

The background is a blurred photograph of a modern office or meeting room. Several people are seated around a long table, and a large screen is visible in the background. The image is out of focus, emphasizing the text in the foreground.

ETHICS ISSUES FOR THE IN-HOUSE LAWYER

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Introductions

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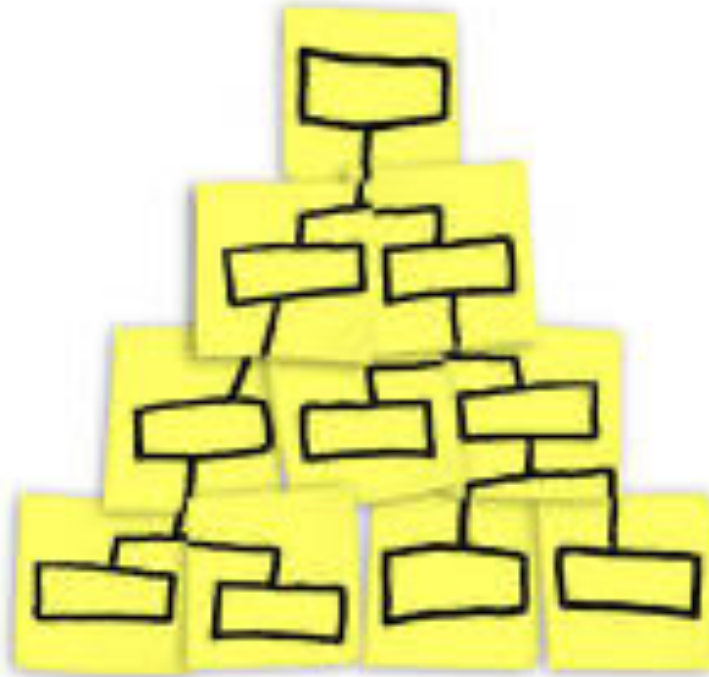
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WARM-UP QUESTIONS



WHO IS THE CLIENT?



Model Rule 1.13

- Rule 1.13 provides that the client is the organization itself. Of course, an organizational client can only act through its officers, directors, employees, members, shareholders and other constituents. The constituents of the corporate organizational client are not, however, the clients of the lawyer.
- Practical Tips
 - Position yourself to be able to work with multiple people as they rise up in the organization.
 - Position yourself to be able to work with people who may leave the organization and then come back.
 - It's often a good use of your personal time to re-read Dale Carnegie's, "How to Win Friends and Influence People"

Model Rule 1.13

From ABA commentary:

“When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. **Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province.** Paragraph (b) makes clear, however, that **when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation** to the organization or is in violation of law that might be imputed to the organization, **the lawyer must proceed as is reasonably necessary in the best interest of the organization.** As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.”

WHAT IS YOUR JOB?



WHAT IS YOUR JOB?

- As in-house counsel, your job scope and job responsibilities are determined by your manager.
- As General Counsel, there is an additional layer of responsibility whereby you are accountable to the Board of Directors for the performance of your job duties.
 - Private Companies: at Board discretion.
 - Public Companies: dotted line relationship, stakeholders are shareholders.
 - Non-Profits: dotted line relationship, stakeholders are the recipients of care.
- Additionally, as members of the bar, every licensed attorney will have requirements to meet their ethical duties. We also each bring to our jobs our own values and principles in tandem with our ethical duties.

Agenda

- Conflicts of Interest; Attorney-Client Privilege
- Ethical Duty of Confidentiality
- Navigating the Gray Areas
- Recent Developments Regarding Non-Disclosure Agreements

CONFLICTS OF INTEREST



Model Rule 1.7

- Rule 1.7 provides that, subject to certain exceptions, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly **adverse to another client**; or (2) there is a significant risk that the representation of one or more clients will be **materially limited by the lawyer's responsibilities to another client**, a former client or a third person, or by the lawyer's **personal interest**.
- When in-house counsel represents groups of related companies, or individual corporate constituents, direct adversity can develop easily.

What is Adversity?

