the views on this post are my own and not necessarily those of EMPLOYER."

With all posts on any social media site you must abide by the following:

- Do not publish any confidential or proprietary information on a social site;
- Do not discuss EMPLOYER or EMPLOYER employees, visitors, vendors or other partners of EMPLOYER without written authorization;
- Do not use insults, obscenity, racial slurs, ethnic slurs, or any other negative comments that can be construed in any way as discriminatory or harassing;
- Do not post photographs taken at any EMPLOYER-sponsored events; and
- Respect all copyright, fair use, and financial disclosure laws.

Violations of this policy can and will be subject to disciplinary action, up to and including dismissal.

SEXUAL HARASSMENT PREVENTION POLICY

(EXAMPLE FOR CALIFORNIA)

It is the policy of EMPLOYER that all employees have a right to work in an environment free from all forms of discrimination, including sexual harassment, intimidation, retaliation or coercion. EMPLOYER is committed to providing a work environment free from sexual harassment. Sexual harassment is a form of sex discrimination that is illegal under both state and federal law. It is prohibited by Title VII of the Civil Rights Act of 1964, as amended, and the Fair Employment and Housing Act.

The Fair Employment and Housing Act defines sexual harassment as harassment based on sex or of a sexual nature; gender harassment; and harassment based on pregnancy, childbirth, or related medical conditions. The definition includes harassment based on sexual orientation, gender identity, gender expression and transgender status.

COVERAGE

This policy extends to the conduct of all supervisors, co-workers and other employees towards any applicant or other employee and to any employee who, while acting in his or her capacity as an employee of EMPLOYER, sexually harasses a contractor, vendor, client, customer, visitor or other individual affiliated with EMPLOYER.

Similarly, EMPLOYER will not tolerate sexual harassment of its employees, applicants, or contractors by non-employees, such as third party contractors, vendors, clients and/or customers. EMPLOYER should be immediately alerted to any such conduct so that it can take immediate and appropriate corrective action, and best attempt to prevent further harassment.

DEFINITION

Sexual harassment is generally defined as unsolicited and/or unwelcome sexual advances, requests for sexual favors, and other visual, verbal or physical conduct of a sexual nature directed to a person of the same or of the opposite sex when:

- Submission to such conduct is explicitly or implicitly made a term or condition of employment;
- Submission to or rejection of this conduct is used as a basis for an employment decision affecting the employee; or
- Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

While it is not possible to list all circumstances that may be considered to be sexual harassment, some examples of conduct that may violate this policy include, but are not limited to, the following:

- An unwelcome sexual advance, whether it involves physical touching or not;
- Reprisal or making a threat after a negative response is made to a sexual advance;
- Offering employment benefits in exchange for sexual favors;
- Unwelcome leering, whistling, sexual gestures, a suggestive comment, staring, sexual flirtation or proposition;
- Displaying a sexually suggestive object in the workplace or telling/showing sexual jokes, stories, drawings, pictures or gestures;
- Making and/or repeating a sexually-related rumor about another employee;
- Making an inquiry into an employee's sexual experience(s);
- Physical assault or an attempt to commit an assault or intentional physical conduct such as impeding or blocking movement or touching or brushing against another employee's body;
- Making a derogatory comment or joke regarding an individual's sexual orientation or perceived sexual orientation.

It is important to note that:

- Such conduct is actionable if offensive to a reasonable person and the victim was actually offended;
- A man or woman may be the harasser of a same or opposite sex victim; the harasser does not necessarily have to be the victim's supervisor;
- The victim does not necessarily have to be the one to whom the remark or conduct is directed, but may be someone in the same room who overhears and is offended by the comment or behavior;

RETALIATION / REPRISAL PROHIBITION-CONFIDENTIALITY

EMPLOYER prohibits retaliation against anyone for reporting discriminatory activity, registering a complaint pursuant to this policy, assisting in making a discrimination complaint, or cooperating in an investigation. Any employee who makes a complaint regarding behavior the employee reasonably and in good faith believes is sexual harassment; assists, testifies, or participates in any sexual harassment investigation or proceeding; or who reasonably opposes such conduct in the workplace, will not be adversely affected in the terms and conditions of his or her employment, and will not be discriminated against or discharged for engaging in such activity.

Every employee, whether witness, complainant or alleged harasser, is expected to cooperate fully with every investigation. Confidentiality concerning complaints or investigations is maintained to the greatest extent possible in order to prevent embarrassment, further discrimination or harassment, or retaliation. Confidential or sensitive information obtained by any employee during the course of an official investigation, whether acquired as a witness, complainant, respondent, or representative, shall not be disclosed to others unless required by law. Concerns of individuals regarding confidentiality of information provided by them will be handled as sensitively as possible, and information shall not unnecessarily be disclosed to others. However, employees should be aware that EMPLOYER is required in certain circumstances to

take preventive or corrective actions that may be inconsistent with an individual's desire that a report of certain behavior be kept completely confidential.

