602:Parting is Such Sweet Sorrow—A How-To Guide to Employee Terminations

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Faculty Biographies

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Peter O. Hughes is the managing director of Stanton, Hughes, Diana, Cerra, Mariani & Margello, P.C. in Morristown, New Jersey. Mr. Hughes and his firm concentrate their practice on the representation of management in labor, employment, and employee benefit matters. He has extensive litigation and trial experience in a wide variety of employment-related matters, including discrimination, wrongful discharge, whistleblower, and trade secret cases throughout the United States. Employers also look to Mr. Hughes for advice on employment issues, including development and implementation of policies, training, and crisis management.

Prior to founding his current firm, Mr. Hughes worked at Shanley & Fisher, P.C. (now Drinker Biddle & Shanley, LLP), one of New Jersey's largest firms. In that role, he worked in a sophisticated commercial litigation practice, representing corporations in cases involving products liability, UCC, trademarks, franchises, licensing, shareholder rights, and other, similar types of issues. Later, he helped build the firm's labor and employment department into one of the premiere practices in the state. He and the other senior members of that practice left Shanley & Fisher to form their current firm.

Mr. Hughes received his BA from Franklin & Marshall College in Lancaster, Pennsylvania., and his JD from the Seton Hall University School of Law.

Cheryl M. Manley

Cheryl M. Manley is currently employment counsel at Smurfit-Stone, a paper packaging manufacturing company. Ms. Manley's varied responsibilities include developing corporate-wide training programs, overseeing the investigation of harassment complaints, managing employment litigation, ensuring the organization's compliance with affirmative action and related laws, developing and revising corporate human resources policies, and participating in the implementation of a myriad of human resources initiatives.

Prior to joining Smurfit-Stone, Ms. Manley was employed as an associate in the labor and employment law department of Blackwell Sanders Peper Martin LLP. Upon graduating from law school, she served two years as a judicial clerk to the Honorable Carol E. Jackson in the U.S. District Court for the Eastern District of Missouri.

Ms. Manley is a member of the Missouri Bar, the Bar Association of Metropolitan St. Louis, and the ABA. She is also a current member of the board of directors for Beyond Housing, a local not-for-profit organization. Ms. Manley is a past member of the board of directors for both the Regional Center for Non-Profit Administration and Lutheran Family and Children's Services.

Ms. Manley received a BS from Old Dominion University and she graduated from St. Louis University School of Law.

Susan H. Roos

Susan H. Roos is the managing partner of Cook & Roos LLP, a member of Worklaw Network, in San Francisco. Ms. Roos has substantial experience defending employers in all aspects of labor and employment law, including wrongful termination, sexual harassment, employment discrimination, and trade secret litigation before federal and state courts. Ms. Roos' trial experience includes both jury and non-jury trials. Ms. Roos also advises and counsels employers in the area of wage and hour, labor relations, and employment law.

Prior to starting her own firm with John Cook, Ms. Roos was a partner at Sheppard, Mullin, Richter & Hampton where she practiced litigation and employment law both in Los Angeles and San Francisco.

Ms. Roos currently is a member of the board of trustees for the Coyote Point Museum for Environmental Education.

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PARTING IS SUCH SWEET SORROW: A GUIDE TO EMPLOYEE TERMINATIONS

I. INTRODUCTION

Terminating employees is one of the most difficult aspects of business, and one that is fraught with legal peril. Numerous federal, state, and local laws provide vehicles for unhappy former employees to pursue wrongful discharge lawsuits. The economic displacement, the emotional upset, and the sympathy a terminated employee may receive from a jury make such case the highest risk in employment litigation. While it is impossible to "bullet proof" your company from such lawsuits, you can limit the risk. However, this requires planning and preparation long before the employee actually is let go.

A. What the Employer Should Be Concerned About In Any Termination

1. Will the *reasons* for this discharge seem fair to an outside observer?

2. Will the *process* the company follows seem fair to an outside observer?

3. Will the company be able to support this discharge with evidence four or five years from now?

B. Why Should Employers Care? Because Juries Care!

Some examples:

- $9,000,000 verdict for single employee on sexual harassment, retaliation, and wrongful discharge claim, *affirmed* by Hoffmann-LaRoche v. Zeltwanger, 69 S.W.3d 634 (Tex. Ct. App. 2002) review granted (October 31, 2002);

- $2,900,000 verdict for single employee in constructive discharge case, *affirmed* by Grant v. Comp USA, 109 Cal. App. 4th 637, 135 Cal.Rptr.2d 177 (6th Dist. 2003) review filed (July 16, 2003);

- $5,000,000 verdict for single employee in sex discrimination and retaliation claim, *affirmed* by Mogull v. CB Commercial Real Estate Group, 162 N.J. 449, 744 A.2d 1186 (2000);

- $5,597,887 verdict for supermarket assistant manager in sex discrimination case, *affirmed* by Rayburn v. Vons Companies, Inc., 2003 WL 42521 (Cal. App. 4th Dist. 2003);

- $7,765,000 verdict for single employee in age discrimination and retaliation case, Sadowski v. Philips Medical Systems, 2003 WL 21350884 (Ohio Court of Common Pleas, Cuyahoga County, March 2003);

- $11,000,000 for single employee in FMLA retaliation case, Schultz v. Advocate Health & Hospitals Corp., 2002 WL 31941430 (N.D. Ill., October 2002);

- $2,166,000 for single employee on claim of retaliatory discharge after complaining of sexual harassment, New Boston Select Group v. DeMichele, 2002 WL 32118769 (Massachusetts Super. Ct., Suffolk County, October 2002).

II. VOLUNTARY TERMINATION

A. "This Is A Good Thing": You are happy to see the employee voluntarily resign because you avoid the need to deal with termination:

1. What happens if the employee changes her mind, can you force the employee to leave anyway?

a. Answer: Yes, you can force the employee to leave, but doing so raises additional issues:

- Issue 1: By forcing the employee to leave have you converted the employee's resignation into a termination?

  Answer: In California, probably not. In Rabago v. Unemployment Ins. Appeals. Board, 84 Cal.App.3d 200 (1978), a case involving an employee seeking unemployment insurance, the issue was whether an employer who refused to allow an employee to withdraw his notice of resignation five days after giving his two-weeks notice had converted the employee's resignation into a termination.

  In finding the employer had not terminated the employee, the court held that an employee's announcement of resignation severs the employment relationship on the date set by the resignation, and an employee's attempt to withdraw the resignation prior to this date is a request for re-employment that the employer is free to refuse without converting the employee's resignation into a termination.

- Issue 2: Have you created a possible discrimination or retaliation claim?

  Answer: It depends. How have you treated other similar cases?

- Issue 3: If it does become a termination, do you have sufficient grounds to support a termination decision?

2. If an employee gives two weeks notice, can you force the employee to leave immediately and not pay her for the notice period?

a. Answer: In California, Yes; the California Labor Commissioner has stated that an employee who gives two weeks notice can be forced by her employer to leave immediately without any entitlement to wages for the notice period as the employee would not have performed any work during this time.

b. Forcing an employee to leave immediately instead of allowing her to work two more weeks does however raise a few issues:

- Issue 1: The California Labor Commissioner takes the position that forcing an employee to leave immediately instead of working during the notice period turns the employee's voluntary resignation into a termination. Under California Labor Code section 201, if an employer terminates an employee, all of the employee's earned and unpaid wages become due and payable immediately. Thus, the employer who forces an employee to leave immediately instead of allowing her to stay through the notice period must pay the employee immediately as the employee has been terminated. (For a discussion of the final wages due to a terminated or resigning employee, see section V.A. below.)

- Issue 2: An employer who otherwise does not want to allow the employee to work through the notice period may consider allowing the employee to work the additional weeks in consideration for the employee signing a release of all claims the employee may have against the employer.

B. "This Is A Bad Thing": A key employee is leaving the employer to go work for a major competitor.

1. Can you prohibit the employee from working for your competitor by enforcing a covenant not to compete?

a. Answer: It depends upon the state in which the employer operates.

- California: In California, covenants not to compete are void as against public policy and are therefore unenforceable. *See* Cal. Bus. & Prof. Code § 16600. A California employer may therefore

not use a covenant not to compete to prevent its employee from working for a competitor.

- Other States: Other states allow the use of covenants not to compete to varying degrees. Examples from certain states include:

- Texas: A covenant not to compete is enforceable only if: (1) it is ancillary to another enforceable agreement; (2) is reasonable as to the time, geography, and scope of activity it seeks to limit; and (3) no more restraint is imposed than is necessary to protect the goodwill or other business interest of the employer. Tex. Bus. & Com. Code Ann. §15.50(a).

- Colorado: In Colorado, covenants not to compete are generally not enforceable with a few narrow exceptions, including the protection of trade secrets and contracts for the sale or purchase of a business. COL. REV. STAT. § 8-2-113.

- Arizona: The factors Arizona courts consider to determine whether to enforce a covenant not to compete are typical of the states that allow such agreements. They are: (1) whether the restriction is reasonable in time and geographic limitation; (2) whether the restriction unreasonably restricts the rights of the employee; (3) whether the restriction is reasonably necessary to protect the employer's business; and (4) whether the restriction contravenes public policy. See American Credit Bureau. Inc. v. Carter 462 P.2d 838, 840 (Ariz. Ct. App. 1969).

- New Jersey: A covenant not to compete will be enforceable to the extent that it: (1) is necessary to protect the employer's legitimate interests; (2) is nor unreasonably burdensome on the employee; (3) is not harmful to the public; and (4) is reasonable in time and geographic scope. Solari Industries, Inc. v. Malady, 55 N.J. 571, 264 A.2d 53 (1970).

- New York: Applies the same standards as New Jersey. Ippolito v. NEEMA Emergency Medical of New York, 127 A.D.2d 821, 512 N.Y.S.2d 216 (1987)

2. Can you prohibit the employee from taking your trade secrets:

a. Answer: Yes, an employee can be prohibited from misappropriating the trade secrets of her former employer. The following should be considered in determining how to restrict an employee from disclosing your trade secrets and confidential information:

i. Uniform Trade Secrets Act: The Uniform Trade Secrets Act (USTA), adopted by California and 41 other states and the District of Columbia defines a trade secret as:

"Information, including a formula, pattern, compilation, program device, method, technique, or process that:

* derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertained by proper means by other persons who can obtain economic value from its disclosure or use; and

* is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

In the employment relationship, issues involving a company's trade secrets arise when an employee who possess confidential information ceases to be employed and is in a position to disclose the information either for her own benefit or the benefit of another company.

Even if the employee is in possession of what can be defined as a trade secret, a misappropriation of that trade secret must occur before the employer has any remedies. Misappropriation of a trade secret can occur when there is disclosure or use of a trade secret by one who:

* used improper means to acquire the knowledge of the trade secret;

* knew or had reason to know that his or her knowledge of the secret was derived from a person who had utilized improper means to acquire it, acquired it under circumstances giving rise to a duty to maintain its secrecy or limit it use, or derived it from a person who owed a duty to the one seeking relief to maintain its secrecy or limit its use; or

* knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Protecting Trade Secrets: Under the USTA, damages as well as injunctive relief are available for actual or threatened misappropriation. To

determine whether information is a trade secret and thus entitled to protection under the USTA, courts will in part examine the extent of the measures taken by the employer to protect information it deems a trade secret.

In addition to assisting a court to determine whether to issue an injunction, an effective trade secret protection program may prevent the loss of intellectual property. An employer should thus consider the following preventative measures.

- Protect Trade Secrets: make sure trade secrets and confidential information are identified, and proper steps are taken to protect them including consulting with security professionals if it is cost effective (i.e. the cost of losing the secret is not less than hiring the professional).

- In identifying and protecting trade secrets, employers should be aware of the types of information to which courts have granted trade secret protection. Courts have found trade secrets to include:

    * Scientific data such as manufacturing methods, machines and devices.

    * Business information such as marketing plans, financial information or pricing policies (including information deemed by the company to be unsuccessful).

    * Customer lists or related information such as customer preferences.

    * Computer Programs.

- Maintain Proper Security on all computer and electronic data systems.

- Obtain Non-Compete / Non-Disclosure Agreements: The employer should have the employee sign a non-disclosure agreement or a covenant not to compete or both depending upon the state in which the employer operates.

- Communicate the confidential nature of trade secrets to employees and discuss with employees what constitutes a trade secret: This includes labeling documents and files as "confidential" or "for internal use only."

- Conduct an Exit Interview: To help protect trade secrets, it may be wise to advise an employee of her obligations as she is resigning. Some issues to discuss include:

  * Discussing with the employee any documents she has signed that discuss the employee's continuing obligation of non-disclosure or not to compete. (This can include job descriptions and employee handbooks.)

  * Determining whether the employee has returned to the employer all confidential information or documents within the employee's possession. (Including access cards and computers).

  * Discussing with the employee what the employer considers to be trade secrets.

- Contact the Employee's New Employer: Without stepping over the line and saying anything negative about a former employee (see Defamation section below), an employer may want to send a friendly reminder to the employee's new employer stating the former employee's continuing obligation not to disclose trade secrets.

ii. Obtaining a court injunction: In California, a court may enjoin the actual or threatened misappropriation of a trade secret. This means that an employer may seek an injunction against an employee who walks off with a trade secret prior to its actual use. If a showing is made that the early misappropriation of a trade secret would give a former employee or her new company an unfair advantage, the court may issue an injunction. Cal. Gov't Code § 3426.2(a)

Although the UTSA makes it clear that the actual or threatened misappropriation of a trade secret may be enjoined, the "inevitable disclosure," doctrine provides for an even greater protection of trade secrets in certain situations as it allows a company to secure an injunction barring a former employee from working in a sensitive position for a competitor without any evidence of use of disclosure, nor any evidence of intent to disclose or use trade secret information.