- Formulations vary among states:

State	Formulation
CT, DC, FL, IL, MA, NJ, PA	"Direct Adversity"
CA	"Adversity"
NY	"Differing Interests"
TX	"Materially adverse in substantially related matter"
UK	"Adversity"
Germany	Adversity exists only within a matter
France	Adversity exists only within a matter

Related Company Conflicts Issues



In-house counsel has broad knowledge of company and ability to advise senior management at an early stage.



Generally, simultaneous representation of multiple wholly-owned and solvent entities does not create a conflict, because duties owed to the sub(s) flow back up to the parent.



When common ownership is less than complete, conflict risk is greater, even if one of the entities has a sufficient ownership interest in the other to exercise effective control.



Is there a "substantial identity of legal interest" in a specific matter?



If so, carefully limit scope joint representation and document it.



If adversity arises, end the joint representation and document its termination.

Dealing with Constituents – Hypo 1

- A high-ranking company executive is writing a book on her own time. Assume she has disclosed this activity as required under internal policies.
- She stops by your office and asks for some quick advice on her book contract.
- What do you tell her?

Dealing with Constituents

- If you know or should know that the organization's interests are adverse to hers, you must explain that you represent the organization; you don't represent her.
- Fight the natural inclination to provide advice. Answering legal questions from constituents about their own legal issues can create an attorney-client relationship...
 - *See, e.g., Dinger v. Allfirst Fin., Inc.*, 82 Fed. Appx. 261 (3rd Cir. 2003) (bank officers sued bank alleging that in-house counsel gave negligent advice regarding required exercise date of employee options; court found that an attorney client relationship existed based on in-house counsel's provision of advice, but that the advice was reasonable).
- ...And the risk of a conflict.

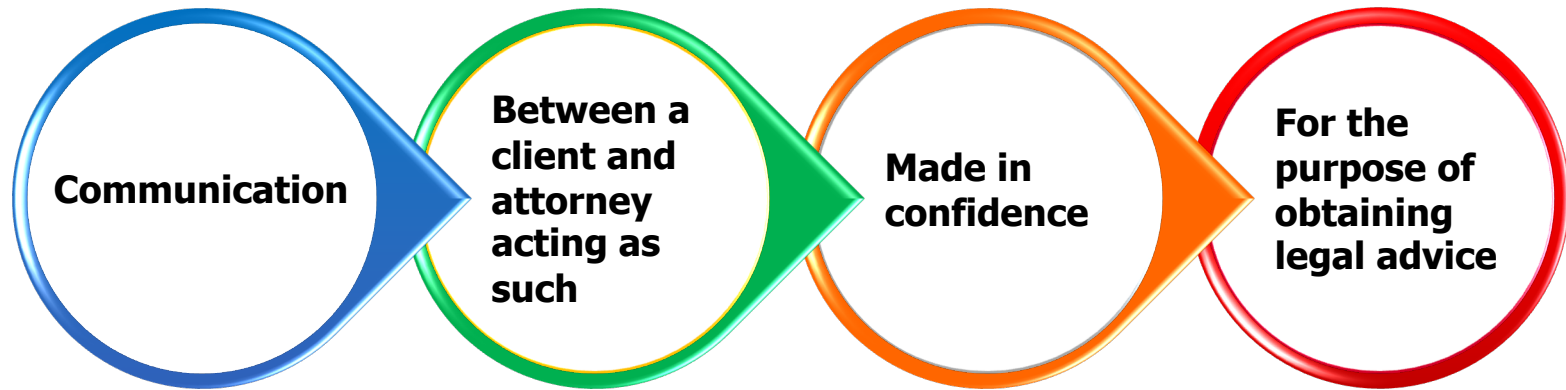
Dealing with Constituents – Hypo 2

- An employee is required to give a deposition in a co-worker's suit against the company.
- You've been assigned to defend the employee's testimony.
- Should you?