SUPERVISORS' RESPONSIBILITIES / POLICY IMPLEMENTATION

Managers and supervisors are in key positions to make an impact in terms of correcting inappropriate behavior in the work place. Managers and supervisors are responsible for setting the tone for a harassment-free work environment first and foremost by setting an example by their own behavior and by 1) monitoring the workplace to identify subtle harassing conduct or behavior, 2) informing new employees of this policy, 3) periodically reiterating this policy to all subordinate staff, and 4) ensuring that employees receive all mandated sexual harassment training.

Managers and supervisors who engage in sexual harassment and/or make submission to sexual favors a term or condition of an individual's employment will be subject to discipline up to and including dismissal if the allegation is substantiated.

Managers and supervisors must immediately inform the Human Resources Department of 1) any sexual harassment complaints you receive, even if the complaining party does not want you to proceed, 2) any sexual harassment you observe, and/or 3) any sexual harassment of which you become aware, even if the occurrence is not directly within your line of supervision or responsibility. Do not investigate any such allegations unless specifically directed to do so by the Human Resources Department.

Managers and supervisors must:

- Take all complaints seriously. Do not shrug off, minimize the complaint, or otherwise discourage employees from reporting such complaints;
- Protect the employee(s) complaining of sexual harassment from any form of reprisal or retaliation; and
- Promptly initiate appropriate action, as directed by the Human Resources Department and executive level management, to remedy a harassing situation in a manner that will protect all parties involved and to prevent further harassment from occurring.

Failure to adhere to the above responsibilities will result in appropriate corrective and/or disciplinary action, up to and including dismissal.

EMPLOYEES RIGHTS / COMPLAINTS PROCEDURES

If you believe you are the target of unwanted sexual attention or behavior, or if you have witnessed sexual harassment, you are encouraged to inform the offending employee or supervisor that the behavior is unwelcome, offensive and inappropriate. You may file a sexual harassment complaint without confronting the offender. Employees who are subject to sexual harassment should immediately report such conduct to their supervisor or, if you prefer, to the Human Resources Department. If your supervisor is the harasser, the behavior may be reported

to any other manager or supervisor, or to the Human Resources Department. Every reasonable effort will be made to intervene early and resolve the complaint informally.

Your complaint will trigger a prompt response in accordance with the procedures outlined below. Individuals may also file a complaint, either separately or concurrently (within each agency's regulatory timeframe), with the Department of Fair Employment and Housing, or the United States Equal Employment Opportunity Commission. EMPLOYER will not tolerate retaliation of any sort against an employee for making a good faith complaint.

After you report an incident of discrimination, you may be asked, but are not required, to complete and sign a written report of the incident.

EMPLOYER will promptly inform the accused that a complaint has been filed against him/her while preserving confidentiality as described in this policy.

At this point, if you so choose, and if the accused agrees, EMPLOYER, will attempt informally to resolve the complaint in a manner acceptable to all parties. If you do not wish to pursue an informal resolution of your complaint, or if an acceptable resolution cannot be found, EMPLOYER will begin a formal investigation of the allegations.

The investigation will, at a minimum, include interviews with all complaining parties, the accused part(y/ies) and witnesses, if any, and will be completed as quickly as practical. The person officially conducting the investigation will attempt to preserve the confidentiality of all parties involved, so far as is consistent with a thorough investigation, and will keep you and the alleged harasser informed of the progress of the investigation.

Upon the conclusion of the investigation, EMPLOYER will make a determination and communicate the results to the complaining part(y/ies), to the alleged harasser(s) and, as appropriate, to all others directly concerned. If harassment is proven, EMPLOYER shall take prompt and effective remediation action which shall include:

- Appropriate action against the harasser(s);
- Communication of the action to the complaining part(y/ies)
- Steps to prevent further harassment; and
- If appropriate, action to remedy the complaining part(y/ies)' loss

Violators of this policy will be subject to appropriate discipline, up to and including immediate termination of employment.