(a) Inevitable Disclosure Doctrine: This doctrine is based upon the legal assumption that, consciously or unconsciously, an employee who makes use of proprietary information while working for one employer, will inevitably use this information when

he moves to accept a similar job with a competitor. Thus, it is a very powerful weapon for limiting the ability of employees with access to trade secrets from working in a similar position for a competitor; barring employment, not simply the use of trade secrets. The often-difficult burden of establishing that trade secrets have been used is replaced with an assumption that they will inevitably be disclosed and used to the detriment of the former employer. While the doctrine had been playing at the fringes of intellectual property law for decades, it has enjoyed a renaissance since 1995 with the decision of the Seventh Circuit Court of Appeals in Pepsi Co., Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995).

In that case a former Pepsi employee, Mr. Redmond, had been involved with preparing the marketing plan for a sports drink that competed with Gatorade, a Quaker Oats product. When he took on a very similar position with Quaker Oats, Pepsi argued that it would be inevitable that in marketing Gatorade he would make use of the proprietary Pepsi marketing plan that he had helped to formulate. The court emphasized that the positions at Pepsi and Quaker Oats were so similar that absent an "uncanny ability to compartmentalize information," Redmond would have to rely upon his former employer's trade secrets to do the job. The court emphasized that "the mere fact that a person assumed a similar position at a competitor" is not enough. Instead, it was PepsiCo's "particularized plans and processes" it sought to protect, as distinguished from the employee's skills, training and knowledge acquired during his tenure.

i. The "inevitable disclosure" doctrine has been adopted in the following states:

- Arkansas: Southwestern Energy Co. v Eickenhorst (W.D. Ark 1997), 955 F. Supp. 1078, *aff'd* 175 F.3d 1025 (8th Cir. 1999). (Similarity of positions and willingness to exploit Hunt's trade secrets were "more than sufficient to show a threatened or inevitable misappropriation.")

- Delaware: E.I. duPont de Nemours & Co. v. American Potash & Chemical Corp. (Del. Ch. 1964) 200 A.2d 428. (Emphasis upon the importance of the similarity between the two positions.)

- Illinois: PepsiCo, supra; see also C&F Packing Co. v. IBP, Inc. (N.D. Ill. 1998) 1998 WL 1147139. (Competitor found liable, not just employee. Inevitability theory can prove existence of a material fact to survive motion for summary judgment.)

- Massachusetts: Marcam Corp. v. Orchard (D. Mass 1995) 885 F.Supp. 294.

- Minnesota: Surgidev v. Eye Technology (D. Minn. 1986) 648 F. Supp 661. IBM v. Seagate Technology, Inc. (D. Minn. 1992) 941 F. Supp. 98 (Court considered its analysis applicable to the law of California since both California and Minnesota had adopted the UTSA. Found more than holding trade secrets and a comparable position at a competitor is necessary. To get injunctive relief "substantial threat of impending injury" need be shown.) *Lexis-Nexis v. Beer* (D. Minn. 1999) 41 F. Supp 2d 950.

- New Jersey: National Starch & Chemical Corp v. Parker Chemical Corp. (1987) 530 A.2d 31 (Extensive knowledge of plaintiff's business plans gave rise to "sufficient likelihood of 'inevitable disclosure'" even where no indication of employee's "lack of candor" or willingness to misappropriate secrets.) *But see*, E.R. Squibb & Sons, Inc. v. Hollister, Inc., - F.Supp. -, 1991 WL 15296 (D.N.J. 1991) *aff'd,* 941 F.2d 1201 (3d Cir. 1991)(refusing to apply inevitable disclosure doctrine, finding it contrary to Third Circuit law governing issuance of injunctions).

- Ohio: Proctor & Gamble Co v. Stoneham (Ohio Ct App. 2000) 747 N.E. 269 appeal denied, 91 Ohio St. 3d 1478 (2001) (where employee had "intimate knowledge" of trade secrets and new position was in "direct competition" court found "not just a threat [but] a substantial probability" that disclosure would occur).

- Utah: Novell, Inc v. Timpanogos Research Group, Inc. (Utah Dist Ct. 1998) 46 U.S.P.Q. 2d 1197.

- Washington: Solutec Corp v. Agnew (Wash Ct. App. 1997) 1997 WL794496.

(ii) The "inevitable disclosure" doctrine has been rejected by California courts: While the California Supreme Court has yet to decide this issue, every federal and lower California appellate court to reach the issue has rejected the concept of inevitable disclosure as contravening California's strong policy in favor of an employee's right to freely change employment. Schlage Lock Co. v. Whyte (2002) 101 Cal. App. 4th 1443 ("'The doctrine of inevitable disclosure,' the court noted, 'creates a de facto covenant not to compete' and runs counter to the strong public policy in California favoring employee mobility."); Bayer v. Roche Molecular Systems, Inc. (N.D. Cal 1999) 72 F. Supp. 2d. 1111, ("California trade secrets law does not recognize the theory of inevitable disclosure."); Globespan, Inc. v. O'Neill (C.D. Cal. 2001) 151 F. Supp. 2d 1229 ("The Central District of California has considered and rejected the inevitable disclosure doctrine.").

iii. Recovering Damages for Misappropriation: The USTA and its California equivalent, in addition to granting a court the authority to enjoin the actual or threatened misappropriation of a trade secret, also allow for the recovery of damages for the

actual loss and unjust enrichment resulting from the misappropriation of a trade secret. Cal. Gov't Code § 3426.3(a). Damages can include the profit realized from the use of the trade secret, royalties and double any damage award if the misappropriation is willful and malicious. *See also,* Lamorte Burns & Co., Inc. v. Walters, 167 N.J. 285, 770 A.2d 1158 (2001)(awarding similar damages under common law).

iv. Conflict of Law Issues: The law on whether covenants not to compete are enforceable, or the extent to which they will be enforced, varies among the fifty states. As a covenant may be enforceable in one state but not another, the law that governs the agreement can be crucial. The following should be considered:

(a) Choice-of-Law Clause: Employers with operations in more than one state may wish to incorporate a clause into a covenant not to compete that expresses which state's law governs the agreement. These clauses may or may not be effective:

i. The United States Supreme Court has stated a general proposition with respect to choice of law issues that reflects the Restatement (Second) of Conflict of Laws position, and that is followed by most states when interpreting choice-of-law clauses.

In M/S Breman v. Zapata Off-Shore Co., 407 U.S. 1 (1971), the U.S. Supreme Court held that the law of the state chosen by the parties will be applied unless there is no reasonable basis for the parties' choice or the application of the law of the chosen state would be contrary to a public policy of the state most interested in the contract.

Thus, the law of the state where the agreement is to be enforced (i.e., the "forum

state") is important even if the agreement contains a choice-of-law clause.

ii. California Will Not Enforce Covenants Not to Compete Regardless of a Choice-Of-Law Provision: As discussed above, California has a strong public policy against covenants not to compete. A California court will therefore not enforce a covenant not to compete even if the employer and employee agreed to have the covenant enforced under the laws of a state permitting covenants not to compete. *See e.g.* Application Group, Inc. v. Hunter Group, Inc., 61 Cal.App. 4th 881 (1998).

iii. States May Apply More Restrictive Law When Appropriate: If the law of the state stipulated in the agreement is more restrictive than that of the forum, the forum must apply the forum must apply the more restrictive rule of law as stipulated in the agreement.

For instance, in Radosh v. Shipstad, 20 N.Y.2d 504(1967), a New York court applied California's more restrictive law on covenants not to compete discussed above although New York has a less restrictive "rule of reason" standard.

iv. In the absence of a public policy of the forum state invalidating the employee's covenant not to compete, the validity of the covenant will be governed by the law of the place where the covenant was both made and was to be performed.

3. Can you prohibit your employee from soliciting your customers?

a. Answer: It depends.

In California, such a provision may be void as a violation of the prohibition against covenants not to compete. *See* Kolani v. Gluska, 64 Cal.App. 4th 402 (1998). However, such provisions may be enforceable if necessary to protect an employer's trade secrets (*e.g.* where customers lists are considered trade secrets) or possibly if the provision is narrowly drawn to specify a certain group of customers. Schlage Lock Co. v. Whyte, 101 Cal.App.4th 1443 (2002). Sending out business announcements is not considered solicitation. Aetna Bldg. Maintenance Co. v. West, 39 Cal. 2d 198 (1952) (solicitation "implies personal petition and importunity addressed to a particular individual to do some particular thing.")

In several states, a provision restricting customer solicitation can be enforced even without a geographic restriction. *See e.g.,* Merrill Lynch Pierce Fenner & Smith, Inc. v. Grall, 836 F. Supp. 428 (W.D. Mich. 1993); American Express Financial Advisors, Inc. v. Scott, 955 F.Supp. 688 (N.D. Tex. 1996); Boisen v. Petersen Flying Service, 222 Neb. 239, 383 N.W. 2d 29 (1986).

4. Can you prohibit your employee from soliciting your other employees?

a. Answer: Yes. In California, an employer maybe able to stop a former employee from soliciting its current employees if the prohibition is reasonable. Loral Corp. v. Mayes, 174 Cal.App. 3d 268 (1985) (anti-raiding provision for one year upheld). While an employer may stop *solicitation*, an agreement that purports to prohibit hiring is not enforceable. *Id.*

Similarly, other states also prohibit "no-hire" agreements, e.g. Wisconsin, *see* Heyde Cos. v. Dove Healthcare LLC, 258 Wis. 2d 28, 654 N.W.2d 830 (2002).

A covenant not to solicit employees is enforceable in New York. Veraldi v. American Analytical Labs, Inc., 271 A.D.2d 599, 706 N.Y.S.2d 158 (2d Dep't. 2000) cited with approval in Global Telesystems v. KPN Quest, N.V., 151 F.Supp.2d 478 (S.D.N.Y. 2001).

B. General Concerns That Apply To All Voluntary Terminations:

Whether you are happy or upset to see your employee leave, you should take the following steps in preparing for your employee to resign:

1. Talk with the resigning employee's supervisor to ensure her work is transferred to remaining employees.

2. Document the voluntary nature of the employee's resignation:

a. Get the employee to sign a resignation letter that states the voluntary nature of the discharge to help avoid the possibility of the employee later claiming she was subjected to a constructive discharge (i.e. that she was forced to resign against her will). Although such a letter may aid in the defense of a constructive discharge claim, it does not guarantee that such a claim will not later be made by the employee.

b. A constructive discharge occurs when an employer's conduct effectively forces an employee to resign. Turner v. Anheuser-Busch, 7 Cal.4th 1238 (California 1994). To succeed on a claim for constructive discharge, the employee must show her working conditions were so intolerable that a reasonable person in her position would feel compelled to resign. *See* Turner, supra, at 1247; King v. AC&R Advertising, Inc., 65 F.3d 764 (9th Cir. 1995); Flaherty v. Metromail Corp., 235 F.3d 133 (2d Cir. 2000); Webb v. Florida Health Care Mgt. Corp., 804 So.2d 422 (Fla. Ct. App. 2001). The employee must also establish that the employer had actual or constructive knowledge of the alleged intolerable conditions and their impact on the employee, and failed to remedy the problem in spite of an ability to do so. Turner, *supra*.

i. For example, in Thomson v. Tracor Flight Systems, Inc., 86 Cal.App.4th 1156 (2001) a court found a constructive discharge may occur when the intolerable conditions result from an employee's complaints that the company is violating anti-discrimination laws. In Tracor, an employee complaining about violations of disability laws was consequently subjected to verbal abuse by a general manager. The employee's resignation resulting from such abuse was found to constitute a constructive discharge.

ii. In Montero v. AGCO Corp., 192 F.3d 856 (9th Cir. 1999) the court found that the employee's resignation did not amount to constructive termination since she resigned several months after the alleged harassment had stopped.

iii. Herr v. Nestle U.S.A., Inc., 109 Cal.App. 4th 779 (2003) review filed. In Herr, an employee resigned from his job at Nestle after becoming frustrated by numerous fruitless attempts to obtain promotions and job opportunities that were instead given to younger and less qualified employees. Finding age discrimination and constructive discharge, the appellate court upheld a five million dollar jury verdict for the employee.

3. Return of Company Property:

a. If an employee is provided with tools or other equipment the employer wants returned upon the employee's resignation, the employer may want to create a check list itemizing all of the equipment provided to the employee at the time the equipment is provided. Employers who draft such checklists often include language in them that requires the employee to reimburse the employer upon termination if the employee fails to return the employer's property.

b. Barnhill Issues: As discussed below (Section VI.A.5, *infra*.), employers sometimes want to recover debts from employees who are resigning. California employers who wish to recover the dollar amount of property not returned by the employee from the employee's final paycheck should obtain an agreement in writing from the employee that such a deduction can be made.

4. Exit Interviews: Exit interviews provide employers with an opportunity to discuss with an employee a number of issues including some of the ones discussed above.

a. An exit interview should:

i. Take place face to face.

ii. Take place in front of at least one witness, if possible.

iii. Be recorded in written form. Some employers use an exit interview form to record what transpired during the interview.

iv. Encompass a number of topics, including:

(a) Identify the reasons for the employee resigning, including:

- Was the employee satisfied with the terms and conditions of her employment.
- Was the employee comfortable with the amount of hours they were required to work.
- Did the employee receive the support she needed from her supervisor and colleague.
- Did the employee feel she received adequate training.
- Did the employee feel she was given opportunity for advancement.
- If the employee indicates she is resigning due to the impermissible conduct of a supervisor, such as sexual harassment, this is an opportunity for the employer to determine the truth of the claim, take corrective measures if necessary, and possibly encourage the employee to rescind her resignation.

(b) Address all final pay and benefit issues: During the exit interview, the employer may discuss with the employee her COBRA rights, and address any issues regarding the employee's final pay.

(c) Return of Company Property: The employer may also use this time to determine whether the employee returned all company property in her possession, or to otherwise ask for the return of such property. If necessary, the employer may obtain at this time a written agreement from the employee in which the employee agrees to reimburse her employer through a deduction from her final wages for all company property not returned by the employee.

(d) Ensure Employee is Familiar With Her Obligation to not Disclose the Employer's Trade Secrets: See further discussion on this point at section B.2, above.

5. Create a Checklist:

a. To ensure all issues are covered with an employee before her departure, an employer may consider creating a checklist that covers all issues surrounding an employee's resignation, including:

(1) whether final wages have been paid and if there are any issues surrounding the payment of final wages;

(2) whether the employee has returned all company property in her possession;

(3) whether the employee has any outstanding debts, and if the employee has signed or will sign a written document agreeing to repay the debt out of her final wages;

(4) whether the employee has been informed of her COBRA rights and other issues surrounding the employee's benefits; and

(5) whether the employee has received an exit interview

(6) whether trade secret issues have been discussed with the employee

III. INDIVIDUAL INVOLUNTARY TERMINATION FOR CAUSE

Unfortunately, it sometimes becomes necessary to discharge an employee because he or she is a poor performer or has engaged in misconduct. This type of situation is the one that most likely will end up in litigation, so it is important to handle it carefully and fairly, and to document what you have done. You may need evidence to support your actions a year, or two, or more down the road.

A. The Employer's Right to Discharge: "At Will" vs. "Good Cause"

1. "At Will" Employment

This is defined to mean that either the employer or the employee can terminate the employment relationship at any time, for any reason, and without any prior warning. As one court succinctly put it, "An employer can fire an at will employee for no specific reason or simply because the employee is bothering the boss." Valentzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 536 A.2d 237 (1988).

2. **"Good Cause" for Termination**.

There are two distinct criteria for good cause, depending on what jurisdiction you are in.

a. In some states, if the employer must show it had just cause to terminate an employee, the jury can perform a *de novo* review of the evidence, and the employer must prove that the employee really did what the employer claims. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980); Ainsworth v. Franklin County Cheese Corp., 150 Vt. 325, 592 A.2d 871 (1991).

b. The majority of courts, however, apply an "objective good faith standard" under which an employer's decision to terminate an employee is proper if the employer had a good faith belief, supported by substantial evidence, that the employee engaged in prohibited conduct, and that a reasonable employer, acting in good faith, would have regarded such conduct as a good and sufficient basis to discharge the employee. *See, e.g.*, Cotran v. Rollins Hudig Hall International, Inc., 17 Cal. 4th 93, 69 Ca. Rptr. 2d 900 (1998); Chrvala v. Borden, Inc., 14 F. Supp. 2d 1013 (S.D. Ohio 1998); Montana "Wrongful Discharge From Employment Act," Mont. Code Ann. § 39-2-903(5).

c. The latter standard is similar to the evaluation of a discharge in a discrimination lawsuit, in which the employer is required to articulate a legitimate, non-discriminatory reason for the employee's discharge. The test is whether the employer's decision makers "reasonably believed" that termination was appropriate in the circumstances, not whether the circumstances met some objective test of "good cause." The employee, on the other hand, must prove that the employer's stated reason is not the real reason for the discharge, but is merely a "pretext" for unlawful discrimination. *See, e.g.*, Harvey v. Anheuser-Busch, Inc., 38 F.3d 968 (8th Cir. 1994); Elrod v. Sears, Roebuck & Co., 939 F.2d 1466 (11th Cir. 1990). "The plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual issue is whether discriminatory *animus* motivated the employer, not whether the employer is wise, shrewd, prudent or competent." Town of Michigan Bell Telephone Co, 455 Mich. 688, 568 N.W.2d 64 (1997) citing Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994).

3. Limitations on the Employer's Right To Discharge "At Will"

Even where the "at will" rule applies, the exceptions to it are almost too numerous to list. These limitations may be statutory or common law, and may be based on theories of tort or contract. The effect of these limitations is to give the employee a vehicle to have the decision reviewed by a court or government agency, and to require the employer to defend the decision to discharge. These limitations fall into three distinct categories:

a. "Trait" Protection: Many federal and state laws protect employees from discrimination based on personal traits such as race, sex, age, religion, disability or handicap, national origin, etc. *See, e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* ("Title VII") ; Age Discrimination In Employment Act, 29 U.S.C. § 621 *et seq*. ("ADEA"); Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA"); Civil Rights Act of 1866, 42 U.S.C. § 1981.

i. State Laws: It is critical to remember that state laws may protect certain traits that do not fall within the coverage of federal laws. For example, several states prohibit discrimination because of marital status and because of sexual or affectional preference, even though these are not protected by federal law. *See, e.g.,* California Fair Employment and Housing Act, Cal. Gov't Code § 12901 *et* seq.; New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.* Another consideration is that employees may have handicaps or disabilities that may not be severe enough to qualify for coverage under the ADA but may qualify the individual for protection under state law. *See, e.g.,* Failla v. City of Passaic, 146 F.3d 149 (3d Cir. 1998) (affirming jury verdict for employee under "handicap" provision of the New Jersey Law Against Discrimination, even though the same jury found the employee was not "disabled" within the meaning of the ADA). *See also*, California Fair Employment and Housing Act, which specifically states that although the ADA "provides a floor of protection, this state's law has always, even prior to the passage of the federal act, afforded additional protections." Cal. Gov't Code, §12926.1(2).

ii. ERISA: While it may be a hybrid between being a "trait" and an "activity," it is unlawful to discharge an employee in order to prevent him or her from vesting in an employee

benefit, Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140.

iii. Criminal Convictions: In most states, employers are free to discharge an employee, or to refuse to hire him in the first place, because he has been convicted of a crime. However, a small number of states, most notably New York, limit this right to situations in which the employer can show that the conviction was for an offense that is related in some way to the job the employee is hired to perform. N.Y. Exec. Law § 296(16).

b. "Activity" Protection: Federal and state laws protect employees from retaliation for engaging in certain activities, *e.g.*:

i. Engaging in concerted protected activity. National Labor Relations Act, 29 U.S.C. § 157, § 158(a)(1) & (3);

ii. Making safety complaints. Occupational Safety and Health Act, 29 U.S.C. §§ 651, 660;

iii. Making complaints about wage and hour law violations, Fair Labor Standards Act, 29 U.S.C. § 201, 215(a)(3);

iv. Taking medical leave for self or family members. Family & Medical Leave Act, 29 U.S.C. § 2601 *et seq.*; Cal. Gov't. Code § 12945.2; District of Columbia Code §32-501 *et seq.*; *N.J.S.A.* 34:11B-1 *et seq.*

v. Filing workers' compensation claims: Nearly every state prohibits retaliation against an employee for filing a workers compensation claim.

vi. "Whistleblowing." *See, e.g.*, New Jersey Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.*; Cal. Labor Code § 1102.5; Fla. St.. Ch. 448.101 *et seq.*; Missouri St. Ann. §197.285 *et seq.*; N.Y. Labor Law § 740.

(a) There also is a substantial body of common law in most states that prohibits termination of an employee who complains about, or refuses to participate in, actions of the employer that are unlawful or violative of a clearly defined public policy. One of the seminal cases in this area is Peterman v. Teamsters Local, 174 Ca. App. 2d 184, 344 P.2d 25 (1959) where the court held that an

employee had cause of action for wrongful discharge when he was discharged for refusing to commit perjury in testifying before the Legislature.

(b) Some states have expanded the theory even further, beyond situations involving "whistleblowing," to cases in which the circumstances of the termination itself are deemed to violate a fundamental public policy. For example, the New Jersey Supreme Court has held that an employee may state a claim for wrongful discharge if he or she is terminated for refusing to submit to random drug testing where the employee does not occupy a safety-sensitive position. Hennessey v. Eagle Coastal Refining, 129 N.J. 81, 609 A.2d 11 (1992).

vii. California has a unique law that forbids a company from discharging an employee because the employee engaged in "lawful conduct occurring during non-working hours away from the employer's premises." Cal. Labor Code §§ 96(k), 98.6. This includes "moonlighting" at another job, even if it is for a direct competitor! The only exception is if the employer (1) obtains a written agreement from the employee *and* (2) can establish that such moonlighting will result in "material and substantial disruption" of its business operations.

viii. Some states prohibit employers from taking adverse action because of the employee's off-hours use of tobacco products. *See, e.g.,* Missouri St. Ann. §290.145; North Carolina G.S. §§95-28.2; 820 Ill. Comp. St. Ann. 551, *et seq*., Oregon R.S. §659.380.

c. Contractual Limitations on the Employer's Right to Discharge: Contracts, express or implied, also may require "good cause" for termination and/or progressive discipline before discharging an employee. The employer needs to be aware that these obligations can arise from a variety of sources.

i. Offer letters. A description of salary "per year" may be construed as an implied contract for at least a year. *See, e.g.*, Ga. Code Ann.. § 34-7-1; South Dakota Codified Laws, § 60-1-03.

ii. Employee handbooks and company policies. *See, e.g.*, Rowe v. Montgomery Ward & Co., Inc. 437 Mich. 627,

473 N.W.2d 268 (1991); Woolley v. Hoffmann-LaRoche, 99 N.J. 284, 453 A.2d 865 (1985) *modified*, 101 N.J. 10 (1985); Swanson v. Liquid Air Corp., 118 Wash. 2d 512, 826 P.2d 664 (1992); Dantley v. Howard University, 801 A.2d 962 (D.C. 2002).

iii. Unwritten or oral policies: Even if a "good cause" or progressive discipline policy is not written, it may nevertheless be enforceable if it in fact is followed and has been communicated to employees. Foley v. Interactive Data Corp., 47 Cal.3d 654, 254 Cal. Rptr. 211 (1988); Reynolds v. The Palnut Company, 330 N.J. Super. 162, 748 A.2d 1216 (App. Div. 2000); Lytle v. Malady, 458 Mich. 153, 579 N.W.2d 906 (1998).

iv. Individual oral contracts. A contract to be discharged only for "good cause" may be based upon specific promises made to an employee upon which he or she relies, rather than on the employer's general policies. The employee needs to show that he or she provided additional consideration, beyond mere continued employment, in reliance on those promises. Mariani v. Rocky Mountain Hospital and Medical Service, 902 P.2d 429 (Colo. 1995); Rinck v. Association of Reserve City Bankers, 676 A.2d 12 (D.C. 1996); Shebar v. Sanyo Business Systems Corp., 111 N.J. 276, 544 A.2d 377 (1988).

v. Promissory estoppel. This is similar to the individual oral employment contract and requires the employee to prove: (1) the employer made a specific representation of fact; (2) the employee reasonably relied on the representation; and (3) suffered a detriment as a result. *See, e.g.,* Lazar v. Superior Court, 12 Cal. 4th 631, 49 Ca.Rptr. 2d 377 (1996); Vajda v. Arthur Anderson & Co., 253 Ill. App. 3d 345, 624 N.E. 2d 1343 (1993).

vi. Implied covenant of good faith and fair dealing. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E. 2d 1251 (1977); Mongo v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

B. Discharge For Poor Performance

In approaching the termination of an employee for poor performance, it is important to keep in mind that a court or jury evaluating the company's decision will want to ensure, first and foremost, that the employer truly believes that the

employee has performed poorly and that the basis on which that determination was made is reasonable. While it is not strictly a legal obligation, a jury may also think it appropriate that the employee be given notice of deficient performance and an opportunity to correct it.

1. The Performance Evaluation Process

If the company wants to support a decision to terminate an employee for poor performance, it must create and maintain a system of evaluating performance that is fair, accurate, provides meaningful information for business purposes, and results in useful information for future litigation. Such a system, along with proper supervisor training, will ensure consistency. The worst evidence in a discharge lawsuit (especially a discrimination lawsuit) is a document that contradicts either what your manager or another document says. *See, e.g.*, Roberts v. Separators, Inc., 172 F.3d 448 (7th Cir. 1999) (evidence of a positive performance review and a sizable raise shortly before termination would be highly relevant to showing pretext for discrimination when employer fired employee for "bad attitude" and work problems); Garrett v. Hewlett-Packard Corp., 305 F.3d 1210 (10th Cir. 2002) (inconsistencies and contradictions between earlier and later performance evaluations was strong evidence of discrimination). *Cf.,* Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994) (plaintiff's burden in discrimination case is to show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons").

For this reason, it is very important to train supervisors on how to conduct performance appraisals and how to document performance issues, good and bad. These should include:

a. Be honest and accurate. Supervisors often are afraid to say that the employee is performing poorly. Reasons for this include human nature, fear that criticism will lead to even worse performance, inflating reviews to make the supervisor look better, etc. What inevitably happens is that either: (1) the supervisor decides one day that she no longer can stand the employee's poor performance and has to get rid of him immediately; or (2) a new manager comes in an provides honest evaluation of the employee's performance and determines that the employee must go. In either case, the evaluations come back to haunt everybody.

In one published case, supervisors deliberately avoided confronting an African-American female employee about her poor

performance – and "deliberately overstated" her performance evaluations in order to avoid starting a process that might lead to termination. When the employer reduced force, however, the employee was identified as one who could be fired to meet cost-cutting goals. The court held that the company had discriminated against the employee because, by not being honest with her, they failed to give her the same opportunity to improve her performance that it gave white employees, which may have led to her discharge. Vaughn v. Edel, 918 F.2d 517 (5th Cir. 1990).

b. Make written comments on the evaluation, and give specific examples of both good and bad performance. Avoid systems where the supervisor simply checks off boxes or chooses a number rating. Requiring specific examples helps both the employee and the company, and will be useful in any future litigation. For example, even if an employee meets expectations overall in a given year, there may be specific areas where she needs to improve. If the employee fails to improve in those areas, she may receive a "Below Expectations" the next year – after, inevitably, she has informed the company that she is pregnant or has an alcohol problem, or has complained about nefarious doings at the company, etc. Without the comments from the previous year, the sudden change in rating could look discriminatory. Requiring written comments also limits – though it cannot eliminate – the tendency to rate everybody as "meets expectations."

c. Provide specific information about objectively-measured performance, not simply subjective analysis like, "Jane is a good employee," or "Bob has a poor attitude." The supervisor should give specific examples of Bob's conduct that demonstrate his poor attitude.

d. Supervisors should keep notes during the course of the year about employee performance or conduct, for use in preparing annual or semi-annual performance appraisals. Otherwise, the last thing that happens will govern the whole evaluation. However: (1) monitor what the supervisor is keeping in those notes – there could be a time-bomb ticking away!; and (2) the supervisor should keep notes about all of his or her subordinates, not just one or a few, or it will look like the supervisor is picking on those employees. *See, e.g.*, In re Novartis Nutrition Corporation, 331 NLRB No. 161, 171 LRRM (BNA) 1281 (August 28, 2000) *review denied, enforcement granted*, 23 Fed. Appx. 1 (D.C. Cir. 2001). (National Labor Relations Board found evidence of anti-union discrimination where supervisor kept notes only about pro-union employee who

was vocal in complaints about management and did not keep notes about other employees).

e. The employee should be required to sign the performance evaluation, acknowledging receipt and review, if not agreement with it.

f. The employee should be given an opportunity to respond in writing to the evaluation, preferably on the form itself. Allowing the employee to have the opportunity to respond demonstrates the overall fairness of the process.

2. Is the Employee Identified for Discharge Actually a Poor Performer?

a. The desired standard of performance should be defined.

i. Is the standard objective (*e.g.*, make 20 widgets per hour) or is it subjective (*e.g.*, the manner in which a receptionist greets visitors and callers)?

ii. How was the standard set and by whom?

iii. Is the standard reasonable?

b. The company should have proof that this standard of performance has been communicated to the employee.

i. What was the method of communication? Written or oral?

ii. Has the standard been communicated effectively?

iii. Has the standard been communicated consistently, or have there been contradictory messages?

c. The company should have proof that the employee has failed to meet this standard.

i. Subjective vs. objective assessment.

ii. Warning of poor performance and an opportunity to correct it.

iii. Performance appraisals should be consistent with the decision.

iv. The company should investigate any explanation or excuse the employee offers.

3. Is This a Lawsuit Waiting to Happen?

a. What is the employee's age, race, gender, religion, sexual preference, marital status, etc.?

i. Is there any evidence of discrimination, such as comments or conduct by the supervisor?

ii. How have we treated similarly situated employees with similar performance issues?

b. Is the employee handicapped or disabled within the meaning of the Americans With Disabilities Act or state law?

i. Has the employee requested a reasonable accommodation?

ii. Have we accommodated the employee or determined that we cannot do so? Remember, the Americans With Disabilities Act requires the company to engage in an "interactive process" to determine the disabled employee's needs and what accommodation, if any, can be provided. 29 CFR § 1630.2(O)(3); EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act* (March 1999) (describing the employer's obligation to engage in the interactive process as a "continuing one".) Thus, if this employee requests a particular accommodation, it is not enough for the company to consider it and reject it; the company must consider alternative accommodations until it either finds one that works or runs out of possible accommodations. *See, e.g.*, Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001) *cert. denied*, 535 U.S. 1011 (2002).

iii. Do we have documentation of the employee's request, the company's investigation of the request, and company's decision on the request? This may be needed as evidence in the event of an ADA claim.

c. Has the employee complained about anything, *i.e.*, is he or she a "whistleblower"?

d. Is there any contractual limitation, express or implied, on the company's right to terminate the employee at this time? For example, if a company policy requires progressive discipline, have the supervisors followed that process?

4. Does this Decision Pass the "Sniff Test"?

Would an objective observer believe that a reasonable employer would discharge an employee for the reasons given, or does the decision seem unreasonable? For example, is a sales representative with good sales results being discharged because of problems with subjective criteria? If so, you may want to rethink the decision or build a stronger case. *See, e.g.*, Keathley v. Ameritech Corporation, 187 F.3d 915 (8th Cir. 1999) (terminated employee's sales results – achieving 300% of quota and selling more units than anyone else in the company – raised issue of age discrimination when she ostensibly was fired for being tardy, neglecting to return client phone calls, and not getting along with co-workers); Brewer v. Quaker State Motor Oils, 72 F.3d 326 (3d Cir. 1995) (issue of fact on age discrimination claim by employee was only one in company to have received consecutive annual performance bonuses).

5. The Decision-Making Process

a. Identifying the decision makers

i. Is there HR or Legal oversight?

ii. Who makes the final decision, or gives the final blessing? Do you want to have a "Termination Czar" (or Czarina), *i.e.*, "a person who must give final approval on all discharges?"

iii. Everyone involved is likely to be a witness in future litigation.

iv. In some states, everyone involved potentially can be sued individually and may be personally liable. *See, e.g.,* New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-12; New York Human Rights Law, N.Y. Exec. L. 296(1).

b. Reaching the decision

i. Is this done in a formal meeting, a telephone conference, an exchange of email or some other form of communication.

ii. A formal meeting or conference call is ideal, so everyone gets the benefit of others thoughts, and can raise any questions or objections.

c. The company should segregate and maintain the investigation file for use in any future litigation.

C. Termination For Misconduct

Sometimes it is necessary to discharge an employee, regardless of her performance, because she has engaged in misconduct. This can range from excessive absence to stealing to workplace violence to being a sexual harasser. Again, we live in an era in which nearly everyone falls into some ""protected class," so the company must be ready to support its decision to terminate an employee, and to defend that decision in a court of law.

1. Identify the Alleged Misconduct

a. Do *you* think it is something for which an employee should be terminated?

b. Would a reasonable, objective third party agree with you?

c. Special issue: excessive absenteeism

i. This can be tricky. Be sure that no missed days are covered by the Family and Medical Leave Act or any state equivalent. The FMLA forbids employers from counting time spent on FMLA leave as "occurrences" under an absence control program or policy. Such days may *not* be counted as occurrences under the policy. 29 CFR § 825.220(c)

ii. Another tricky issue is the situation in which the employee has exhausted all FMLA and other leave entitlement, but still is not ready to return to work. The Americans With Disabilities Act and equivalent state laws may require the employer to grant additional leave as a "reasonable accommodation" for the employee's disability. *See, generally*, Peter O. Hughes and Deborah A. Keller, "Beyond the FMLA: Medical Leave As a Reasonable Accommodation," *ACCA Docket* 20, no. 3 (2002): pp. 40-57.

2. Identify Applicable Company Policies.

a. Does the company have a policy governing this type of conduct?

b. Has the policy been published?

c. Does the policy specify the discipline?

3. Determine treatment of Similarly-Situated Employees Who Have Engaged in Similar Conduct.

If there are no similar cases, will we be setting precedent with this employee?

4. Investigate the Misconduct

a. Choose the investigator

i. Ideally, the investigator should be experienced and be trained in conducting investigations.

ii. The investigator should be a neutral "third-party," *e.g.*, someone from outside the company or, at least, from outside the department in which the employee works.

iii. The investigator likely will be a witness in future litigation. Therefore, in selecting the investigator, you need to consider carefully how well the individual might perform as a witness and how credible he or she will be.

iv. Will he/she be a decision maker on the discharge, or simply presenting the conclusions of the investigation to the decision makers? It is strongly recommended that the investigator NOT be a decision maker, if at all possible. The decision maker will have to evaluate the investigation and the investigator at some point, when determining whether good grounds for discharge exist.

v. Warning – If you choose yourself or another attorney as the investigator, the communications with the investigator might not be privileged. *See, e.g.*, Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 691 A.2d 321 (1997) (materials relating to sexual harassment investigation are not necessarily privileged simply because an attorney conducted investigation); Peterson v. Wallace Computer Services, Inc., 984 F. Supp. 821 (D. Vt. 1997) (employer

waived attorney-client privilege by defending sexual harassment claim on ground that the investigation was adequate); Brooms v. Regal Tube Co., 1986 WL 8971 (N.D. Ill. 1986) (same). *But see*, EEOC v. Lutheran Social Services, 186 F.3d 959 (D.C. Cir. 1999) (attorney notes not discoverable when investigation was conducted in anticipation of litigation, and therefore qualified for work-product privilege).

b. Interview the employees

It is critical for the investigator to keep an open mind in the process, and to avoid an adversarial or prosecutorial attitude. He or she should consider any excuses or alibis the employee uses, and interview any witness the employee identifies. He or she should treat the accuser in the same way. This may require more than one interview, with each person, depending upon whether there are significant differences in their stories. The investigator ultimately will have to gauge the truthfulness and credibility of everyone.

i. Note: If the employee is not a supervisor, and demands the right to have a co-worker sit in on the meeting with him, the investigator must comply. This is referred to as the employee's "Weingarten" right, after NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), with held that unionized employees have the right under the National Labor Relations Act, 29 U.S.C. §151 ("NLRA") *et. seq*. to have a representative present for any interview the employee may reasonably believe might lead to disciplinary action. The NLRB extended the right to non-union employees in Epilepsy Foundation of Northeast Ohio, 331 NLRB 92 (2000), and this was upheld in Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001) *cert. denied*, 536 U.S. 904 (2002).

ii. Under the rule, if the company denies the employee's request to have someone present, the company may be guilty of an "unfair labor practice" in violation of the NLRA, 29 U.S.C. §§157, 158(a)i..

iii. However, this right extends only to "employees," as defined by the NLRA, and consequently, "supervisors" do not have this right, because they are not considered "employees" under the NLRA.

> A "supervisor" is defined as "any individual having authority…to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action.…" 29 U.S.C. §152(9)

c. Choose which documents to review. They should include items that support the decision to discharge as well as those that may militate against it.

d. Prepare a written report or summary, bearing in mind that this will be a trial exhibit.

e. Conclusions:

   i. Are you confident that the employee engaged in the misconduct?

      (a) What is the evidence that supports it?

      (b) What evidence is contrary?

   ii. Are you confident we can prove that to a jury?

   iii. Will the employee be sympathetic?

   iv. Will the accuser and others make good witnesses?

5. Is Termination Appropriate?

a. Be sure the conduct is severe enough to merit termination.

b. Consider mitigating circumstances, such as long tenure with the company, a good prior work record, any previous misconduct.

c. Consider whether a lesser form of discipline might be more appropriate.

   i. Is there a progressive discipline policy?

   ii. How has the company treated similarly situated individuals who engaged in similar misconduct in the past?

6. Make Sure Everyone Is On Board

a. Are there any supervisors who disagree?

b. Have their reasons for disagreement been explored/investigated?

c. Will their disagreement come back to haunt the company in a lawsuit?

IV. GROUP TERMINATIONS AND LAYOFFS

Unfortunately, because of corporate reorganizations or economic difficulties, it sometimes becomes necessary to lay off multiple employees. This is a difficult decision for the company and a frightening event for both the employees who are being laid off and those who are staying. A layoff also implicates a number of legal obligations for the employer and creates risks of litigation, particularly discrimination claims.

A. Relevant Legal Authority

1. Worker Adjustment and Retraining Notification Act ("WARN Act")

The WARN Act, 29 U.S.C. §2101 *et seq*., requires employers of 100 or more to give 60 days' notice to employees in the event of a "plant closing" or "mass layoff." The Department of Labor has issued Final Rules under WARN that define relevant terms and provide guidance to employers on issues such as required notices. While a full analysis of the WARN Act is beyond the scope of this outline, some key concepts are important.

a. Definitions

i. "Plant Closing": Permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site, that results in loss of employment of 50 or more full-time employees in any 30-day period. 29 U.S.C. § 2101(a)(2)

ii. "Mass Layoff": A reduction in force that is not the result of a "plant closing" and results in loss of employment for

(a) 50 or more full-time employees if they constitute at least 33% of the workforce of the site; or

(b) 500 or more full-time employees, regardless of the percentage of the overall workforce they constitute. 29 U.S.C. § 2102(a)(3)

b. Required Notices

i. To workers: If the employees are unionized, the company must provide 60 days' written notice of the job action to the union. If employees are not unionized, company must provide written notices to each individual employee affected by the layoff. This notice must be written in language understandable to the average worker and contain:

(a) A statement as to whether the planned action will be temporary or permanent;

(b) The expected date the layoff or plant closing will commence, and the expected date the employee will be separated;

(c) An indication as to whether bumping rights exist; and

(d) The name and telephone number of a company official to contact for further information. 29 CFR § 639.7(d).

ii. To state and local governments: The company also must provide written notice to the state (or an entity designated by the state) and the chief elected official of the local government within which the plant closing or mass layoff is to take place. 29 U.S.C. § 2102.

iii. Notices can be served by "any reasonable method of delivery," including mail or personal delivery. In the case of individual employees, notices may be placed in their pay envelopes.

c. Exemptions

Even if the job action otherwise would meet the definition of either a plant closing or mass layoff, the company need not give the WARN notices if:

i. The closing is of a temporary facility, or is the result of completion of a particular project, so long as the affected employees were hired with the expectation that their

employment was limited to the duration of the facility project. 29 U.S.C. § 2103(1).

ii. The closing or layoff constitutes a strike or a lockout. 29 U.S.C. § 2103(2).

iii. The company sells the facility and the purchaser agrees to hire all employees.

d. Reduction of Notice Period

The company can give *less than* 60 days' notice if:

i. At the time notice would have been required, the company (a) was actively seeking capital or business that would have allowed it to avoid or postpone the job action, and (b) the company reasonably and in good faith believed that giving the notice would have precluded it from obtaining the needed capital or business. 29 U.S.C. § 2102(b)(1).

ii. If the job action is necessitated by business circumstances that were not reasonably foreseeable as of the time notice would have been required. 29 U.S.C. § 2102(b)(2)(A).

iii. If the job action is necessitated by a natural disaster such as flood, earthquake, or drought. 29 U.S.C. § 2102(b)(2)(B).

iv. In these cases, the company must give as much notice as is practicable and must state the reason to reduced notice period. 29 U.S.C. § 2102 (b)(3).

e. Enforcement

Aggrieved employees are entitled to recover back pay and benefits for each day of violation (*i.e.*, each day less then the 60 days' notice period) reduced by interim earnings and gratuitous payments by the employer either directly to the employee or to a third party or trustee on behalf of the employee.

i. There is disagreement between various courts as to whether the back pay should include all calendar days or only work days, excluding weekends and holidays. *Compare*, Steelworkers v. North Star Steel Co., 5 F.3d 39 (3d Cir. 1993) *cert. denied*, 510 U.S. 1114 (1993) (calendar days) with Burns v. Stone Forest Industries, Inc., 147 F.3d 1182

(9th Cir. 1998) (work days) and Joe v. First Bank Systems, Inc., 202 F.3d 1067 (8th Cir. 2000) (work days).

ii. Punitive damages are not available. Finnan v. L.F. Rothschild & Co., 726 F.Supp. 460 (S.D.N.Y. 1989). However, the employer faces a $500 per day penalty for failing to give timely notice to the governmental unit. 29 U.S.C. § 2104(a)(3).

iii. Reasonable attorney fees may be awarded to any prevailing party. 29 U.S.C. § 2104(6).

f. Also note that several states and local governments have their own plan closing laws that may impact the company's actions. You need to check applicable state laws and local ordinances before proceeding.

i. California's law, Cal-WARN which became effective January 1, 2003, closely tracks the requirements of the federal WARN Act. Cal. Lab. Code §1400 *et seq.* **However**, note that the law requires the employer to provide the 60-day notice upon the layoff of 50 or more employees, *regardless of what percentage of the workforce they constitute.* Thus, the company's action might be covered under Cal-WARN even if it is not covered by the federal WARN Act.

ii. Other states' laws impose different, usually lesser, obligation. See, *e.g.* Mass. Gen. Law Ch. 151A, §71A *et seq*.; Conn. G.S. §31-51(O); Hawaii Rev. Stat. §394-1 *et seq*.

2. Civil Rights Laws

Layoffs and downsizing also provide a fertile ground for discrimination claims. The most common claim in a layoff is age discrimination, though certainly other types of discrimination claims can and have been asserted. It is important to note, however, that there are two general types of discrimination claim:

a. "Disparate Treatment" claims assert that the employer intentionally took adverse action against the employee because of age, sex, race, etc.

b. "Disparate Impact" claims, on the other hand, assert that a facially neutral policy has a disproportionate effect on a protected group because of age, race, sex, etc.

i. There is some question as to whether, as a matter of law, disparate impact claims are available for age discrimination under the ADEA. The Supreme Court has suggested it is not. *See*, *e.g.*, Blackwell v. Cole Taylor Bank, 152 F.3d 666 (7th Cir. 1998) (disparate impact not cognizable under ADEA); Adams v. Florida Power Corp. 255 F.3d 1322 (11th Cir. 2001) *cert. dismissed*, 122 S.Ct. 1290 (2002)(not cognizable); Katz v. Regents of the University of California, 229 F.3d 831 (9th Cir. 2000) *cert. denied*, 532 U.S. 1033 (2001) (disparate impact can be asserted under ADEA); EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Circ. 1999) (same).

ii. Even if the company is doing business in a circuit that does not recognize disparate impact ADEA claims, bear in mind that state civil rights laws may nevertheless recognize such claims.

3. National Labor Relations Act and Collective Bargaining Agreements

If the employees are represented by a union, federal labor law, including the National Labor Relations Act, 29 U.S.C. §151 *et seq.* ("NLRA") and any applicable collective bargaining agreements ("CBA"), impact and may limit the employer's right to act. The NLRA requires employers to bargain with the union regarding mandatory subjects of bargaining.

a. The National Labor Relations Board ("NLRB") has held that layoffs are a mandatory subject of bargaining. *See, e.g.*, Hilton Mobile Homes, 155 NLRB 873, 60 LRRM 1411 (1965); Odebrecht Contractors of California, 324 NLRB 396, 156 LRRM 1123 (1997). When the decision to close or curtail operations is the result of the employer's business decision for economic reasons, the Supreme Court has held that resulting layoffs are *not* a mandatory subject of bargaining. First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). To add further confusion, however, the NLRB has held that when the employer closes an operation and relocates the work elsewhere to save labor costs, such action will be a mandatory subject of bargaining. Dubuque Packing Co., 303 NLRB 386, 137 LRRM 1185 (1991).

b. Bear in mind that, even if the *decision* to lay off employees is not a mandatory subject of bargaining, the *"effects"* of the decision

(*e.g.*, selection for lay off, severance, etc.) may be, and the failure to bargain will constitute an unfair labor practice. First National Maintenance Corp, *supra.*

4. Individual Contracts, Express and Implied

a. The affected employees' contractual rights also may be implicated by the layoff. If an individual has a written contract, that document may govern what pay, benefits, and other considerations the employee is entitled to received. For example, if the contract states that the employee can be discharged only for specific reasons, and the layoff is not one of the enumerated reasons, the company may have to pay the employee the balance of the contract.

b. However, when "good cause" is required by an implied contract created by an employee handbook, employer policies, etc., the law in most states is that a good faith decision to reduce staff for legitimate business or economic reasons constitutes "good cause." *See, e.g.*, Martin v. Lockheed Missiles & Space Co., 29 Cal.App.4th 1718 (1994); Linn v. Beneficial Commercial Corp., 226 N.J. Super. 74 (App. Div. 1988); McDonald v. Strohs Brewery Co., 191 Mich. App. 601, 478 N.W.2d 669 (1992) *appeal denied*, 439 Mich. 1012 (1992). However, the employer will bear the burden of establishing that the layoff was a good faith business decision.

c. Further, if the company handbook or other policy sets forth a method by which layoff will be implemented, employees may have a valid claim for breach of implied contract if the employer fails to follow the policy. At a minimum, the failure to abide by the policy may be construed as evidence of "pretext," supporting a discrimination claim. Cook v. Arrowsmith Shelbourne, Inc, 69 F.3d 1235 (2d Cir. 1995); Herold v. Hajoca Corp., 864 F.2d 317 (4th Cir 1988) *cert. denied,* 490 U.S. 1107 (1988) (company's failure to follow existing policy that allowed laid off workers to bump less senior employees was evidence of discrimination, supporting jury's verdict for plaintiff).

B. Documenting the Reasons for the Layoff

Though it is relatively rare in litigation involving a layoff, the underlying justification given by the company for having the layoff could come into dispute. (As detailed below, the dispute usually centers on the selection process). It is important to prepare a detailed, written business/economic analysis of the need for the layoff *before* the company undertakes the reduction in force. If the analysis is

prepared only later, or is never prepared at all, the explanation of the reasons may sound like a *post hoc* rationalization, *i.e.,* a "pretext" for some improper purpose. A clear explanation of the reasons for the reduction in force also will help determine the appropriate selection process.

C. The Selection Process

The central issue raised in most downsizing-related lawsuits is the legitimacy of the selection of particular individuals to be terminated as part of the downsizing process. Consequently, the criteria a company utilizes to select employees for lay off during the downsizing process will be carefully scrutinized by the courts.

1. There are several objective selection criteria an employer can use to accomplish workforce downsizing, including:

   a. seniority;

   b. particular job positions;

   c. elimination of highly-compensated workers; *but see* California Gov. Code § 12941 ("the use of salary as the basis for differentiating between employees maybe found to constitute age discrimination if use of that criterion adversely impacts older workers as a group...") and

   d. job performance or merit.

2. Selection methods will vary depending on an employer's goals. For example, if an employer emphasizes loyalty to the company as demonstrated by years of employment, a seniority-based selection method might be appropriate. Alternatively, an economics-oriented decision to downsize may be best served by eliminating certain unnecessary job positions or positions of highly compensated workers. Finally, a carefully planned performance-based method may be appropriate for employers seeking to retain only the most able and skilled of its employees.

3. The more objective the criteria are, the safer the decision from a liability standpoint. Seniority is the safest of all. As you move from that toward more subjective criteria involving merit or performance, the risk of litigation obviously increases. Again, if *performance* is going to be the deciding factor, the employer needs to be sure: (1) that the company has an effective performance evaluation system in place; (2) that the prior performance evaluations and other documents support what supervisors are now saying about employees' relative performance; and (3) that there is not personal animosity, retaliation, or discrimination at work in supervisors' analyses of their subordinates. *See, e.g.*, Danzer v. Norden

Systems, Inc., 151 F.3d 50 (2d Cir. 1998) ("sudden and unexpected downturn in performance reports" on the eve of a RIF supported jury verdict for employee in age discrimination case); Beaird v. Seagate Technology, Inc., 145 F.3d 1159 (1oth Cir. 1998) *cert. denied*, 525 U.S. 1054 (1998) (evidence that some evaluations were falsified supported age discrimination claim of employees terminated in RIF); Wilson v. AM General Corporation, 167 F.3d 1114 (7th Cir. 1999) (jury verdict for plaintiff upheld where company claimed it fired employee in RIF because of poor performance, although: employee was not told at time of termination that poor performance was factor; he testified he had never been counseled about poor performance; there was no documentation of poor performance; and all prior evaluations were good).

4. Again, contracts or policies may require the company to use a particular selection process, even if it would like to use a different one. Prior to utilizing any particular selection methods, it is important to make sure that an existing policy or agreement does not obligate the employer to use a particular selection method over another. For example, a collective bargaining agreement may require an employer to use seniority alone in selecting and determining the order of employees to be downsized.

5. The method an employer uses to select employees for downsizing is likely to be carefully scrutinized by the courts in the context of legal challenges to such decisions. Consider the following real-life scenarios:

   a. Employer gave conflicting reasons for layoff, citing poor-performance as its layoff selection criteria only *after* an EEOC investigator found that work was still available. EEOC v. Ethan Allen, Inc., 44 F.3d 116 (2d Cir. 1994).

   b. Employer impermissibly made layoff decision utilizing race-based selection criteria in order to satisfy its racial diversity objectives. Taxman v. Board of Educ., 91 F.3d 1547 (3d Cir. 1996) *cert. dismissed,* 522 U.S. 1010 (1997).

   c. Employer violated Title VII by terminating long-service minority employee based on poor performance when past "overinflated" performance evaluations and lack of appropriate counseling had prevented employee from improving performance. Vaughn v. Edel, 918 F.2d 517 (5th Cir. 1990).

   d. Employer violated Title VII by terminating employee, despite an asserted reduction in force, immediately after the terminated employee filed an administrative complaint against her former supervisors alleging race and gender discrimination. Hashimoto v.

Dalton, 118 F.3d 671 (9th Cir. 1997) *cert. denied,* 523 U.S. 1122 (1997).

6. The best way to minimize potential liability for employment discrimination is to carefully prepare your criteria *and* to document and clearly articulate how the chosen selection methods best achieve legitimate downsizing objectives, if later called upon to do so.

7. After the selection method has been chosen, the company should put together a document – **an attorney-client privileged document** – setting forth the identities of the individuals who would be affected if that method were applied, as well as their ages, sexes, and races. The purpose of this is to perform a rough statistical analysis or, at a minimum, to see if the selections meet the "sniff test." If employees over the age of 40 make up only 20% of your workforce but are 90% of the people being laid off, you may have a problem. There is no requirement that there be a perfect correlation between representation in the workforce and representation in the pool of employees being laid off, but if the numbers are completely out of whack, the EEOC or some other agency may get interested. If the numbers look problematic:

   a. Consider adjusting the criteria to get the numbers in better balance; or

   b. Be sure the company is able to explain the disparity and prove it is the result of nondiscriminatory reasons.

   c. You may also want to give special consideration to long-service employees and "hardship" cases.

   d. **Again, an attorney should be part of any such analysis and all discussions regarding it. This is necessary to ensure the documents and communications remain privileged and are not discoverable in future litigation.**

D. Voluntary Exit Programs

In order to minimize some of the pain or risk of these selection procedures, the company may want to consider implementing a voluntary early retirement or other exit program. In general, voluntary terminations are less likely to produce lawsuits. Accordingly, a company should first consider implementing a variety of voluntary incentive programs to encourage voluntary termination prior to effecting involuntary terminations as a result of downsizing.

1. For example, Early Retirement Incentive Programs ("ERIP"s) offer certain "retirement benefit enhancements" to employees participating in

retirement plans so as to encourage early retirement. As one advantage, ERIPs permit employers to obtain voluntary workforce reductions while avoiding the difficult task of selecting and identifying employees for downsizing. In Lockheed Co. v. Spink, 517 U.S. 882 (1996) the Supreme Court held that conditioning early retirement eligibility on an employee's knowing and voluntary release of all employment-related claims does not violate the provisions of ERISA.

2. However, ERIP often are of interest to those employees who are close to eligibility for retirement in terms of age and service. Consequently, ERIPs may create the risk for potential age discrimination liability, as terminated employees frequently challenge such "voluntary separation programs" as violative of the Age Discrimination in Employment Act (ADEA). In particular, the ADEA prohibits employer discrimination with respect to an employee's "compensation, terms, conditions, or privileges of employment," including any employee benefits provided under a *bona fide* employee benefit plan. Conversely, some states have laws that prohibit age discrimination against *younger* employees. *See, e.g.*, Bergen Commercial Bank v. Sisler, 157 N.J. 188 (1999); Zanni v. Medaphys Physician Services Corp., 240 Mich.App. 472, 612 N.W.2d 845 (2000) *appeal denied*, 463 Mich. 879 (2000).

3. Further, the company should take steps to ensure that employee participation in such programs truly is voluntary in order to avoid having to defend their legitimacy in court. James v. Sears Roebuck & Co., 21 F.3d 989 (10th Cir. 1994) ("an offer of early retirement may constitute constructive discharge if the employee demonstrates each choice facing the employee makes him worse off, and if he refuses the offer and decides to stay, the employer will treat him less favorably because of age"); Paolillo v. Dresser Indus., Inc., 821 F.2d 81 (2d. Cir. 1987) ("voluntariness" of employer's incentive program questioned where eligible employees were required to chose within 24 hours whether to participate in any of several complex early retirement options).

4. Moreover, any misleading representations in an ERIP may lead to claims of involuntary termination. Khan v. United States, 201 F.3d 1375 (Fed. Cir. 2000) (doctor who elected to retire pursuant to early retirement program could state a claim for involuntary retirement based on employer's misleading representations concerning the program; doctor was entitled to reinstatement and back pay during period of involuntary retirement). **Note, however**, that the employer's threat that terminations will result if not enough employees accept the voluntary program is *not* enough to render the program involuntary, so long as the risk of job loss is shared by all employees, not just older ones. *See, e.g.,* Vega v. Kodak Caribbean, Ltd., 3 F.3d 476 (1st Cir. 1993); Lynch v. J.P. Stevens & Co., Inc., 758 F.Supp. 976 (D.N.J. 1991).

5. Bear in mind that, if the incentive to voluntarily depart is an increase in pension benefits, such as additional credit for years of service or "bridging," this may require a formal amendment to the company's pension plan, pursuant to ERISA and the regulations enacted thereunder. The company should consult with qualified benefits counsel long before undertaking such a program.

E. Waivers and Releases

The company certainly should try to obtain release of claims from employees who are let go in a layoff. Waivers and releases are discussed in more detail below in Section V.E.2. However the federal Older Workers Benefit Protection Act ("OWBPA") imposes additional requirements where the employer seeks releases of ADEA claims in a group setting. These requirements are:

1. The employee must be given 45 days to consider whether he will accept the offer and sign the release, rather than the 21 days given to an individual employee; and

2. The company must provide data regarding that class of workers eligible for and affected by the program; the eligibility factors for such program; any time limits to such program; as well as the job titles and ages of all individuals eligible for the program; and the ages of all individuals in the same job classification who are not eligible for the program, to allow the employee the opportunity to evaluate the potential for an age discrimination claim before waiving the right to sue. Failure to provide this information, or to provide it in a timely manner, may invalidate the release. Tung v. Texaco, Inc., 150 F.3d 206 (2d Cir. 1998) (release was not valid where, although employee had 45 days to consider release, he was not given the required list of names until the day he signed the release).

    a. The list does *not* have to include the names of the affected and unaffected individuals, just job titles and ages. 29 U.S.C. §626(f)(H).

    b. The scope of the class of employees who must be identified is determined by examining the "decisional unit" at issue. 29 CFR §1625.22(f)(1)iii.(C). "A 'decisional unit' is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration in return for the signing of a waiver and those who would not be offered consideration for the signing of a waiver." 29 CFR §1625.22(f)(3)(B). It could be as small as a particular department

or could involve the entire company, depending upon how the company made the selections.

3. If the company's existing severance pay policy does not require execution of a release, the company will have to pay additional severance (or some other additional benefit such as paid COBRA, additional service credit to boost pension entitlement, etc.) in order to obtain an effective release. This is because the employee must receive additional consideration, above and beyond what she otherwise is entitled to receive, to support a release.

4. The EEOC's definition of a "group" layoff is a termination that involves "two or more employees." 29 CFR §1625.22(f)(1)iii..

F. Basic Procedures

1. Inform all levels of management before affected employees are notified.

a. You want to avoid a situation in which the rank and file know more than the supervisors and managers.

b. At the same time, all supervisors who are given the information must keep it confidential; "leaks" beget rumors that can ruin the morale of everyone, both those who are to be laid off and those who will remain.

2. Handle the notification procedure as expeditiously as possible to avoid rumors.

3. To the extent practicable, give all bad news at once so that those remaining will feel secure in their jobs.

G. Easing the Transition

1. **Job Transition:** In an effort to assist employees to move on and get a new job, employers often provide assistance to employees to make themselves more marketable. These include:

a. Outplacement counseling or services;

b. Resume preparation assistance; or

c. Job fairs.

2. **Stay Bonuses:** To help the *company* with the transition in a facility that is closing, it may be necessary to pay stay bonuses or give similar incentives

for employees to stay at the facility until the business is wound up. Such agreements should be in writing and should specify the exact criteria for receiving the bonus. The agreement also should specify that the employee must execute a release on or after the last day of employment as a condition of receiving the bonus. Such an agreement will prevent the employee from asserting claims for events that allegedly occurred after he signed the initial agreement and the last day of work.

V. THE TERMINATION MEETING

Termination is a major event in the life of the employee. The way it is handled can influence the employee's decision to pursue legal action. If legal action is brought, the manner in which the termination is handled absolutely will influence the jury's decision about whether the company acted *properly* and *lawfully*. In a worst-case scenario, it will influence the jury's decision about the amount of damages and whether punitive damages are appropriate. The communication of the decision therefore is critical.

A. "Don'ts" for Terminating an Employee

1. DON'T inform the employee by mail, by email, or by telephone; do it face-to-face.

2. DON'T do it alone. Have someone else present as a witness.

3. DON'T do it in a way that is unnecessarily embarrassing or humiliating for the employee.

4. DON'T suggest that you disagree with the decision by saying it was "made by the company."

5. DON'T argue or debate; the decision has been made, so there is no point arguing.

B. Preparing for the Meeting

1. Prepare a "script" for the meeting. This should be a brief outline of what the company representative will say in the meeting. This should <u>*not*</u> involve chapter and verse of every incident involving the employee.

2. Anticipate possible responses from the employee, and be prepared to respond.

3. Rehearse, especially if the person who will be doing the firing is not experienced.

4. Emphasize brevity, respect, and moving on.

C. Choosing a Location for the Termination Meeting

1. On-site at the company facility

a. Hold the meeting in a conference room or empty office.

b. *Never* hold it in your own office: you want to have someplace you can easily exit in order to end the meeting;

c. It should be a room in which the employee can stay for a few minutes if he or she becomes emotionally upset.

d. If possible, it should be a room from which the employee can exit without having to parade before fellow workers.

2. Off-site

Sometimes, it is necessary to handle a termination meeting off the company premises. For example, with sales representatives and others who do not have permanent offices, it will be difficult to get them to an office to discharge them.

a. Should it be done in a public place?

Many companies do this, believing that employees will be less likely to remonstrate loudly or to create problems in a public place. However, this may be viewed by juries as cruel and unfair to the employee, requiring the employee to receive emotionally upsetting news in a public place. *See, e.g.*, Maiorino v. Schering-Plough Corporation, 302 N.J.Super. 323, 695 A.2d 353 (App. Div. 1997) *cert. denied*, 152 N.J. 189(1997) (speculating that jury awarded $8 million in punitive damages in an age discrimination case at least in part because the pharmaceutical sales representative plaintiff was fired in a diner).

b. It is better to rent a hotel conference room or similar accommodation in which to hold the meeting. It allows for privacy, and allows the person delivering the bad news to exit.

D. Choosing a Date and Time for the Meeting

1. There is never a good day or time to get fired.

a. One often hears that the company should never fire employees on Friday, but should do terminations on a Monday or Tuesday so the individual can immediately begin the process of finding a new job and moving on. If the individual is fired on a Friday afternoon, the logic goes, he or she will have the whole weekend to do little but brood about it. There certainly appears to be logic in this, but there is no empirical evidence to prove or disprove this theory.

b. Avoid holidays and special occasions, "Happy Birthday, you're fired!" will sound great to a jury. If you are considering firing someone on Christmas Eve, first consider how many times that will be mentioned in her attorney's opening statement at trial.

c. Be careful about the timing of firing someone who is about to vest in some employee benefit. You do not want to create an ERISA lawsuit through bad timing. 29 U.S.C. §1140. If it can be delayed a week or a month, or if you can "bridge" the employee's vesting, you may want to consider doing so.

d. If the employee has engaged in serious misconduct, however, throw all theories about timing out the window and get the individual off the premises as soon as possible. If not, someone in the future may ask, "How bad could the misconduct have been if the company let the employee hang around for several days?"

2. The best time to hold the meeting is around lunchtime or near the end of the day, so the employee can exit, and collect personal belongings, with as few people around as possible.

E. Documentation

1. Termination letter: a brief letter setting forth:

a. Date of termination;

b. Reason for termination;

c. What pay, benefits, etc. the employee will receive

2. Releases or Waivers

a. Minimum requirements:

i. Must provide extra consideration, beyond what the employee already is entitled to by law or contract. Check your severance pay policy; if it provides for a specific level

of payment, and does not state that the employee needs to sign a release to obtain severance, you may have to give the employee more than the severance policy provides in order to obtain a valid release.

ii. Must be understandable to the average employee.

iii. Must provide employee a reasonable time to consider the release.

iv. Must allow employee the opportunity to consult with an attorney. *See, e.g.*, Melanson v. Browning-Ferris Industries, Inc., 281 F.3d 272 (1st Cir. 2002) *cert. denied*; Bormann v. AT&T Communications, Inc., 875 F.2d 399 (2d Cir.) *cert. denied*, 493 U.S. 924 (1989).

b. For employees over the age of 40, you need to ensure that you obtain a valid release of claims under the Age Discrimination In Employment Act, 29 U.S.C. § 621 *et seq*. ("ADEA"). This, in turn, requires that you comply with specific requirements under the Older Worker Benefit Protection Act ("OWBPA"), which is codified in the ADEA at 29 U.S.C. § 626(f) and in the EEOC's regulations at 29 CFR § 1625.22. Under OWBPA, the release must:

i. Give the employee at least 21 days to consider signing (45 days in the case of a group layoff).

ii. Provide consideration over and above what the employee otherwise is entitled to;

iii. Mention ADEA.

iv. Give employee at least seven days to revoke acceptance after he or she has signed. Query: does this mean seven calendar days or seven business days? The statute and regulations are silent. *But see*, *Fed. R. Civ.P* .6 (when period of time "prescribed or allowed by these rules, … or by any applicable statute…" is less than 11 days, "intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computations").

v. Cannot require repayment if employee sues. 29 CFR §1625.23; Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998).

vi. Cannot purport to prevent the employee from filing a charge with the EEOC (though you can prevent the employee from obtaining damages through the EEOC process). The inclusion of such a provision will not *necessarily* invalidate the release, Wastak v. Lehigh Valley Health Network, 333 F.3d 120 (3d Cir. 2003), but it probably is not worth the risk.

c. Be aware of state-specific requirements, as well; for example:

i. California Civil Code § 1542, which requires the inclusion of specific language in order to allow release of claims the employee is not aware of at the time of execution.

ii. Minnesota Human Rights Act, §363.031, which requires that employees be given 15 calendar days to revoke acceptance of the waiver.

d. Be aware that in some jurisdictions the employer's request that the employee sign a release, if done contemporaneously with the termination, may be admissible in evidence to prove the employer's discriminatory intent. Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338 (9th Cir. 1987) *cert. denied*, 484 U.S. 1047 (1988). *But see*, Courtney v. Biosound, Inc., 42 F.3d 414 (7th Cir. 1994) (holding that the offer of the release is not admissible, "no inference of guilt can be drawn from a company's sensitivity to its potential liability under the age discrimination law when discharging a protected older worker").

e. Bear in mind that the employee cannot release future claims. 29 CFR §1625.22 (d); Adams v. Philip Morris, Inc., 67 F.3d 580 (6th Cir. 1995). Therefore, if the employee's termination will not take until sometime in the future (*e.g.*, two weeks' notice) the employee should not be permitted to sign the release before the actual last day of employment. Otherwise, the employee could still base a claim on anything that happens to him or her between the date of signing the release and the last day of employment.

3. Service letters

Some states require employers, upon request from the employee, to provide a "service letter," a document setting forth the services the employee rendered and stating the true reason for the discharge. *See, e.g.,* Vernon's Ann. Missouri St. § 290.140; Mont. Code Ann. § 39-2-801.

F. Handling the Meeting

1. Get straight to the point, keep it short and sweet, and stick to the script.

2. Don't encourage hopes that the company might change its decision: "You should know that the decision is final."

3. Don't argue, don't debate, don't get into details. However, if the employee states or suggests that the decision was based on a prohibited factor (*e.g.*, age) emphatically deny it, and restate the actual reason.

4. Don't apologize.

5. Don't say anything stupid, *e.g.*, "You'll be happier spending time with your kids."

6. Don't suggest self-improvement; it's too late, and what the employee does at his next job is not your concern.

7. Get it over with and get out of there.

8. **Remember**: *Nothing* is off the record. Pretend that this meeting is being tape-recorded.

V. POST-TERMINATION

A. Final Wages and Other Payroll Issues

Upon termination, whether voluntary or involuntary, the company must make arrangements to pay the employee for any wages earned through the day of termination, and account for bonuses, commissions, vacation pay, sick pay, PTO, and other compensation that may be due to the employee. State law governs what must be paid and when the company must pay it. Each state has different requirements, and there can be wide variations between states. This can be particularly difficult to track for employers with operations in multiple locations.

1. Salary and Wages

In California, an employee who voluntarily resigns without notice is entitled to her final wages within 72 hours of the resignation. If the employee specifies the wages are to be mailed, the employer satisfies this requirement if the final wages are placed in the mail within 72 hours. Cal. Labor Code §§ 201-203. If the employee gives more than 72 hours notice,

the employee is entitled to her wages on the final day of employment. The time period proscribed for the payment of final wages cannot be contravened or set aside by a private agreement. Cal. Labor Code § 219.

On the other hand, in several other states, the company need only pay the wages on the next scheduled payday. *See, e.g.*, New York Labor Law §191; *N.J.S.A.* 34:11-4.3 (New Jersey); Texas Labor Code §61.014 (wages due must be paid on next regular payday in event of a quit, but must be paid within six days of termination in the event of involuntary discharge). Some states, *e.g.* Florida, have no specific requirements covering final wage payments.

2. Commissions

If the employee's pay was in based in part or solely upon a commission the employer may have to pay the earned commission immediately, rather than waiting until the normal pay period for commissions.

a. The California Labor Commissioner takes the position that it is *not* permissible to delay the payment of "earned" commissions to an employee who has resigned until the customary time for calculating the commissions of current employees, or until the next regularly scheduled payday. A resigning employee who has earned her commission *must* receive the commission payment on her final day of employment. **However,** The Commissioner also states that if the commission has not yet been earned at the time of termination and is awaiting the completion of some legal condition precedent (*e.g.* receipt of a customers payment), the commission must be paid to the employee who resigned immediately upon completion of the condition precedent. It cannot be forfeited. However, if the employee voluntarily terminates and the customer has not paid the employer within 30 days after the termination, the commission will not be considered earned, and thus does not need to be paid. American Software Inc. v. Ali, 46 Cal.App. 4th 1386 (1996).

b. In New York, commissions owed to a sales representative must be paid within 5 business days after employment is terminated or 5 business days after they become due if earned but not due when employment terminates. New York Labor Law §191-c.

c. In New Jersey, an employee on an incentive compensation system must be paid a reasonable approximation of the amount earned until the exact amount can be determined. *N.J.S.A.* 34:11-4.3.

d. In Washington, a salesperson must be paid all earned commissions within 30 days of receipt by the company of payment for the goods or services sold. Wash. Rev. Code §49.48.160.

3. Bonuses

Whether or not an employee is entitled to bonus payments on her final day of employment depends on the nature of the bonus, and the particular state's law. For example, in Illinois, if the employee is involuntarily terminate through no fault of her own, the employer must pay a proportionate share of the bonus. 820 Ill. Comp. Stat. 115/5. In California, if payment of the bonus is conditioned upon the employee remaining employed through a given date, the employee is not entitled to the bonus if the employee voluntarily resigns before this date. Lucien v. All-States Trucking 116 Cal.App.3d 972 (1981).

a. Must the individual be employed on the day the bonus is to be paid?

i. Again, this varies state by state. In California, if payment of the bonus is conditioned upon some factor other than remaining employed (*e.g.* reaching a certain sales quota), an employee who voluntarily resigns may be entitled to payment of the bonus upon termination provided the condition has been met. *See, e.g.*, Hill v. Kaiser Aetna 130 Cal.App.3d 188 (1982). The California Labor Commissioner stated in an opinion letter that if a condition requiring payment of a bonus is met by the employee's performance (e.g. reaching a certain sales quota), then an additional condition that the employee be employed through the payment date in order to be eligible for the bonus constitutes an impermissible forfeiture of the bonus if the employee resigns before this time. *See also,* Enstar Corporation v. Bass, 737 S.W.2d 890 (Tex. Ct. App. 1987) (loss of bonus is permissible if employee resigns or is fired for "good cause"; if employee loses bonus because fired without cause, the company must pay the earned bonus); Mulford v. Computer Leasing, Inc., 334 N.J.Super. 385, 759 A.2d 887 (Law Div. 1999)(company could not deprive employee of earned commissions by terminating him).

ii. In many other states, this issue will be dealt with as a matter of contract between the parties. A contract provision that requires the employee to be employed on the date of payment will be enforced in many states. *See, e.g.*, Fernandes v. Manugistics Atlanta, Inc., - S.E.2d -, 2003 WL 21058285 (Ga. Ct. App., May 13, 2003) (provision in

contract that commission must be earned and payable before termination of employment was a proper condition precedent, rather than a forfeiture clause); Wolf v. Nations Capital, Inc., 721 So.2d 357 (Fla. App. 1998) (contract provision that no commissions would be paid on transactions that closed more than 14 days after termination was enforceable); Truelove v. Northeast Capital & Advisory, Inc., 95 N.Y.2d 220, 738 N.E.2d 770 (2000) (employer has right to set terms of incentive compensation plan and forfeiture provision is permissible).

iii. Discretionary Bonuses Do Not Need to be Paid: Even in California, bonuses that are completely discretionary, and that are not based on any objective criteria, do not give rise to an obligation for the employer to pay the bonus to an employee.

4. Unused Vacation and Paid Time Off

Vacation time earned by the employee but unused, normally must be paid out to the employee in the employee's final paycheck. Most states have laws that prohibit employers from having a policy that causes the employee to forfeit any unused vacation time in the event of a resignation. *See* Suastez v. Plastic Dress-Up Co., 31 Cal.3d 774 (1982). *See also*, Texas Labor Code § 61.001 (vacation pay owed to an employee under a vacation policy is considered wages and payable on the same terms as other compensation); 820 Ill.Comp.Stat. 115/4 (Illinois) (same).

5. Deductions From Final Wages

a. Again, state law governs what deductions can be made from employees' paychecks. A frequent question that comes up is what can be done about amounts the employee owes the company at the time of termination California Court of Appeals decision, Barnhill v. Robert Saunders & Co., 125 Cal.App.3d 1, 177 Ca. Rptr. 803 (1981), generally holds that an employer is not entitled to a setoff against wages due an employee as the result of a debt owed by such employee.

b. Employers are allowed to offset certain employee debts through wage deductions. Situations may arise however where an employee has incurred a specific type of debt from her employer. (*e.g.*, an employer loaning an employee money or an employee willfully destroying company property.) In these limited situations, the California Division of Labor Standards Enforcement has stated an employer may recoup the debt through deductions

from the employee's wages provided the employee agreed in writing that the deductions could be made.

i. No Balloon Payments: If an employee agreed in writing to repay a debt through installment payments, but then resigns before the entire debt is repaid, the employer is prohibited from recouping the remaining debt in one lump sum. Instead, the employer may only recoup an amount from the employee's final paycheck that is equivalent to the amount of the installment payments made by the employee. An employer may only collect the entire remaining debt from the employee's final wages in the event the employee agrees in writing to repay the debt in full.

ii. Get it in Writing: If a situation arises where an employee agrees to repay a debt through a payroll deduction, make sure the agreement is in writing. If the repayment is to be made through periodic deductions, you should include in the original written agreement a clause that states that if the employee resigns before the debt is repaid, the employee agrees to sign a second agreement at the time of resignation allowing the employer to collect the entire remaining debt from the employee's final paycheck.

6. Penalties for Failure to Comply

There may be penalties for failure to pay terminated employees in a timely manner. In California, for example, if an employer *willfully* fails to pay a terminated employee all final wages, and there is no *good faith dispute* that such wages were due to the employee, the employer will owe as a penalty an amount equal to the employee's daily wages for each day the wages remain unpaid until an action is commenced by the employee for the wages. *See* Cal. Labor Code § 203. This penalty will accrue on a daily basis, for all calendar days, for a maximum of 30 days, and it is not limited by the number of workdays an employee might have worked during the time. This penalty, if assessed, must be paid in addition to the wages owed the employee.

B. COBRA Notices

The Consolidated Omnibus Budget and Reconciliation Act ("COBRA") requires employers to make continuation of medical insurance available to terminating employees and their qualified dependents. The employees must pay the cost of coverage, at up to 102% of the premium the employer owes. Note, however, that the employer need not provide COBRA coverage if the employee has been discharged for "gross misconduct."

COBRA, and the regulations issued pursuant to it, require that certain notices be provided in the event of a "qualifying event," *e.g.*, termination of employment.

1. The *employer* must notify the *plan administrator* within 30 days of a qualifying event. Failure to provide such notice may subject the employer to liability for any loss in coverage to this employee. Kidder v. H&B Marine, Inc., 734 F. Supp. 724 (E.D. La. 1990) *aff'd*, 932 F.2d 347 (5th Cir. 1991); Van Hoove v. Mid-America Building Maintenance, Inc., 841 F.Supp. 1523 (D.Kan. 1993).

2. The plan administrator, within 14 days of receiving such notice, must provide notice to qualified beneficiaries of their rights under COBRA. Internal Revenue Code § 4980 B(f)(6)(D). Note, however, that if the employer is the plan administrator, it has a total of 44 days to send the notice. Anderson v. Royal Crest Dairy, Inc., 253 F.Supp.2d 1136 (D.Colo. 2003); Roberts v. National Health Corp., 963 F.Supp. 512 (D.S.C. 1997) aff'd, 133 F.3d 916 (4th Cir. 1998); It is *not* sufficient to provide notice just to the employee; all qualified beneficiaries must receive notice. *See, e.g.,* Burgess v. Adams Tool & Engineering, Inc., 908 F.Supp. 473 (W.D. Mich. 1995). The notice must advise a qualified beneficiary of her right to elect coverage, regardless of whether other qualified beneficiaries elect coverage. Smith v. Rogers Galvanizing Co., 128 F.3d 1380 (10th Cir. 1997) aff'd on rehearing, 148 F.3d 1196 (10th Cir. 1998).

3. There is no statutory or regulatory mandate as to what must be in a COBRA notice in the event of a "qualifying event." In fact, there currently is no requirement that the notice be in writing (although, we strongly recommend written notice). That said, regulations proposed by the Department of Labor will require written notice that, at a minimum:

    a. Adequately informs the qualified beneficiaries of the coverage they are entitled to received, including the length of coverage;

    b. Discloses the amount that must be paid in order to maintain coverage, and premium due dates, and payment policies (including grace periods and the consequences of late payment or non-payment);

    c. Informs qualified beneficiaries of the consequences of not electing continuation coverage under the plan; and

d. Makes clear that each qualified beneficiary has an independent right to elect continuation coverage. *See, Federal Register,* Volume 68, No. 102 (May 28, 2003).

4. Note that the current "model" COBRA notice from the Department of Labor was initially drafted in 1986. It already is out of date, and will be hopelessly so if and when the new regulations are implemented.

5. Also note that some states have their own statutes and regulations that require continuation of health insurance. These vary greatly from state to state, some applying only to smaller employers, some applying to all employers.

   a. For example, Cal-COBRA, a recently passed law in California will significantly expand COBRA coverage for California employees. This new law, Assembly Bill 1401 (AB 1401), applies to all individuals, regardless of the size of their employers, who began receiving COBRA or Cal-COBRA coverage after January 1, 2003. Employers will not feel the effect of this new law however until July 1, 2004.

      i. This is a significant change from existing California law. The original Cal-COBRA covered only certain qualified plans of small employers (2 to 19 employees) that were not covered by COBRA. The continuation coverage under the former Cal-COBRA was very similar to federal COBRA requirements.

      ii. Under AB 1401, the "new" Cal-COBRA, the maximum coverage for all individuals eligible for Cal-COBRA has been extended to 36 months. In addition, individuals in California who are eligible for less than 36 months of federal COBRA coverage, may continue coverage under Cal-COBRA for up to a total of 36 months. As employees who resign are eligible for 18 months continued coverage under federal COBRA, the new Cal-COBRA would allow them to extend their coverage for up to 36 months.

   b. Other states' insurance continuation laws, if they exist, tend to be less inclusive. For example, the New Jersey law applies only to small employers (fewer than 50 employees), employees covered by federal COBRA are not eligible, spouses and dependents are not eligible, and coverage lasts only twelve months. *N.J.S.A.* 17B:27A-27. *See also,* 215 Ill. Comp. Stat. 5/367e (Illinois statute requires continuation for only 9 months, or even shorter if certain specified

events occur). Again, it is critical to check individual states' laws to see if any statutes or regulations apply to your employee.

C. Handling Reference Requests From Prospective Employers

1. After an employee has terminated, the company may receive requests for references from other companies that may be considering hiring the employee. It is worth considering, in an era when courts and legislatures are expanding employers' liability, whether your company should give references regarding former employees. The company risks claims for both negative references and unduly positive ones.

   a. A false, *negative* reference for a former employee can result in liability to the company for defamation or even retaliation. *See, e.g.* Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (false *negative* reference for a former employee who had filed an EEOC charge against the employer could be retaliation under Title VII. Thompson v. Orange Lake Country Club, 224 F. Supp. 2d 1368 (M.D. Fla. 2002) (defamation); McKinney v. County of Santa Clara, 110 Cal.App.3d 787, 168 Cal.Rptr. 89 (1980) (defamation).

   A negative reference also may be considered "blacklisting" in violation of some states' laws. California Labor Code § 1050, for example prohibits an employer from making any misrepresentation that prevents or attempts to prevent someone from obtaining employment. The defenses available to an employer in a defamation claim are also available in a claim under section 1050. *See* O'Shea v. General Telephone Co., 193 Cal.App.3d 1040 (1987).

   b. A false, unduly *positive* reference may subject the company to liability for fraud or misrepresentation if the individual harms others. Thus, in Randi W. v. Muroc Joint Unified School District, 14 Cal.4th 1066, 60 Cal.Rptr. 263 (1997), the California Supreme Court held that former employers, who gave glowing references for a teacher who had a history of sexual molestation accusations, could be liable to a student whom the teacher attacked after he was hired at another school in reliance on these recommendations. *See also,* Davis v. Bd. of County Commissioners, 127 N.M. 785, 987 P.2d 1172 (1999); Restatement (Second) Torts, §311. *Cf.*, Schrager v. North Community Bank, 328 Ill.App.3d 696, 767 N.E.2d 376 (2002) (bank and its officers could be liable to loan guarantor for falsely representing that the developer was experienced and successful when loan guarantor relied on representations). *But see,* Neptuno Treuhand-Und Verwaltgesellschaf MBH v. Arbor, 295 Ill.App.3d 507 3d 567, 692 N.E. 2d 872 (1998) (no liability could

attach to former employer's statement that individual was "an intelligent, industrious and innovative young man;" statements were merely opinion of the person giving the reference).

3. To be safe, the best practice with regard to any former employee, regardless of the circumstances of departure, is to give a completely neutral reference, limited to: (1) dates of employment; (2) positions held; and (3) compensation, if the employee agrees that compensation should be divulged.

4. Also, the employee should be given a single person or single department within your company to whom all reference checks from prospective employers should be directed. All managers and supervisors in your company should be told that, if they directly receive a request for a reference (whether written or by telephone) about a former employee, they should not respond, but should direct it to the appropriate person or department within your company.

5. If, for some reason, your company is amenable to providing a "positive" reference for a former employee, is should be done in a form letter which, again, should emanate from one person or department in your company.

6. **Eligibility for Rehire.** Many employers often either note on the employee's separation documents or state to prospective employers whether an employee is eligible for rehire. This practice can cause problems for an employer. For instance,

   a. Defamation, Blacklisting: Again, the negative inference created by the statement that an employee is "ineligible for rehire," may subject an employer to the claims for defamation and "blacklisting" discussed above.

   b. Americans with Disabilities Act: If the employer notes on separation documents that an employee who resigned due to drug or alcohol problems is ineligible for rehire, failure to rehire an employee who has recovered from the problem may give rise to a disability discrimination claim under the ADA Hernandez v. Hughes Missile Systems Co., 298 F.3d 1030 (9th Cir. 2002) cert. granted, 123 S.Ct. 1255 (2003).

   c. California Civil Code 47(c) recently was amended to provide for a qualified privilege to authorize former employer to answer the question whether employee would be rehired.

D. Unemployment Insurance: To Contest or Not To Contest?

Here are certain issues to consider regarding an employee who has filed such a claim:

1. Voluntarily termination: Section 1256 of California's Unemployment Insurance Code provides that if an individual voluntarily resigns from employment without good cause, the employee is not entitled to benefits.

   Under 1256, leaving for good cause can include leaving work to accompany a spouse to a location from which it is impracticable to commute, or to seek protection from domestic abuse or because of alleged harassment.

2. Involuntary termination: Section 1256 also provides that an employee who is discharged for misconduct connected with her most recent work is ineligible for benefits.

3. Should an Employer Contest? Section 1256 provides a presumption to the effect that an employee is *not* presumed to have left her work voluntarily without good cause and is *not* presumed to have been discharged for misconduct when applying for unemployment benefits. Employers may rebut this presumption and contest an employee's right to benefits.

   a. Is there a downside in contesting?

      Win or lose the employer may end up "buying" itself a lawsuit. Many times, the fact that an employee has to "fight" to get unemployment is the straw that breaks the camel's back – even if she ends up winning. The amount of money the employer might save by "winning" may be outweighed by the cost of defending a civil suit.

   b. Is there an upside to contesting?

      It depends. In some states, an adverse finding might be admissible in a in a subsequent action. (*See* below)

4. Is the determination admissible? Whether or not the results of an unemployment insurance hearing are admissible in a future proceeding differs from state-to-state, and even within a state.

a. For example, in New Jersey, one court held that the unemployment hearing findings did not result in collateral estoppel, Fusco v. Bd. Of Ed. of Newark, 349 N.J. Super. 455, 793 A.2d 856 (App.Div. 2002) *certif. denied*, 174 N.J. 544 (2002), but another trial court held that the Unemployment Division's finding that the employee had been discharged for "misconduct" barred the employee from claiming discharge without cause in a subsequent action. Rendine v. Pantzer, 276 N.J. Super 398, 648 A.2d 223, 235 (App.Div.1994) *aff'd* 141 N.J. 292 (1994). *See also,* Martinez v. Tuesday Morning, Inc., 1997 WL 644866 (Tex. App. 1997) (unemployment determination is admissible if otherwise properly authenticated).

b. In California, on the other hand, the unemployment hearing result is prohibited from being used in another proceeding by statute, thus, "any finding of fact or law, judgement or final order made in an unemployment insurance proceeding is not conclusive or binding in any separate action and cannot be used as evidence." (California Unemployment Insurance Code §1960) Pichon v. PGE, Co. 212 Cal.App.3d 488, 260 Cal. Rptr.2d 677 (1989). *See also,* Kennedy v. Four Boys Labor Service, Inc., 276 Ill.App.3d 248, 657 N.E.2d 1130 (1995) (determination not admissible per 820 ILCS 405/1900(B)); Reninger v. Dept. of Corrections, 79 Wash.App. 623, 901 P.2d 325 (1995) *aff'd*, 134 Wash. 2d 437 (1998) (not admissible per RCW 50.32.097).

c. However, under normal evidentiary rules, statements made under oath at the appeal hearing might be admissible in subsequent litigation. Thus if an employer representative makes an inadvertent (*i.e.* ill-advised) statement at the hearing, this may hurt the employer if the employee later files a lawsuit. *But see*, Barilla v. Patella, 144 Ohio.App.3d 524, 760 N.E.2d 898 (2001) *appeal denied*, 93 Ohio.St. 1476 (2001) (statements made in unemployment proceeding are not admissible in subsequent litigation); Wilson v. Bratton, 266 A.D.2d 140, 699 N.Y.S.2d 29 (1999) (not admissible pursuant to N.Y. Labor Law §537). Again, you must check the law of the state where the employee works or resides.

E. Retaining Records

The company may have fantastic personnel practices, may have had excellent justification for terminating an employee, and may have conducted a thorough investigation, but if it does not have the evidence at the time of trial, it could nevertheless get hammered by a jury. The company should retain personnel files and other relevant documents in a manner and a location that ensures they will be accessible when needed. It also is important to retain these records for a long enough period of time to ensure they will still be there when needed *and* to ensure the company is in compliance with state and federal law.

The EEOC has set forth certain minimum requirements for how long an employer must retain personnel files, pay records, and similar documents. The time periods required by the EEOC are relatively short, between one and three years. *See,* 29 CFR §127.3 and §1602.14. Some states also have specific requirements for retention of documents, as well. For example, Massachusetts requires employers to maintain the complete personnel file for three (3) years after termination. M.G.L. ch. 149 § 52c.

That probably is not long enough to protect the company, however. At a minimum, the longest possible statute of limitations that may apply should be the touchstone. For example, in New Jersey, actions for economic loss based on implied contract claims are governed by a six-year statute of limitations. *N.J.S.A.* 2A:14-1. By the time a case gets filed and served, and discovery gets underway, it could be many years later that someone begins to search for the relevant documents. That would be a bad time to find out that someone destroyed them. Be aware also that state and federal law may impose specific requirements on the company:

a. Pension and welfare plan information (six years);

b. First aid records of job injuries causing loss of work time (five years)

c. Safety and toxic / chemical exposure records (30 years).

F. Former Employee's Right to Inspect Personnel Files

If an employee request copies of her personnel file upon resigning, this may raise a few issues. The answer, once again, varies from state-to-state.

1. Inspection of Personnel Files: In Massachusetts, employers of 20 or more employees upon receiving a written request must provide the employee with an opportunity to review her personnel records within 5 business days of the request. (Mass. Gen. Laws Ch. 149, § 52C as amended by 1998 Mass. Acts. 231). In Washington, every employer at least annually

must allow an employee to inspect his personnel file. (Wash. Rev. Code § 49.12.240). In California, employers must permit an employee to inspect personnel files that are or have been used to determine the employee's qualifications for employment, promotion, additional compensation, termination, or other disciplinary action. (Cal. Labor Code § 1198.5). This right to inspection, however, does not extend to letters of reference. *See* Board of Trustees of Leland Stanford, Jr. University v. Superior Court 119 Cal.App.3d 516 (1981). New Jersey, Georgia and Florida for example, do not require an employer to provide employees access to their personnel files.

2. Must The Employer Provide A Copy Of The Employee's File? Again, this depends on the state. In Massachusetts, the employer must provide the records within 5 business days of a written request. (Mass. Gen. Laws Ch. 149, § 52C, as amended by 1998 Mass. Acts 231). In California, an employer must provide an employee with copies of all documents signed by the employee that relate to the employee obtaining or holding employment with the employer, if requested. (Cal. Labor Code § 432).

3. Payroll Records. In California, as of January 1, 2003 an employer must allow an employee to inspect and copy payroll records within 21 days of a request.

FORM #1: EXIT INTERVIEW:

Employee Name: **Date of Hire:**
Job Title: **Date of Termination:**
Department:
Manager:
Reason for Resignation:

History:

1.) How did you first become aware of the Company (e.g. Newspaper Ad, Company Employee)?

2.) What were your main reasons for joining the Company (e.g. Good Company, Salary, Location)?

Decision to Leave:

1) Employee's general satisfaction with conditions of employment:

2) Employee's general satisfaction with compensation:

3) Employee's general satisfaction with the number of hours he / she was required to work and schedule:

4) Employee's general satisfaction with his / her relationship with his / her manager (including receipt of needed support, overall relationship, and whether his / her manager was interested in his / her career)

5) Employee's general satisfaction with the support he / she received from the Company.

6.) Employee's general satisfaction with the support he / she received from his / her colleagues:

7.) How did the employee feel about the training and development he /she received?

8.) Did the employee feel he /she was presented with sufficient opportunity for advancement?

9.) Employee's main reason for leaving the Company:

10.) Discuss with the employee his/her continuing obligation not to disclose trade secrets.

FORM # 2: RESIGNATION CHECKLIST (CALIFORNIA EMPLOYERS)

Employee Name: **Date of Hire:**
Job Title: **Date of Termination:**
Department:
Manager:
Reason for Resignation

1.) Final Wages:

a.) Salary: Yes___ No____ N/A___

b.) Vacation Pay Yes___ No____ N/A___

c.) Commissions: Yes___ No____ N/A___

d.) Bonus: Yes___ No____ N/A___

e.) Outstanding wage issues at time of resignation:

2.) All company property returned: Yes____ No____ N/A_____

a.) If, no, does the employee still have the property, and when can it be returned:

b.) If the employee no longer has the property, why not:

c.) What arrangements will be made for the employee to reimburse the company (applicable if the employee lost the property or willfully destroyed it)?

3.) Does the employee owe any outstanding debts to the company: Yes___ No___ N/A___

a.) If yes, has the employee agreed in writing to reimburse the company (if the employee lost or willfully destroyed company property, an agreement to reimburse to company should be included in this writing)

Yes ___ No ___

4.) Has the employee been informed of his / her COBRA rights: Yes___ No___ N/A___

a.) Have the employee's beneficiaries been informed independently of their COBRA rights: : Yes___ No___ N/A___

5.) Has the employee received an exit interview: : Yes___ No___ N/A___

a.) If yes, attach a copy of the completed exit interview form.

6.) During the exit interview, were the Company's trade secrets and the employee's obligation not to disclose such secrets discussed with the employee:

Yes___ No___ N/A___

FORM #3: CHECKLIST FOR PERFORMANCE-RELATED TERMINATION

1) Determine what position the employee holds and what his or her duties are. Review job description.

2) Determine what is the deficiency in his/her performance.

   a) Has the expected standard of performance been defined and communicated?

   b) What evidence do we have that the employee's performance is unsatisfactory?

3) Determine whether the employee has received previous warnings about poor performance.

   a) Review past performance evaluations.

   b) Review file for any warning notices or other discipline.

   c) What response, if any, has the employee made to prior warnings?.

4) Determine whether there are any legal issues.

   a) Is the employee the member of a protected class?.

   b) Is the employee handicapped or disabled?

      i. Is this affecting performance?

      ii. If so, has reasonable accommodation been considered?

   c) Is this employee a potential "whistleblower"?

      i. What did he or she complain about?

      ii. When and in what manner?

      iii. What was done about the complaint?

      iv. Is anyone the employee complained about involved in the decision to terminate?

   d) Are there any other contractual or legal limitations on the company's right to discharge this employee at this time?

5) How has the company treated similarly-situated employees with the same performance problems? Is termination of the employee consistent with post practice? If not, is deviation from past practice appropriate?

6) Ensure you obtain and save all necessary documentation in case there are future legal proceedings.

7) Determine the date, time, and location of the termination meeting.

8) Determine who will attend the meeting.

9) Prepare the "script."

10) Prepare the necessary documentation.

11) Rehearse the termination meeting.

12) Meet with the employee.

13) Post-termination -- retrieve company property, allow employee to retrieve personal belongings while guided by company representative.

FORM #4: CHECKLIST FOR MISCONDUCT TERMINATION

1) Determine the employee's job title and duties.

2) Determine the misconduct the employee is accused of committing.

   a) Does the company have a policy on such conduct?

   b) If so, does the policy specify what discipline will be imposed?

3) Determine whether the employee admits or denies the conduct. If the employee admits it does he or she have any explanation or excuse?

   a) Is this a handicap or disability issue?

   b) If so, has reasonable accommodation been considered?/

4) Appoint an appropriate investigator.

5) Make all witnesses and documents available to the investigator.

6) Review the results of the investigation.

7) Determine how similarly-situated employees have been treated in the past.

8) Determine if any aggravating or mitigating circumstances justify different treatment here. For example, has the employee been warned previously about this conduct?

9) Review the legal issues.

   a) Is the employee a member of a protected class?/

   b) Is the employee a "whistleblower"? If so, did the employee's complaints relate to anyone who is an accuser or a witness to the alleged misconduct?

   c) Are there any other legal impediments to termination?

10) Decide on the discipline to be imposed.

11) Ensure you obtain and save all necessary documentation in case there are future legal proceedings.

12) Determine the date, time, and location of the termination meeting.

13) Determine who will attend the meeting.

14) Prepare the "script."

15) Prepare the necessary documentation.

16) Rehearse the termination meeting.

17) Meet with the employee.

18) Post-termination -- retrieve company property, allow employee to retrieve personal belongings while guided by company representative.

19) Post Termination: Determine whether to challenge unemployment claim.

FORM #5: REDUCTION IN FORCE CHECKLIST

A. Planning to Downsize

__ Identify downsizing goals & objectives
__ Understand what existing workforce looks like
__ Understand what the workforce will look like after downsizing

B. Preparing to Downsize

__ Review whether downsizing governed by or addressed in other employment documents

__ Abide by layoff policy in employment agreements or employee handbooks
__ Collective Bargaining Agreement - review any applicable provisions
__ The National Labor Relations Act (NLRA) - avoid potential unfair labor practices
__ Begin with voluntary terminations and prepare voluntary termination packages
__ Develop appropriate selection criteria for layoffs
__ Apply chosen selection criteria for involuntary terminations
__ Personnel documentation stating reasons for termination
__ Assess whether selection criteria achieves employer's goals/objectives

C. Potential Legal Issues

__ Employment Discrimination

Are any of the employees selected for downsizing members of a protected class? If so, determine whether you are prepared to articulate a legitimate basis for the decision to downsize and an appropriate selection method designed to achieve these goals.

__ WARN

__ Written Notice Requirement 60 Days Before the Actual Downsizing Occurs

__ Drafted in language employees can understand

<u>WARN ACT Checklist</u>

___ Plant closing imminent
___ Check applicable state and/or local laws
___ Number of employees expected to be affected
___ Notice requirement compliance
___ Select date for notification within statutory time frame
___ Ensure notice received by all employees
___ Draft notice in plain language
___ Notice to proper local government officials

__ ERISA

__ Assess whether affected employees are close to pension vesting

__ COBRA

__ Any covered employees affected by downsizing (check applicable state law)

__ If so, provide written notice of option to continue coverage

__ Draft in language employees can understand

D. Releases

__ Waivers - knowing and voluntary standard

__ Consideration above and beyond what the employee is otherwise entitled to receive.

__ Appropriate waiting period/revocation period provided (Be sure to check requirements of both Older Workers Benefit Protection Act and applicable state law)

__ Exit Incentive or Employment Termination Program - prepare necessary data on eligible and ineligible employees

E. Transition Issues

___ Exit Interviews

___ Outplacement

___ Stay Bonuses/Agreements