Dealing with Constituents

- Are his interests aligned with the organization's?
- Is there a significant risk that your representation of the employee will be materially limited by your responsibility to the organization?
- Do you have the written, informed consent of both the employee and the organization?
 - *See, e.g., Yanez v. Plummer*, 164 Cal. Rptr. 3d 309 (Cal. Ct. App. 2013) (triable issue of fact whether, but for in-house counsel's breach of duty in undertaking concurrent representation of organization and employee without the written consent of both, employee would not have been terminated by the company for dishonesty for giving testimony that conflicted with a prior statement).

Attorney-Client Privilege



- There is no privilege for communication between a “client” and an unlicensed attorney.
- The scope of the privilege may be broader or narrower in countries outside of the U.S.
- Some jurisdictions outside of the U.S. may not recognize privilege for communications between in-house counsel and their clients.

Common Privilege Issues for In-house Counsel

- The **organization is the client** and not any constituents
 - Be careful with internal investigations
- The privilege only applies to **communications for legal advice**
 - Not facts
 - Not business advice
- Communications between **joint clients** are not privileged between the clients



Internal Investigations

- Internal investigations immediately raise ethical issues.
- Whether in-house counsel should conduct the investigation is a threshold issue.
 - This could lead to in-house counsel being disqualified from acting as an advocate for the company in any subsequent trial related to that action under the lawyer as witness prohibition in Rule 3.7.
 - If company wants to use the fact of the investigation as a defense, the in-house attorney would be disqualified because she would be the only one with knowledge of the entire investigative process.
 - There is also a risk that a court will find the investigation was conducted for a business reason, not a legal reason, and is therefore not privileged.
- More commonly, the issue is making sure all parties involved understand that the client is the organization, not any individuals.

Maximizing Protection

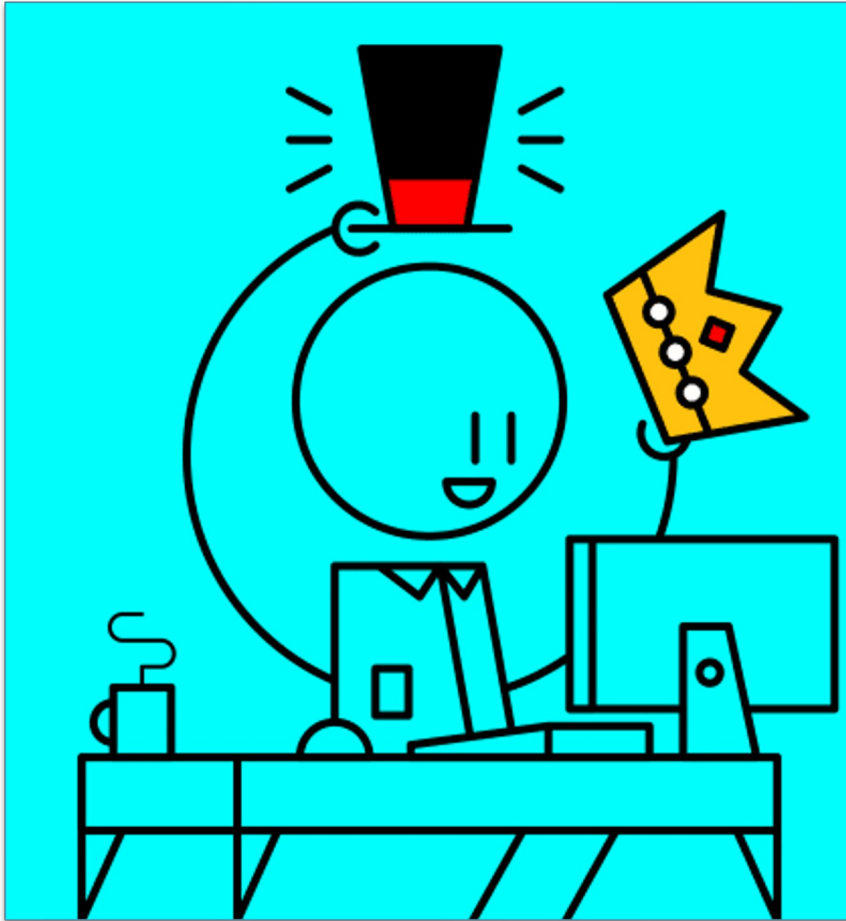
Model Rule 1.13(f)

- Creates a duty for the lawyer representing an organization to explain that the lawyer represents the organization, not the constituents, especially when it is clear that the organization's interests are at odds with those of the constituent.