EMPLOYEE COMPLAINT FORM – REPORT OF EVENT

1. Date: _____

2. Name of Employee being Interviewed: _____

3. Name of Interviewer: _____

4. Name of Facility or Location: _____

5. Tell me what happened:

_____
_____
_____
_____
_____
_____

6. Who was involved, or who was a witness?

_____
_____

7. When did the incident(s) happen? _____

8. Where did the incident(s) happen? _____

9. Were there any other incident(s)?

_____
_____
_____

10. How did this incident make you feel?

_____
_____
_____

11. Was your work affected?

_____
_____
_____

12. Was this the first time this had happened?

_____
_____
_____

13. Were there any previous incidents of similar behavior or other behavior that you consider to be inappropriate?

_____
_____
_____

14. Have you kept any records, such as written notes, tape recordings, or anything else? (If so, please attach.)

_____
_____
_____

15. Do you know of any other employee(s) who had similar experiences?

_____
_____
_____

16. Have you discussed this with anyone at work? _____

    A. Who: _____

    B. When: _____

17. Have you discussed this with anyone outside of work? _____

    A. Who: _____

    B. When: _____

18. Did you participate in the incident or have a reaction in any way?

_____

    A. If yes, tell me how you participated or reacted:

_____
_____
_____

19. How would you describe your relationship with the employee about whom you are complaining?

_____
_____

20. Are there any other issues we should discuss?

_____

_____
_____

21. Are there any other facts or information that you think I should know?

_____
_____
_____

22. Are there any people whom you think I should talk to?

_____
_____
_____

23. What would be your desired outcome as a result of an investigation?

_____
_____
_____
_____
_____

_____ _____

Date Signature of Interviewer

CONFIDENTIAL INVESTIGATION REPORT

Date Investigation was opened:
Investigator(s) name(s):
Name, title and department of accused:
Description of the allegation (include names, location of incidents, times, dates):
Name, title, department of accuser(s):
Interview timeline (include dates and times of interview, location of interview, names of everyone present) / Attach interview notes:
Summary of evidence (such as witness statements) that confirms or denies allegation / Credibility determinations:
Applicable employer policies or guidelines:
Recommended actions for employer to take:
Actual actions taken by employer:
Date accuser was notified of actions taken:
Date accused was notified of actions that will be taken:
Other post-investigation follow-up conversation(s) (include dates, names and topics of discussion) / Attach relevant meeting notes:
Date investigation was closed:
Investigator signature:

EMPLOYEE PERFORMANCE PLANNING AND REVIEW FORM

(EXAMPLE 1)

Name: **Division/Department:**

Position: **Date of Last Review:**

Review Period: **Reviewing Supervisor:**

Instructions:

Complete shaded boxes at the beginning of the appraisal cycle.		**Complete white boxes at the end of the appraisal cycle.**	
Major Job Responsibilities *(List key responsibilities from job description or job posting)*	**Results Achieved/ Not Achieved**	**Specific Examples** *(successfully completed / not)*	**Performance Rating*** *(See below)*
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

Review Period Goals/Objectives *(**S**pecific, **M**easurable, **A**ttainable, **R**elevant, **T**ime- limited)*	**Weight %**	**Specific Examples** *(how goal was/ was not met)*	**Met/ Not Met**
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

Key Skills *(List major skills <u>required for effective job performance</u>)*	**Examples of How Skills Were Used Effectively/Ineffectively** *(Be specific about results that demonstrated skills)*
1.	
2.	
3.	
4.	
5.	

Skills Needing Development *(List key skills which employee needs to develop for current job performance and career development)*	**Training Planned for Each Skill Needing Development** *(Include classroom, self-study, on-the-job experiences, job shadowing, etc.)*	**Date**	**Results Achieved/ Not Achieved from Training** *(Be specific about on-the-job results)*
1.			
2.			
3.			
4.			

	Core Value/ Competencies	Results Achieved/ Not Achieved	Specific Examples *(how each core value / competency is exemplified at work)*
1.			
2.			
3.			
4.			
5.			
6			
7.	Other:		
8.	Other:		

Performance Summary – "Reflecting upon the individual's full review period, they have. . ."

Overall Performance Rating*:

1	2	3	A	B
Top Performer *Works consistently at superior level in most aspects of position*	**Solid/Fully Contributing** *Reliably performs position responsibilities*	**Needs Development** *Fails to meet one or more of significant position responsibilities*	**New to Position** *In position for 3 months or fewer*	**Not Performing** *Consistently fails to meet position standards*
☐	☐	☐	☐	☐

Employee Comments [optional]:

_____

_____

Supervisor's Signature: _____ **Date: _____**

Reviewed by (next level signature): _____ **Date: _____**

Employee's Signature: _____ **Date: _____**

HR Signature: _____ **Date: _____**

EMPLOYEE PERFORMANCE REVIEW FORM
(EXAMPLE 2)

Name: _____ Supervisor: _____

Job Title: _____ Department: _____

Review Period: From _____ to _____

Purpose of Review:

___ Introductory ___ Annual Performance ___ Other _____

Score the performance in each job factor below on a scale of 5 - 1, as follows:

- **5 = Outstanding**, consistently exceeds this job factor expectation and is recognized by peers and/or customers as a leader and positive example for others.
- **4 = Above Expectations**, consistently meets and occasionally exceeds this job factor expectation.
- **3 = Meets Expectations**, consistently meets this job factor expectation.
- **2 = Below Expectations**, occasionally fails to meet this job factor expectation.
- **1 = Needs Improvement**, consistently fails to meet this job factor expectation and a job performance improvement plan is required.

Section 1 - Job Performance (60% of total score)

Enter up to five job knowledge & skill factors from job description: **SCORE**

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

Quality of work_____ _____

Quantity of work_____ _____

Negotiable Item_____ _____

Overall Score (Add all scores and divide by the number of factors) x 12 = _____

Comments:

_____
_____
_____
_____

Section 2 – Personal Performance (20% of total score)

Dependability _____ _____

Attendance & Punctuality _____ _____

Interpersonal Skills _____ _____

Flexibility _____ _____

Communication Skills _____ _____

Teamwork _____ _____

Customer Service _____ _____

Negotiable Item _____ _____

Overall Score (Add all scores and divide by the number of factors) x 4= _____

Comments:

_____
_____
_____
_____

Section 3 - Personal Improvement (20% of total score)

Change environment support _____ _____

Quality Improvement support _____ _____

Professional growth _____ _____

Developmental goal accomplishment _____ _____

Negotiable Item _____ _____

Overall Score (Add all scores and divide by the number of factors) x 4= _____

Comments:

_____
_____
_____
_____

Add Overall Scores from Section 1-3 =Total Score _____

<u>Performance Objectives for next review period</u>:

(*SMART*—Specific, **M**easurable, **A**pplicable, **R**elevant, **T**ime-Sensitive)

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____

<u>Employee Comments</u>:

_____
_____
_____
_____

<u>Signatures</u>

Employee: _____ Date: _____

Supervisor: _____ Date: _____

Department Head: _____ Date: _____

Human Resources: _____ Date: _____

EMPLOYEE PERFORMANCE REVIEW FORM

(EXAMPLE 3)

The following is a basic form for employee review filled out by the employee's direct supervisor. Modifications can be made, such as the addition of other performance issues.

Employee name		Date Hired
Job Title	Date of last Review	Date of this Review

Performance Issues	**Score (5-1):** **5 = outstanding** **1 = unsatisfactory**	**Comments**
Team Player		
Meets Deadlines		
Organizational Skills		
Communication Skills		
Leadership Ability		
Interaction With Co-Workers		
Attendance		
Quality of Work		

Employer's Comments

Goals

Employee's Comments

Date of Next Review: _____

_____ _____

Employee Signature Interviewer Signature

EMPLOYEE PERFORMANCE REVIEW FORM
(EXAMPLE 4)

Employee Name: _____ **Title: _____**

Review Period: _____ **Date: _____**

Instructions:

This form is designed to be completed by the supervisor, providing a means to review key performance metrics.

Use the scale below to evaluate the employee, circling the number that most accurately describes your perception for each item. Please note that "NE" means you have no firsthand knowledge or experience with the individual regarding the question.

1 = Never 2 = Occasionally 3= Sometimes 4 = Most of the Time 5 = Always NE = No Experience

1.	Behaves in a manner consistent with the company's mission, vision and values	1	2	3	4	5	NE
2.	Is viewed as a person of integrity by co-workers	1	2	3	4	5	NE
3.	Has an attitude of helpfulness toward co-workers	1	2	3	4	5	NE
4.	Complies with company policies and procedures	1	2	3	4	5	NE
5.	Is professional and courteous when communicating with coworkers	1	2	3	4	5	NE
6.	Represents the company in a positive manner when interacting with customers	1	2	3	4	5	NE
7.	Is interested in continuing to develop new skills and to grow as a professional	1	2	3	4	5	NE
8.	Follows through with tasks and responsibilities in an appropriate and timely manner	1	2	3	4	5	NE
9.	Demonstrates respect for the work and ideas of others	1	2	3	4	5	NE
10.	Is punctual	1	2	3	4	5	NE
11.	Is willing to accept responsibility for his or her own actions	1	2	3	4	5	NE

12.	Is someone who works efficiently	1	2	3	4	5	NE
13.	Is someone who is willing to take direction from management	1	2	3	4	5	NE
14.	Conveys a customer-focused manner in communication with others	1	2	3	4	5	NE
15.	Demonstrates a willingness to listen to what others have to say	1	2	3	4	5	NE

Supervisor's Notes:

Employee's Notes:

By signing this form, you confirm that you have discussed this review with your supervisor. Signature does not necessarily indicate that you agree with this evaluation.

Employee Signature: _____ Date: _____

Supervisor Signature: _____ Date: _____