Best Practices

- Advise of the purpose of the interview.
- State clearly that the client is the company, not the employee.
- Caution that while the interview is privileged, the privilege belongs to the company, only the company can assert or waive it, and the employee has no role in making that decision.
- Advise that the substance of the interview may be shared with third parties.
- Do not provide legal advice to the employee. If the employee asks whether s/he needs his or her own attorney, refer to any company policies and refrain from advising the employee not to seek counsel.
- Memorialize the substance of the interview, including delivery of the Upjohn warning. Mark the document as subject to relevant privilege(s).

The Dual Hat Dilemma

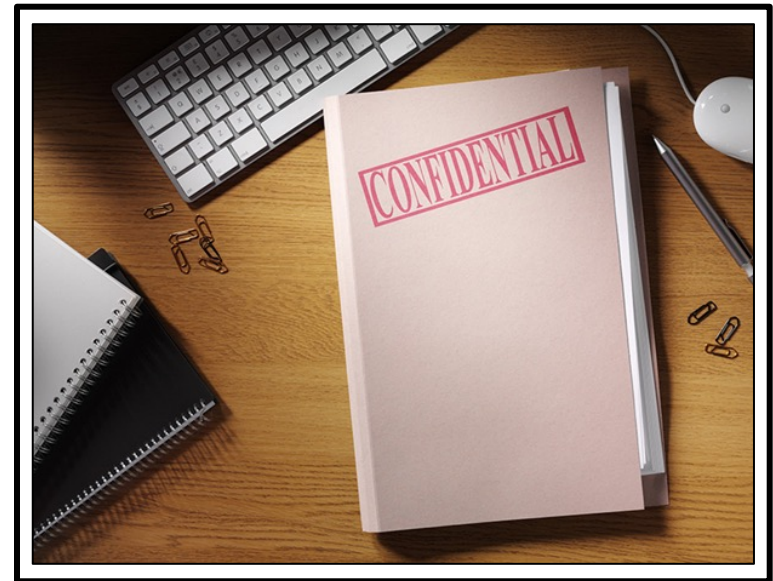


Best Practices

- Segregate business from legal advice.
 - Where mixed, divide into separate documents or clearly labeled sections.
- Create a record when giving legal advice:
 - “You sought my legal advice regarding ...”
- Avoid blanket privilege designation and routine copying of legal counsel on non-legal communications.
- Use appropriate titles.
- Consider having a businessperson present, e.g., at negotiations, to advise and report to client on business issues.

Maximizing the Privilege

- Provide **training** on the scope of the privilege and how to maintain it
- Keep privileged information in a **separate file**
- **Label** communications as privileged
- **Confirm** in the communications that you're providing legal advice and not business advice
- **Limit the recipients** of privileged information to those who need to know
- **Use technology with care**
- **Screen** carefully for privilege and enter into claw-back agreements before producing documents in litigation



Waiver

- The power to assert or waive the privilege rests with the organization's current management, and ordinarily is exercised by its officers and directors.
- Because the privilege belongs to the entity, it effectively changes hands when management or ownership of the entity changes hands.
- Voluntary disclosure of privileged material to a third party destroys the privilege.
 - The presence of third parties in a meeting destroys the privilege, as does forwarding an email containing privileged communications to anyone outside of the organization.

Communications with Auditors

The Tension

- Companies must disclose sufficient information to allow independent auditors to perform audits.
- Providing adequate information while still protecting confidential legal information is a challenge.

Practice Pointers

- Privileged is likely to be waived when legal advice is shared with an auditor.
- Sharing materials protected by the work product privilege might be a safer course in some jurisdictions.
- Consider oral presentations in lieu of sharing written materials.
- If writings are shared, confirm that the work product is actually privileged in the relevant jurisdiction, that what you are sharing is truly work product, and that any materials provided are scrubbed for attorney-client privileged information.
- Tailor disclosures to minimize scope of any waiver.
- Require detailed confidentiality agreement from the auditor.

ETHICAL DUTY OF CONFIDENTIALITY



Duty of Confidentiality

- The duty of confidentiality is at the core of a lawyer's professional responsibilities.
- The duty sweeps broadly – **confidential information includes more than privileged information**; in many jurisdictions, it includes all information relating to the representation.
- The duty is **not limited to information provided by the client** – it applies to all confidential information whatever its source.

Model Rule 1.6

A lawyer shall not reveal client information relating to the representation of a client unless the client gives informed consent.

A lawyer **may** reveal client information to the extent the lawyer reasonably believes necessary to:

- Prevent reasonably certain death or substantial bodily harm.
- Prevent commission of a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client used the lawyer's services.
- Prevent, mitigate or rectify substantial injury that resulted from the crime or fraud.
- Secure legal advice regarding compliance with professional rules.
- Establish a claim or defense in a dispute with a client.
- Comply with other law or court order.
- Detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Douglas v. DynMcDermott

- Douglas worked at a company that worked with the Department of Energy. When Douglas was invited to a meeting with employees of the Department of Energy, Douglas made comments related to discrimination occurring at her company:
 - (to DOE) confirmed that she was not aware of any equal pay claims
 - (to DOE) made a further comment that implied Douglas was herself underpaid
 - (to DOE) made a further comment that indicated a great deal of potential litigation may be forthcoming, though no charges had yet been filed
- Douglas then made a further, informal disclosure to a DOE whistleblower official, though upon inquiry confirmed that the disclosure should *not* be treated as a whistle-blower complaint.
- Douglas was terminated for unethical conduct based on the disclosure of confidential information to parties outside the company. Additionally, the unethical nature of her disclosures disqualified them from being protected activity under Title VII.

Douglas v. DynMcDermott – Lessons

- Cal Bar Ethics Hotline: 1-800-238-4427
- At the point when you as an in-house lawyer may have a grievance arise against your company, it is good practice to secure separate advice from your own attorney.
- Familiarize yourself with Model Rule 1.13(b) relating to when you would reasonably need to report an issue to a higher authority.
 - Be mindful of taking time (if conditions allow) to try and instruct/educate your manager.
 - Be aware of context: your manager's manager will want your manager to succeed, will want whatever is wrong to just be fixed.
- Familiarize yourself with Model Rule 1.16 relating to when you can withdraw and when you must withdraw.

Navigating the Gray Areas – Role of Personal Ethics

The business team is considering taking a high-profile action and they have come to you for your opinion. You explain the legal risks, but the business team is thinking of moving forward anyway. You believe this is a gray area of the law and are concerned about whether the team should proceed. You:

1. Wash your hands of it; in your role as an attorney, you are not accountable for the business decisions
2. Call outside counsel for their views
3. Reach out to the business team to share considerations beyond the law
4. Start looking for another job. There are limits on an attorney's ability to withdraw if it is harmful to the client's rights, but there are also grounds for an attorney to have the discretion to withdraw.

Model Rule 2.1

Rule 2.1 defines your role as advisor:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

This may include ethical considerations, beyond rules of professional responsibility.

Ethics

Ethics is not religion, following the law, science, culturally accepted norms or feelings, although all there is overlap with all of these.

Ethics refers to standards and practices that tell us how human beings ought to act in the many situations in which they find themselves—as friends, parents, children, citizens, businesspeople, professionals, and so on. Ethics is also concerned with our character. It requires knowledge, skills, and habits.

What should I do based on values and principles?

See Markkula Center for Applied Ethics for a framework for ethical decision making <https://www.scu.edu/ethics/ethics-resources/a-framework-for-ethical-decision-making/>

Nonprofit Illustration of GC in Broad Advisor Role – Ethical Considerations

The situation:

- Child sponsorship in charities under scrutiny
- Heightened interest from Attorneys General
- GC office tasked with review of all marketing materials
- As always, pressure on marketing department to raise money

Marketing department sought to use Pulitzer prize winning photo of a vulture hovering near a starving child who appeared near death. Photo taken in former Sudan. Wanted to use for sponsorship ad.

The Gray Area

- Photo not representative of the children Save served in their sponsorship programs (education, clean water, health). But Save also did emergency relief work.
- Connecticut law: Prohibited “misrepresentation of the purpose or beneficiary of a solicitation.”

Role as Advisor

- Get others' opinions.
- Could the photo hurt the agency in other ways?

Pro:

- Very compelling and would raise money
- Sensationalism may be justified to help those in need

Con:

- Is it misleading to donors, lose trust? Once trust is gone...
- Stereotypes
- "Poverty-Porn is the tactic of media and charities that uses sympathy as a catalyst for monetary gain, exploiting the poor and uneducated, to showcase desperate conditions for an emotional response. And while the tactic may be effective at heightening profits—by misrepresenting an entire continent as slum—the fate of an entire continent is stamped with pity." Plaid Zebra

Legal Areas with Inherent Ethical Concerns

- **Artificial Intelligence: Impact on human rights?**
 - Lack of transparency re the algorithms
 - Privacy and data protection issues
 - Bias and discrimination
 - And others.
 - Journal of Responsible Technology, Volume 4 (December 2020)
- **ESG: Is the corporation trying to get around the spirit of the rules or is the corporation trying to comply?**
 - The Moral Responsibility of the Corporate Lawyer, *Catholic University Law Review* Vol. 60 Iss. 2 (2011)
- **Patent Law in the Healthcare Sector: Are there times when the rules should be suspended, such as ventilators during the pandemic?**
 - Top Ten Tips to be Successful as a New In-House Counsel (and Beyond), ACC Resource Library (2021)

Avoiding Ethical Compromise

1. Do your research on the company and its leaders to make sure your values are aligned.
2. Understand your own core values and communicate them (appropriately) in the interview process and early in the job.
3. Work to be part of the greater team – not just “legal.”
4. “Always maintain your integrity and your ethical and moral compass.”

-Top Ten Tips to be Successful as a New In-House Counsel (and Beyond), ACC Resource Library (2021)

Recent Developments Regarding Non-Disclosure Agreements



Non-Disclosure Agreements – Evolving Law

California's SB 331: Settlement Agreements (effective January 1, 2022)

- Settlement Agreements (post civil or administrative action): SB 331 prohibits preventing and restricting the disclosure of factual information regarding workplace harassment/discrimination related to a claim filed in a civil action or a complaint filed in an administrative action.
- Acts of workplace harassment or discrimination, including not based on sex are now part of the information which employers cannot prevent disclosure of.
- Agreements can still bar the disclosure of the amount paid in settlement of a claim.
- The parties can include a provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court, at the request of the claimant (provided that a government agency or public official is not a party to the settlement agreement).

SB 331: Non-Disparagement Agreements/ No FEHA Release

- It is an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to do either:
 - Require employee to sign a release of a claim under FEHA (harassment or discrimination); or
 - Require employee to sign non-disparagement agreement/other document denying employee the right to disclose information about unlawful acts in the workplace.
- SB 331 requires specific language for a non-disparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace:
 - ***"Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."***

SB 331: Separation Agreements

- Severance/separation agreements:
 - Cannot prohibit the disclosure of information about unlawful acts in the workplace
 - Include: ***"Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."***
 - Include: Employer must advise employee of the right to consult an attorney regarding the agreement and that employee has a period of not less than 5 business days to do so.
 - Employees can sign separation agreement before 5 business days if:
 - Employee's decision to accept such shortening of time is **knowing and voluntary** and is **not induced** by the employer through **fraud, misrepresentation, or a threat to withdraw** or alter the offer prior to the expiration of the reasonable time period, or by providing **different terms** to employees who sign such an agreement prior to the expiration of such time period.
- Does not apply to "negotiated settlement agreement" to resolve an underlying claim.
- Does not prohibit inclusion of general release of claims.
- Does not prohibit employers from protecting trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace.