106:Employment Law 101 for the In-house Practitioner

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Faculty Biographies

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Patricia K. Cofer is counsel for Beckman Coulter, Inc., a global provider of instrument systems and complementary products that simplify and automate laboratory processes, headquartered in Fullerton, California. Her responsibilities include U.S. and Far East employee relations, global benefits and compensation, risk management, occupational health and safety, and certain securities matters.

Prior to joining Beckman Coulter, Ms. Cofer was a member of law firms in Kansas City and Overland Park, Kansas, working in insurance defense and employment litigations. She has been a university public relations speech and articles writer, has written materials for and presented management and law training, and has taught at both the high school and university levels. She also served on the editorial staff and co-authored articles for the *Urban Lawyer,* a journal of the ABA.

In addition to ACCA, she is a member of the National Association of Stock Plan Professionals, the California and Kansas Bars, and the Orange County Bar Association ("OCBA") employment and corporate sections. She volunteers for the OCBA's Lawyers for Literacy program and judges regional law school client counseling competitions.

Ms. Cofer received a BS from Central Missouri State University and a JD from the University of Missouri-Kansas City School of Law.

Mark W. Okey

Mark W. Okey is a director and senior corporate counsel for Ingram Micro Inc., a Fortune 100 company that is the leading distributor of information technology products and services worldwide.

Mr. Okey is responsible all U.S. employment matters for the company, with 4,700 U.S. employees. Prior to joining Ingram Micro, Mr. Okey served as associate regional counsel for the western region of Waste Management, Inc. in Irvine, California. His responsibilities included general business, employment, and real estate matters. Mr. Okey served as cochair of the Orange County Bar Association, corporate counsel section.

Mr. Okey received a BA from the University of California at Irvine and his JD from Hastings College of the Law, in San Francisco.

Julie I. Pierce

Julie I. Pierce is the assistant general counsel of Toshiba America Business Solutions, Inc. ("TABS"), where she works closely with management to analyze complex legal issues and develop creative solutions consistent with business strategies. She is responsible for handling the legal affairs of the company, including handling contracts, mergers and acquisitions, employment matters, corporate compliance issues, licensing, bankruptcy, and credit matters. She also manages all litigation throughout the United States.

Prior to joining TABS, Ms. Pierce was a senior attorney for TABS' sister company, Toshiba America Information Systems, Inc. She handled all of the legal affairs on the company's storage device division, networks products division, imaging systems division, and administration. She also counseled the company on all employment-related issues, supervised outside counsel in litigation matters, and regularly conducted training for the company on numerous legal issues. Before becoming in-house counsel, she was an associate at two law firms, where she engaged in business and insurance defense litigation, as well as general corporate and business counseling.

Ms. Pierce currently serves on the board of directors of ACCA's Southern California Chapter, and is slated to be the president of the chapter in 2004. She previously served as the cochair of the Orange County Bar association's corporate counsel section. For these and other accomplishments, she was honored as a Woman of Distinction in the Business Law Community in May 2003.

Ms. Pierce received her BA from the University of California, Los Angeles and her JD from Loyola Law School. While at Loyola, she was an extern law clerk to the Honorable Sheila Prell Sonenshine, Justice of the California Court of Appeal, Fourth Appellate District.

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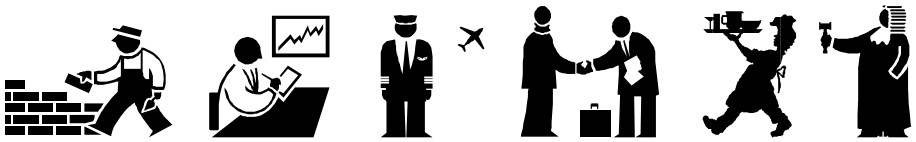
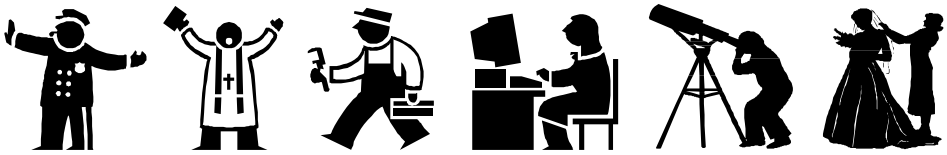


EMPLOYMENT LAW 101



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I. BASIC OVERVIEW OF LABOR AND EMPLOYMENT LAWS

The following are many of the seminal laws in the areas of labor and employment. Other laws will be covered in different sections of this Program.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 42 U.S.C. 2000e, et seq.
Title VII of the Civil Rights Act of 1964, as amended, ("Title VII") prohibits an employer from discriminating against any individual with respect to compensation, terms, conditions or privileges of employment because of the individual's:

- race
- national origin (includes one's birthplace, ancestry, culture or linguistic characteristics common to a specific ethnic group)
- color
- religion
- sex (including pregnancy, childbirth or related medical conditions)

Title VII's prohibition against discrimination applies to all aspects of employment including, but not limited to:

- hiring, including recruiting practices such as testing and use of job advertisements
- compensation and benefits (including "perks" and "fringe benefits")
- job assignments and classification of employees
- use of company facilities
- shift assignments
- promotion
- demotion
- transfer
- discipline
- training and apprenticeship programs
- pay, retirement plans, and disability leave
- termination, layoff or recall
- any other term or condition of employment

For example, an individual could not be terminated because an employer finds the employee's national origin controversial or objectionable (such as terminating a worker born in Iraq because the employer is afraid other employees in its warehouse facility may fight with the Iraqi-American employee during the war in Iraq.)

Another example of prohibited conduct would be a manager stating that he refused to take business trips with a female employee because "it might look bad," despite the fact that the manager frequently took male employees on trips to meet new customers.

Disparate Impact Discrimination. Title VII prohibits not only intentional discrimination, but also business practices that have the *effect of discriminating* against individuals because of their race, national origin, race, religion or sex. The law specifically says that "it shall be an unlawful employment practice for an employer … to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." In other words, Title VII also prohibits employer practices that seem neutral on their face, but have a disproportionate impact

on a protected group of people. In one case, an employer was prohibited from enforcing a policy that men could not have facial hair because it had a disproportional affect on African-American men who are more susceptible to certain skin conditions if they shave daily.

Harassment. The Courts have also interpreted Title VII as also prohibiting harassment of applicants and employees because of a person's race, national origin, religion or sex, even though the text of the law does not literally mention the word "harassment."

Other Prohibited Business Practices. Title VII also prohibits: (1) the making of employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain race, national origin, race, religion or sex; and (2) denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, national origin, race, religion or sex. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

EXCEPTION: Discrimination Allowed by Title VII. A *very narrow* exception to Title VII allows employers to discriminate on the basis of religion, sex or national origin if the characteristic is something intrinsic to the job. This exception is often called the bona fide occupational qualification ("BFOQ"). For example, it may be a lawful practice to have gender-based staffing when it is necessary for medical procedures or privacy concerns. The burden is on the employer to prove: (1) a relationship between the classification and job performance; (2) the necessity of the classification for successful performance; and (3) the job performance affected is the essence of the employer's business operations. The BFOQ defense is *very* narrowly construed and not favored by the Courts.

Employers Subject to Title VII. Title VII applies to these employers:

- private employers with 15 or more employees;
- state governments, their political subdivisions and agencies;
- the federal government;
- employment agencies;
- labor organizations; and
- joint labor-management committees.

The Federal Enforcement Agency Responsible For Enforcing Title VII. The U.S. Equal Employment Opportunity Commission ("EEOC") enforces Title VII.

THE EQUAL PAY ACT OF 1963 29 U.S.C. 206(d)

The Equal Pay Act of 1963 ("EPA") protects against gender-based wage discrimination for men and women who perform substantially equal work. Specifically, the EPA prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work with similar skill, effort and responsibility for the same employer under similar working conditions.

Men and women do "equal work" when they perform, under similar working conditions, jobs that require equal skill, effort and responsibility. Individuals' job titles carry no weight in the analysis to determine if two jobs are equal. For example, the EPA makes it unlawful for a hotel to pay its janitors, who are primarily men, more than it pays its housekeepers, who are primarily women, *if* they are doing essentially the same work.

The EPA also prohibits an employer that is in violation of the Act from *reducing* the wages of any employee in order to come into compliance with the Act. In other words, a non-complying employer would be required to raise the pay of the lower-earning employee to bring the employer into compliance with the EPA.

A violation of the EPA may occur where a different wage was/is paid to a person who worked in the same job before or after an employee of the opposite sex.

A violation of the EPA may also occur when a labor organization or its agents cause (or attempts to cause) an employer to violate the Act. The term "labor organization" is defined as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Exceptions to the Equal Pay Act. An employer can pay a man and a woman different salaries for equal work if the difference is based on: (a) a seniority, merit or incentive system; or (b) if the difference is based on factors other than gender.

For example, an employer can pay a male employee more than a female employee if the reason for the pay difference is that the male employee has been with the company for ten years, and the female employee has been with the company only one year. This is true even if the male employee and the female employee are working identical jobs. The same is true if a female employee produces significantly more and/or a better quality work product (such as selling 200% of quota vs. a male employee who only sold 85% of quota).

Employers Subject to the Equal Pay Act. Virtually all employers must comply with the Equal Pay Act, including all private employers (regardless of the number of employees they have), the federal government and its agencies, state governments and their agencies, public entities and labor unions.

The Federal Agency Responsible For Enforcing The Equal Pay Act. The Equal Employment Opportunity Commission ("EEOC") enforces the Equal Pay Act.

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 29 U.S.C. 621, et seq.
The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits employment discrimination against persons 40 years of age or older. The ADEA's prohibition against discrimination applies to all terms and conditions of employment.

Specifically, the ADEA provides that it is unlawful for an employer to:

- fail or refuse to hire, or to discharge, any individual because of his or her age;
- discriminate against any individual with respect to his/her compensation, terms, conditions or privileges of employment because of the individual's age;
- limit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his/her status as an employee because of the individual's age; and
- reduce the wage rate of any employee in order to comply with the requirements of the ADEA.

The ADEA also prohibits employment agencies from failing or refusing to refer for employment (or otherwise to discriminate against) any individual because of his/her age, or classifying or refering for employment any individual on the basis of his or her age.

Labor organizations are prohibited by the ADEA from:

- excluding or expeling from their membership, or otherwise discriminating against any individual because of his/her age;
- limiting, segregating or classifying their membership, or classifying or failing or refusing to refer for employment any individual, in any way which would deprive (or tend to deprive or limit) him/her of employment opportunities, or would otherwise adversely affect his/her status as an employee or applicant because of the individual's age; and
- causing or attempting to cause an employer to discriminate against an individual in violation of the ADEA.

The ADEA also prohibits statements or specifications of age preference or age limitations in job advertisements. An age limit may only be specified in rare circumstances where age has been proven to be a Bona Fide Occupational Qualification ("BFOQ"). [See discussion of BFOQ under the section on Title VII, above.]

Employers Subject to the ADEA. The ADEA does not apply to all employers. Most significantly, it does not apply to the state governments or their agencies, or to private employers with less than 20 employees.

The Federal Agency Responsible For Enforcing The ADEA. The Equal Employment Opportunity Commission ("EEOC") enforces the ADEA.

THE OLDER WORKERS BENEFIT PROTECTION ACT 29 U.S.C. 623, et seq.

The Older Workers Benefit Protection Act ("OWBPA") makes it illegal for an employer to use an employee's age as a basis for discrimination in employment benefits and retirement. Like the ADEA, this Act only protects people who are at least 40 years old.

If an employer wishes to have a legally enforceable severance agreement with employees ages 40 or over, the employer must include the agreement complies with the OWBPA and the regulations interpreting this Act. The OWBPA set forth a number of requirements that *must* be in a severance agreement containing a waiver of the employee's rights in order for the waiver to be valid. These requirements include:

- the waiver must be part of a written agreement between the employer and the employee;
- the agreement must be written in clear and understandable language;
- the waiver must specifically refer to claims arising under the ADEA;
- the employee must not waive the right to claims that may arise after the date on which the waiver is signed;
- the employee must be given additional consideration for the waiver of age-related claims;
- the employee must be advised in writing to consult an attorney prior to signing the waiver;
- the employee must be given 21 days within which to consider the proposed waiver (this time MAY NOT be shortened by the employer); and
- the employee must be given seven (7) days after signing the waiver to revoke it if he/she changes his/her mind.

The Federal Agency Responsible For Enforcing The OWBPA. The EEOC enforces the OWBPA's provisions.

FAMILY AND MEDICAL LEAVE ACT OF 1993 29 U.S.C. 2611, et seq / 29 C.F.R. 825

The Family and Medical Leave Act ("FMLA") requires certain employers to give their workers up to twelve (12) weeks of leave per "year" (generally unpaid – unless your employee is in California) to care for a seriously ill family member, recuperate from their own serious illness or take care of a newborn or newly adopted child. The "year" can be a calendar year or other twelve (12) month period, as set forth in the Act.

Employers Subject To FMLA. Private employer must have 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Public agencies are covered employers regardless of the number of employees it has.

Employees Eligible To Take Leave. Employees must:

First, meet three (3) conditions in order to be eligible to take FMLA leave. Specifically, the employee:

- must have worked for the employer at least 12 months (which need not be continuous); and
- must have worked for the employer at least 1,250 hours in the 12 months prior to the first day of leave; and
- must work in a location where there are 50 or more employees employed within a 75-mile radius of the employee's work site.

Second, FMLA leave may be taken only for certain reasons. In other words, not every personal or family emergency will qualify for FMLA leave. The employee must be seeking leave for one of the following reasons.

- If an employee becomes a new parent or foster parent, the employee may take FMLA leave within one (1) year after the child is born or placed in his/her home. The leave may start before the child arrives, if necessary, for prenatal care or preparations for the child's arrival.
- The employee's own "serious health condition."
- A family member's "serious health condition." ["Family member" is narrowly defined as parents, spouses and children. Thus, grandparents, domestic partners, in-laws and siblings are not included.]

"Serious Health Condition". The definition of a serious health condition is very broad and not as straight-forward as one might imagine. However, the general rule is that a person who has an injury, illness, impairment or physical or mental condition that requires: inpatient care (an overnight stay at a medical facility); or "continuing treatment" by or under the supervision of a healthcare provider.

"Continuing Treatment". The term "continuing treatment is defined under FMLA as:

- A period of incapacity (inability to work, attend school or perform other regular daily activities) for *more than* three (3) calendar days **and** it involves continuing treatment from a health care provider; or
- Any period of incapacity or treatment for an incapacity due to a chronic serious health condition (such as asthma, diabetes or epilepsy); or

- The receipt of continuing treatment by a health care provider for any period of incapacity due to pregnancy or prenatal care; or
- Chronic or long-term incapacity due to a condition for which treatment may not be effective [such as Alzheimer's or the terminal stages of a disease.]

Employee's Notice Requirements. The FMLA requires that employees give 30 days' prior notice of the need for a leave, if it is foreseeable (such as with the birth of a child). If the need for a leave is not foreseeable, the employee need only give as much notice as is practical (such as with a medical emergency).

Employers' Duties Under The FMLA. Employers subject to the FMLA must designate that a leave is a FMLA leave and keep records relating to its compliance with the FMLA. Additionally, employers must, among other things: reinstate an employee (in most instances), after the return from leave, to the position he/she held before going on leave; providing employees with continued health insurance while on leave; and allowing employees to take paid time off (such as vacation and sick time) during FMLA leave – unless, of course, your employee is in California, where employees get *paid* leave.
Employers are not required to allow intermittent leave, but the law says that employers *may* agree to it.

The Federal Agency Responsible For Enforcing The FMLA. The FMLA is enforced by the U.S. Department of Labor, Wage and Hour Division.

EXECUTIVE ORDER 11246

Executive Order 11246, as amended, prohibits federal contractors and federally-assisted construction contractors and subcontractors, who conduct more than $50,000 in government business in one year, from discriminating against employees or applicants for employment because of race, color, religion, sex or national origin.

This Executive Order also requires government contractors to take affirmative action to insure that equal opportunity is provided in all aspects of their employment. Specifically, government contractors and subcontractors must develop for each of its qualifying establishments a written affirmative action plan containing, among other things: an analysis of the contractor's workforce by race and gender; an analysis of the overall labor force by race and gender; a determination of whether the contractor is underutilizing minorities or women in any job category; and an establishment of goals and timetables for correcting any such underutilization.

The Federal Agency Responsible For Enforcing Executive Order 11246. The United States Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") ensures that Government contractors comply with the equal employment opportunity and the affirmative action provisions of their contracts.

REHABILITATION ACT OF 1973 29 U.S.C. 791, et seq.

Section 501 of the Rehabilitation Act of 1973, as amended, requires federal contractors and subcontractors with Government contracts in excess of $10,000 ("Covered Employers"), to take affirmative action to employ and advance in employment qualified individuals with disabilities. Additionally, the Act prohibits Covered Employers from discriminating against "individuals with disabilities." Section 505 of the Act sets forth the remedies (including attorney's fees) for violations of Section 501.

The Americans with Disabilities Act of 1990 (see below) amends many sections of the Rehabilitation Act, including a number of the definitions applicable to the Rehabilitation Act, such as the definition of the phrase "individual with a disability." In addition, the Civil Rights Act of 1991 (also discussed below) amends the Rehabilitation Act by providing for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973.

The Federal Agency Responsible For Enforcing The Rehabilitation Act. The OFCCP is responsible for enforcing the terms of the Rehabilitation Act.

THE AMERICANS WITH DISABILITIES ACT OF 1990. 42 U.S.C. 12101, et seq.
Title I of the Americans with Disabilities Act of 1990 ("ADA") prohibits employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments. Title III of the ADA allows individuals with disabilities access to public accommodations. [This section will focus only on the employment aspect of the ADA.]

The ADA is essentially an anti-discrimination statute requiring that employers give individuals with disabilities the same consideration for employment as individuals without disabilities. An individual who is qualified for an employment opportunity cannot be denied that opportunity simply because the individual is disabled. The ADA also requires employers to provide reasonable accommodations in order to allow qualified individuals with disabilities to perform the essential functions of the job, unless to do so would cause an undue hardship or pose a safety or health risk.

Specifically, the ADA protects "qualified individuals with a disability." In other words, the ADA protects people who:

- have a disability, and
- are qualified for the job that they are either hold or seek to hold.

Definition of Disability. An individual is "disabled" if he/she:

- has a physical or mental impairment that substantially limits one or more of his/her major life activities;
- has a record of such an impairment; or
- is regarded as having such an impairment when, in fact, they do not.

The ADA also prohibits employers from refusing to hire someone or discriminating against someone because that person is related to or associates with someone who has a "disability".

Substantially Limits. The term "substantially limits" means that the individual is unable to perform or is significantly restricted from performing -- as to the condition, manner or duration under which the individual can perform -- a certain major life activity (as opposed to the average person).

Major Life Activities. Major life activities that must be substantially impaired include, but are not limited to: hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning and working.

Qualified Individual. An individual with a disability is "qualified" if he/she has the requisite experience, education, skills or other job-related requirements for the position held or desired.

The person also must be able to perform the "essential functions of the job" (defined as the fundamental duties of the position he/she holds or desires) with or without reasonable accommodation.

Reasonable Accommodation. A reasonable accommodation involves an employer making adjustments or modifications (in the work, job application process, work environment, job structure, equipment, employment practices or the way that job duties are performed) so an individual with a disability can perform the essential functions of a job. Reasonable accommodation may include, but is not limited to: making existing facilities used by employees readily accessible to and usable by persons with disabilities; job restructuring; modification of work schedules; providing additional unpaid leave; reassignment to a vacant position; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; and providing qualified readers or interpreters. An employer is not required to lower production standards to make an accommodation or provide personal use items, such as eyeglasses or hearing aids.

Undue Hardship. An employer is required to make a reasonable accommodation to a qualified individual with a disability *unless* doing so would impose an "undue hardship" on the operation of the employer's business. Undue hardship means the accommodation would require significant difficulty or expense, when considered in relation to factors such as a business' size, financial resources, and the nature and structure of its operation.

Covered Employers. The ADA's employment provisions apply to employers with fifteen (15) employees or more, but the ADA's public accommodations provisions apply to all businesses. All state and local governments are covered by the ADA regardless of size.

California Disability Law. Once again, the California legislature out-did itself by enacting what many employment lawyers call the "Californians With Mere Difficulties Act." This law substantially increases the number of employees eligible for protections because the definition of "disability" no longer requires a substantial limitation; a Californian only needs to show he/she has a disability that "merely limits" a major life activity. And that is just the beginning. If you have employees in California, you need to learn the many differences between this state law and the ADA.

The Federal Agency Responsible For Enforcing The ADA. Two agencies enforce the ADA: The U.S. Department of Justice (DOJ) and the U.S. Equal Employment Opportunity Commission ("EEOC").

UNIFORMED SERVICES EMPLOYMENT AND RE-EMPLOYMENT RIGHTS ACT

38 U.S.C. 4301, et seq.

The Uniformed Services Employment and Re-employment Rights Act ("USSERRA") generally requires that all public and private employers provide leaves of absence for military personnel to serve up to five (5) years, to reinstate employees into the positions they would have held if they had not been on military leave, to continue certain benefits during the leave, and to refrain from discharging without cause an employee who is reinstated after military leave for a period of up to one (1) year after re-employment. The Act further prohibits employment discrimination based upon past, present or future military obligations.

The Federal Agency Responsible For Enforcing The USSERRA. The Office of Federal Contract Compliance Programs (OFCCP) will enforce violations of this Act itself or through the local Veteran's Employment Representative at a local State employment service office.

THE CIVIL RIGHTS ACT OF 1991 42 U.S.C. 1981

The Civil Rights Act of 1991 ("CRA") amended a number of laws, including Title VII, the Rehabilitation Act, the Americans With Disabilities Act and the ADEA. Among other things, the CRA provided additional protections to claimants, such as authorizing compensatory and punitive damages in cases of intentional discrimination, providing for the recovery of attorneys' fees and allowing jury trials.

The CRA was enacted, in part, to reverse seven (7) United States Supreme Court decisions that limited the rights of individuals protected by these laws. Moreover, the established a glass-ceiling commission and directed the EEOC to expand its technical assistance and outreach activities.

The Federal Agency Responsible For Enforcing The CRA of 1991. The EEOC is responsible for enforcing the CRA of 1991.

THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 8 U.S.C. 1324

The Immigration Reform And Control Act Of 1986 ("IRCA") prohibits employers from discriminating against applicants or employees on the basis of their citizenship or national origin. The IRCA also makes it illegal for employers to knowingly hire or retain in employment people who are not authorized to work in the United States. Employers have the burden of proving they are in compliance with these laws, so they are required to maintain records verifying their employees are authorized to work in the USA.

However, employers that only request employment verification for individuals of a particular national origin or individuals with accents may violate both Title VII and IRCA. As a result, it is a best practice to obtain verification from all applicants and employees. Employers who impose citizenship requirements or give preferences to U.S. citizens in hiring or employment opportunities also may violate IRCA.

Employers Subject to the IRCA. The IRCA only applies to employers with four (4) or more employees.

WHISTLEBLOWER PROTECTIONS

Most labor and employment laws contain protections for employees (called "whistleblowers") who complain about their employers violating the law. Remedies often include reinstatement to the position from which he/she was fired or laid off, as well as payment of back wages. OSHA enforces the whistleblower protections of many laws.

RETALIATION

It is illegal for employers to fire employees for asserting their rights under state and federal anti-discrimination laws, or "retaliating" against employees who do so. Retaliation means taking an adverse employment action against an employee because he/she complained about harassment or discrimination or some other violation of a workplace law (such as a health-and-

safety law or a wage-and-hour law). Employees who participate in an investigation of any of these problems are also protected.

"Adverse employment action" includes demotion, discipline, firing, salary reduction, negative evaluation, change in job assignment or change in shift assignment. Retaliation can also include harassing or hostile behavior or attitudes toward an employee who complained.

Most state and federal statutes contain provisions protecting employees from illegal retaliation due to his/her exercising his/her rights under law. Frequently, the protection extends to those who aided or encouraged any other person to enjoy or practice any right granted or protected by the law.

To establish a claim of retaliation, an employee must show:

- He/she engaged in protected conduct known to the employer;
- He/she was subject to an adverse employment action by the employer subsequent to engaging in the protected conduct; and
- A causal link exists between the protected activity and the adverse action.

For example an employee would likely have a viable claim for retaliation if he/she had always received ratings of "outstanding" until he/she complained to the Human Resources Department that the reason he/she did not receive the promotion was due to his/her race – and, at the next performance review, he/she receives an "average" rating.

OCCUPATIONAL SAFETY AND HEALTH ACT

The main statute protecting the health and safety of workers in the workplace is the Occupational and Safety Health Act ("OSHA"). Workplace safety and health laws establish regulations designed to eliminate personal injuries and illnesses from occurring in the workplace.

WORKERS COMPENSATION ACT

Employees who sustain a work-related injury will find their remedies set forth in the Workers Compensation Act. These statutes (which vary by state) often provide wage replacement and medical benefits to employees injured in the course and scope of their employment. Benefits are provided to employees *regardless of fault.* Employees are not required to show that the employer was negligent or created a hazardous condition. The fact that an injury occurred while the employee was in the course and scope of his/her work is enough. Similarly, an employee's contributory negligence or fault does not disqualify the worker from receiving benefits. However, if an employee deliberately, intentionally or willfully injures himself/herself, or is intoxicated or committing a crime when injured, workers compensation benefits generally are not afforded to the employee. In most instances, workers compensation benefits cover all physical injuries and some mental injuries arising out of, or incidental to, an employee's performance of his/her job. Employers have short response time deadlines, so make sure you learn when the employer must complete the appropriate paperwork (reports of the occupational illness or injury often required to be sent to the state) and send appropriate notices to the injured employee. [In California, an employer must send an injured employee written notice that workers compensation benefits may be available within five (5) days of the employer learning of the injury *from any source*.] Finally, be extremely careful about laying off or terminating the employment of an employee who has an open workers compensation claim (or is on a workers' compensation leave), as you will very likely face a retaliation claim for doing so.

POSTINGS

Many laws require that employers post in locations accessible to their employees posters explaining their rights in the workplace. Make sure to check both federal and state posting requirements.

INDUSTRY-SPECIFIC LAWS

Please also check to see if there are specific laws governing your specific industry, such as: The Federal Mine Safety and Health Act ("MSHA"); The Longshore and Harbor Workers' Compensation Act ("LHWCA"); and The Migrant and Seasonal Agricultural Worker Protection Act ("MSPA").

II. UNDERSTANDING & PREVENTING UNLAWFUL HARASSMENT*

HOW DOES THE LAW DEFINE SEXUAL HARASSMENT?

Sexual harassment is UNWELCOME conduct of a SEXUAL NATURE that occurs in the workplace and takes one of two forms:

- ***Quid Pro Quo Harassment****:* when submission to or rejection of sexual conduct is used as the basis for making employment decisions, such as promotions, pay increases, hiring and firing; or

- ***Hostile Environment Harassment****:* sexual conduct which has the *purpose or effect* of unreasonably interfering with an employee's work performance *or* creates an intimidating, hostile, or offensive working environment. A violation of the law occurs even if the individual suffers no economic loss or tangible job detriment.

DETERMINING WHEN SEXUAL CONDUCT IS UNWELCOME

- The inquiry will be whether the employee by his/her conduct indicated that the sexual advances or conduct were unwelcome, not whether any participation was voluntary.

- The "totality of the circumstances" will be evaluated such as:

- Whether the employee contemporaneously complained about the conduct;

- If no complaint was made, the reason the employee did not come forward, i.e., fear of retaliation;

- Whether the employee's conduct was consistent or inconsistent with the claim that the sexual conduct was unwelcome; and,

- Whether the individual initiated the conduct.

DETERMINING WHEN A WORK ENVIRONMENT IS HOSTILE

- The conduct must be sufficiently severe and pervasive so as to alter the conditions of the employee's employment. Trivial or merely annoying conduct will not sufficiently alter an employee's working conditions. Hypersensitive employees will not automatically be entitled to relief.

- A pattern of offensive conduct is generally required. Unless severe, a single incident or isolated incidents of sexual conduct or remarks will not be sufficient to show environmental harassment.

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- The conduct will be evaluated from the objective viewpoint of a *reasonable person* facing the same conditions. The victim's perspective and not community standards or stereotypes of acceptable behavior will be used.

For example, a workplace in which sexual slurs, displays of pinups and other offensive conduct are commonplace can still be a hostile environment even if many employees deem it to be harmless or insignificant.

***NOTE: A hostile work environment can also be created based on non-sexual situations, such as gender, religion, ethnic background, or any of the EEOC protected factors.**

SEXUAL HARASSMENT GUIDELINES

THE EEOC HARASSMENT GUIDELINES

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title V11. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

(c) Applying general Title V11 principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title V1I, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied the employment opportunity or benefit.

HOW CALIFORNIA STATE LAW DEFINES SEXUAL HARASSMENT

CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

In its regulations, the California Fair Employment and Housing Commission defines sexual harassment as including, but not limited to:

State Definition	***Examples***
Verbal harassment: epithets, derogatory comments or slurs.	Name-calling, belittling, sexually explicit or degrading words to describe an individual, sexually explicit jokes, comments about an employee's anatomy and/or dress, sexually oriented noises or remarks, questions about a person's sexual practices, use of patronizing terms or remarks, verbal abuse, graphic verbal commentaries about the body.
Physical harassment: assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual.	Touching, pinching, patting, grabbing, brushing against or poking another employee's body, hazing or initiation that involves a sexual component, requiring an employee to wear sexually suggestive clothing.
Visual forms of harassment: derogatory posters, cartoons or drawings.	Displaying sexual pictures, writings or objects, obscene letters or invitations, staring at an employee's anatomy, leering, sexually oriented gestures, unwanted love letters or notes.
Sexual favors: unwanted sexual advances that condition employment benefit upon an exchange of sexual favors.	Continued requests for dates, any threat of demotion, termination, etc., if requested sexual favors are not given, making or threatening reprisals after a negative response to sexual advances, propositioning an individual.

WHAT ARE THE OBLIGATIONS AND LIABILITIES OF EMPLOYERS AND SUPERVISORS?

Key Responsibility: Employers and supervisors must take steps to **prevent** sexual harassment, **and respond promptly** to stop harassment which is brought to their attention or which should have been known to them.

The nature of the legal obligations and potential liability depend u n whether the alleged harasser is exploiting a position of power to obtain sexual favors.

Supervisor	→	Employee
Employee	→	Employee
Customer/Vendor	→	Employee
Employee	→	Non-employees in a business, service or. professional relationship

SUPERVISOR EMPLOYEE (POWER RELATIONSHIP)

- Quid Pro Quo Harassment: the employer will always be liable where a supervisor has made or threatened to make an employment decision based on the refusal to participate in sexual conduct. The use of authority and position to obtain sexual favors may result in liability even when the sexual advances or conduct occurs during non-working hours or off company premises.

Supervisors may also be held personally liable for such conduct.

- Hostile Environment: The employer is automatically liable for environmental harassment created by the conduct of a supervisor. Under federal law, employers may have a defense if (1) there has been no tangible job loss or detriment; (2) the employer has an established and disseminated sexual harassment policy and complaint procedure; and (3) the complainant unreasonably failed to complain about the unwelcome conduct.

In California, employers are generally held to a strict liability standard regarding the conduct of supervisors and those in positions of power. Supervisors may be held personally liable for their own wrongful conduct.

SUPERVISOR EMPLOYEE (NEUTRAL POWER RELATIONSHIP)

- An employer becomes liable for sexual harassment between employees when it **knew or should have known of the conduct and fails to take immediate and appropriate corrective action.**

- Employees have been held personally liable in California for their unlawful conduct.

MEMBERS OF THE PUBLIC/CUSTOMERS AND VENDORS → EMPLOYEES

The same standard will be used as with harassment which occurs between two employees.

EMPLOYEE → NON-EMPLOYEE IN A "PROFESSIONAL RELATIONSHIP"

An employee (and potentially a person's employer) is liable for sexual harassment committed by the employee to a non-employee if:

- a business, service or professional relationship exists – such as physician, psychotherapist, dentist-patient, attorney-client; banker; trust officer; real estate agent; accountant; loan officer; teacher-student; or other "substantially similar" officer; teacher relationship.
- the non-employee cannot easily end the relationship without tangible hardship;
- sexual advances, solicitations, sexual requests; or demands for sexual compliance have been made;
- the conduct was unwelcome and persistent or severe;
- the conduct continued after a direct request to stop; and
- the non-employee has suffered or will suffer economic loss or disadvantage or personal injury as a result.

THE LITMUS TEST

PREVENTING WORKPLACE SEXUAL HARASSMENT: WHAT NO ONE IS TELLING YOU

If you have any question about whether your comments,compliments, jokes or conduct will be considered unwelcome, don't do it. If you need help drawing a line for workplace comments or conduct, use either of our three "litmus tests":

1. Would you say the same thing or allow such a comment to be said to a loved one to whom you feel especially protective, e.g., a daughter, son, niece, nephew, sister or brother? If you wouldn't want such a comment said to that person, then don't say it and don't allow it to be said to others.

2. Would you make the same comment or act in the same manner if your spouse/partner and, the other person's spouse/partner were present? f not, don't say it and don't allow it to occur.

3. Would you want to read about your comments or conduct on the front page of the morning newspaper? If that is a distasteful thought, then do not make the comment or engage in the conduct.

ALCOHOL: MODERATION OR TEMPTATION?

A surprising number of sexual harassment issues arise when co-workers drink alcohol. Often this conduct occurs at company functions, such as holiday parties, and the excessive consumption of alcohol prompts embarrassing and regrettable conduct. Alcohol loosens inhibitions and causes you to look differently at that co-worker you have known for years. Suddenly, your co-worker is unbelievably more attractive and wittier than you ever thought he or she could be. A possible solution is to avoid drinking alcohol with co-workers unless: (1) it is just one drink; (2) you know the person well enough to avoid any misunderstandings in communication; or (3) both parties' spouses/partners are present. The presence of spouses/partners serves to dramatically counteract the effect of alcohol consumption.

WAIT FOR THE RETURN ARROW

The law does not prohibit you from asking a co-worker out on a date one time. However, if the person you ask declines without indicating that he or she is interested in going out another time, then don't ask again. Wait for the person to return Cupid's arrow by asking you out socially.

COMPLIMENTS DON'T INCLUDE BODY PARTS

It is perfectly acceptable to compliment co-workers if the remarks have no sexual component. "That is a nice tie: or "Those are nice earrings" are appropriate comments and do not constitute sexual harassment. However, by including body parts in the compliment, you introduce a sexual element in the comment. "You have great legs" objectifies the person's body and should be avoided.

KNOW YOUR LIMITATIONS

If you have been involved in prior incidents in which co-workers misunderstood you regarding your intentions, then be especiallycautious in how you interact with others. Be sensitive to how you are being perceived.

"I WAS JUST JOKING" IS NO EXCUSE

The law on sexual harassment clearly states that an individual's interfering with an Employee's work performance or creates a hostile environment can be found to be unlawful. Everyone understands that deliberately creating a hostile environment would be unlawful. However, many people don't understand that intent is irrelevant - merely creating the effect is sufficient. "I didn't mean to do anything. I was just joking around." These are common excuses, but they are not ways to escape liability.

LISTEN AND PAY ATTENTION

Almost all sexual harassment complaints could be resolved without involving a supervisor or the human resources department, if everyone in the workplace paid more attention to the verbal

and nonverbal cues of others. An employee usually gives some indication that the objectionable conduct from another employee is unwelcome. Pay attention and respect that individual's wishes.

A CO-WORKER IS A CO-WORKER

Many employees make the mistake of believing co-workers are their friends based on "friendly" interaction in the workplace, and therefore often unwittingly step over the line of acceptable behavior. Unless you truly have a relationship outside of work, then a co-worker is a co-worker, not a friend.

CONFIDENTIALITY: NOT SECRECY

Anyone who complains to management about unwelcome and offensive conduct should expect the complaint to be handled in a confidential manner. However, you must understand that confidential does not mean secret. Rather, it means that the matter will only be addressed with those who have a legitimate business need to know the information.

DON'T FISH OFF YOUR OWN PIER

Numerous issues are raised when supervisors date subordinates. Under the best of circumstances you create morale, credibility and supervisory problems. The worst-case scenario is exposure to sexual harassment complaints and possible liability. There are many fish in the sea, just don't fish off your own pier.

CASE LAW

Employers are reminded now more than ever of the importance of promptly and adequately responding to sexual harassment complaints. A recent California case, *Gober v. Ralphs Grocery Co.,* resulted in a jury award of $30.6 million in punitive damages, which marks the largest sexual harassment verdict in the history of the state of California. This case sends a wake-up call to employers that sexual harassment complaints must be taken seriously. Otherwise, the consequences are far too costly.

In this case, six employees of the chain's Escondido grocery store alleged that a store director, Roger Misiolek, harassed female employees over the span of a decade. Despite numerous complaints to senior management, the women alleged that Ralphs failed to investigate, document, or remedy the situation. Since Misiolek raised store revenues, he did not receive disciplinary action according to the women. Instead, Ralphs transferred him to the Mission Viejo store where he continued to harass female employees. Misiolek was transferred yet again to another store and demoted after employees and customers complained about his abusive conduct.

Interestingly, the $30.6 million award is the result of a second trial. At the first trial in 1998, the jury awarded plaintiffs $550,000 in compensatory damages and $3.3 million in punitive damages. However, the judge vacated the punitive damages award when the court discovered that one juror was a Ralphs shareholder and used out-of-court information to contest plaintiffs'

expert's testimony regarding Ralphs' net worth. Ralphs appealed the verdict, however, the appeals court upheld the finding of Ralphs' liability and the compensatory award. During a second trial, the jury focused solely on whether the company acted with conscious disregard to the rights and safety of its female employees. It was at this trial in April 2002 that a jury awarded the staggering $30.6 million. In fact, the jury even told plaintiffs' counsel that they would have awarded more if they had been allowed to hear additional evidence detailing the harassment that was not ruled as admissible. Statements regarding the harasser's conduct that the jury did not hear included descriptions of unwanted sexual advances, obscene references, groping, and throwing objects at the women such as clipboards, telephones, food products, keys, and even a 30-40 pound mailbag on one occasion.

In July 2002, the trial judge for the second trial indicated he would reduce the punitive damage award from $30.6 million to $8.25 million. The judge granted the company's motion for a new trial, unless plaintiffs accept the lower punitive damage awards. He stated that the jury had been inflamed by passion and the original award was excessive. A further appeal and third trial may be in the future.

Although tide facts of this are certainly extreme, the most important lesson to be learned is that employers must respond to harassment lent complaints and take corrective action in a timely fashion. Gober vs *Ralphs* forewarns employers not to turn a blind cry.. even when the alleged harasser is a valued and profitable employee.

The following cases illustrate exemplary measures taken by employers to combat harassment, and also common mistakes employers make leaving them vulnerable to sexual harassment suits.

RECENT CASE LAW

Birschtein v. New United Motor Manufacturing, 92 Cal.* App. *4th 994 (20011)

In this case, an assembly line employee alleged sexual harassment by a co-worker, Bonillia, who repeatedly asked her out on dates and made inappropriate remarks. Plaintiff complained to her supervisor. Bonillia stopped speaking to plaintiff, but began to repeatedly go near her workstation and stare at her for five to ten minutes. Plaintiff complained to an assistant plant manager and met with the employer's labor department and her union representative. After her complaints, the staring lessened. At the conclusion of an investigation, the employer determined that Bonillia's behavior did not warrant discipline.

Plaintiff sued her employer for sexual harassment under the California Fair Employment and Housing Act. The lower court granted summary judgment for the employer on the grounds that staring at a co-worker does not constitute actionable sexual harassment and her claims of sexual harassment outside the one-year limitation period are barred. The appeals court reversed.

The appeals court stated that the conduct does not have to be sexual in nature to constitute harassment, as long as the conduct is based on plaintiff's sex. Here, the court found that repeated acts of staring, in the context of the prior conduct, might qualify as sexual harassment. Second, the court addressed the plaintiff's argument that her claims of sexual harassment prior to the one-year limitation period are not time barred under the continuing violation doctrine. The court applied the test from *Richards v. CH2M Hill, Inc.* 26 Cal. 4th 798 (2001), and found that

the alleged harasser's conduct was sufficiently related and ongoing to constitute a continuing violation. Therefore, plaintiff's claims of sexual harassment prior to the one-year limitation period were actionable for purposes of summary judgment.

***Beard v. Southern Flying J, Inc.,* 266 F.3d 792 (8th Cir. 2001)**

Plaintiff, an assistant manager of a restaurant chain in Iowa, claimed a supervisor sexually harassed her by repeatedly touching her breasts over a period of several weeks. Plaintiff told the alleged harasser, Krout, that the conduct was unwelcome and she complained to several co-workers. A division manager investigated the allegations by meeting with both plaintiff and the alleged harasser. In response, the supervisor received a written warning. Afterwards, Krout stopped harassing the plaintiff, but began to harass other female employees. After another investigation, he was suspended without pay. However, Krout was reinstated a few weeks later. Plaintiff immediately quit her position.

Plaintiff sued Flying J. for sexual harassment and constructive discharge. A jury found for plaintiff on the sexual harassment claim and awarded her $12,500 in compensatory damages and $12,500 in punitive damages. The jury found for the employer on the constructive discharge claim.

On appeal, Flying J. argued that it was entitled to judgment as a matter of law because the harassment was not based on sex since Krout also harassed male employees, and the behavior did not affect the condition of plaintiff's employment. The Eighth Circuit concluded that although Krout harassed male employees, a reasonable jury could determine that most of his activities were directed at female employees and therefore based on sex. Also, the court found that a three-week period of repeated incidents of inappropriate touching is sufficient to constitute a hostile work environment and alter the condition of employment.

In addition, Flying J. asserted that the company is entitled to an affirmative defense under *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), because management took reasonable care to prevent sexual harassment and promptly correct any sexual harassment that occurred. However, the Eighth Circuit determined that a reasonable jury could determine that the defendant failed to exercise reasonable care since the restaurant failed to interview any of the other female employees in the first investigation. In addition, management failed to take further disciplinary action against Krout, despite the fact that the district manager testified that he believed the new allegations. Management had even accused the women of conspiring to remove Krout as evidenced from a memo.

***Nichols v. Azteca Restaurant Enterprises, Inc.,* 256 F.3d 864 (9th Cir. 2001)**

Plaintiff, a food server, was mocked for his effeminate behavior by his male coworkers and supervisor. He complained to the general manager and assistant manager. A human resource director decided to conduct "spot checks" to see if the harassment continued and told plaintiff to report any further incidents. The human resource director only met with plaintiff once and plaintiff stated the situation was improving. Two months later, plaintiff was fired and filed a sexual harassment and retaliation claim under Title VII and state law. The district court entered judgment in favor of the employer and concluded that plaintiff was neither objectively nor subjectively placed in a hostile work environment and that the harassment did not occur because of sex. Plaintiff appealed and the Ninth Circuit reversed.

The Ninth Circuit determined that a reasonable person could find the unrelenting taunting to sufficiently constitute a hostile work environment. Furthermore, the court determined that plaintiff found the verbal abuse subjectively hostile because he complained about the abuse. The fact that plaintiff never sought psychological treatment was irrelevant because Title VIPs protections are not limited to conduct that affects plaintiff's mental health. In addition, the fact that plaintiff engaged in "horseplay" with his harassers does not mean he was not subjected to a hostile work environment on other occasions. The frequent verbal abuse plaintiff endured "reflected a belief that Sanchez [plaintiff] did not act as a man should act." Under *Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)* and *Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998),* harassment based on gender stereotypes constitutes sexual harassment.

An employer is liable for co-worker sexual harassment once it is aware or should know of the conduct, unless the employer takes reasonable measures to end the harassment. Although the employer took some action in response to plaintiff's complaint, the response was not adequate to remedy or deter the harassment. The court pointed to the fact that the company failed to investigate the complaint or discuss allegations with the alleged harassers. The defendant did not threaten discipline if the harassment continued or inform the perpetrators that the conduct must stop. Also, the court criticized the employer's decision to condition its response on further complaints, thus placing the burden on the victim. Therefore, the court found the company liable for co-worker sexual harassment.

An employer may be liable for supervisor-employee sexual harassment. However, when there is no tangible employment action, an employer may raise an affirmative defense under *Faragher, 524 U.S. 775 (1998),* if it can show: 1) it exercised reasonable care to prevent and correct sexual harassment, and *2)* the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. The Ninth Circuit found that the defendant took adequate measures to prevent sexual harassment by having a written anti-harassment policy and mandatory sexual harassment training for all of its employees. However, the court found that defendant did not exercise reasonable care to promptly correct harassment for the reasons addressed earlier with respect to co-worker harassment.

***Hare v. H&R Industries, Inc.,* 2002 U.S. Dist. Lexis 4268 (E.D. Pa. 2002)**

Plaintiff was hired as an assembler and transferred to a machine shop where she was sexually harassed. Her co-workers, supervisor, and the general manager repeatedly made sexual comments and inappropriately touched her. Plaintiff complained to management numerous times, but no remedial action was taken. H&R Industries failed to investigate, document, or remedy the situation. Ultimately, plaintiff was fired.

Plaintiff sued H&R Industries for hostile work environment and retaliation under Title VII. Since defendant failed to take any remedial action, the court held H&R Industries liable for sexual harassment. The court specifically referred to the company's provide sexual harassment training and an inadequate sexual harassment policy. The company's policy directed employees to report the harassment to their supervisor, which in this case was the alleged harasser. The district court entered judgment for the plaintiff in the amount of $25,708 in compensatory damages and $50,000 for punitive damages.

Swenson v. Potter, 271 F.3d 1184 (9th ***Cir. 2001)***

Plaintiff was a postal worker in San Francisco. She complained of sexual harassment to another co-worker, who informed her supervisor. The supervisor spoke with the alleged harasser and informed him that his conduct constituted sexual harassment and to stay away from plaintiff. A few days later, the plaintiff directly reported the harassment to the human resources department. An investigation began and the employer temporarily moved plaintiff to a new location to minimize contact between the two workers. Swenson requested a face-to-face meeting with the harasser to personally tell him to leave her alone. The meeting was arranged, but plaintiff stopped working after she gave her statement to the human resources department. After the investigation, the company concluded that there was insufficient evidence to warrant disciplinary action. The company arranged for plaintiff to return to work and offered her a reassignment to a position away from the alleged harasser. In addition, she was given a customized work schedule to minimize contact. Plaintiff returned to work and during a fourteen-month period her contact with the harasser only consisted of 16 sightings.

Plaintiff sued the Postal Service for sexual harassment under Title VII and a jury entered judgment in plaintiff's favor. She was awarded $125,000 in damages, reduced to $85,000 by the district court. The Ninth Circuit reviewed the district court's denial of the employer's motion for judgment as a matter of law and reversed.

The Ninth Circuit stated that in cases of co-worker harassment, the employer can be held liable only if its own negligence was a cause of the harassment. Potential liability begins only when the employer is aware of the harassment or should have been aware. In this case, once the employer had notice of the conduct, prompt corrective action was taken. The court analyzed the employer's immediate and long-term remedies. First, the court found the immediate response to be adequate because the employer warned the alleged harasser and instructed him to leave plaintiff alone. Furthermore, an investigation began and the employer moved plaintiff to a new location to minimize her contact with the alleged harasser. The Postal Service also took long-term action by giving plaintiff a permanent assignment away from the harasser and providing her with a customized work schedule to avoid contact with the co-worker. The court noted that the transfer was justified because it was not adverse to plaintiff. Ultimately, the Ninth Circuit reversed because the employer took adequate action to remedy the situation.

Jackson v. Arkansas Department of Education, 272 F.3d 1020 (8th Cir. 2001)

Plaintiff was hired as a secretary and was harassed by her supervisor from the beginning of her employment. Nine months later, plaintiff's fiancé contacted one of her supervisors and notified her of the harassment. The department began an investigation and agreed to change plaintiff's working hours. According to the department's grievance procedure, defendant attempted to arrange a meeting with plaintiff and the harasser. However, plaintiff declined the meeting and filed a charge with the EEOC. The department continued to offer her flexible working hours to avoid being alone with the alleged harasser and a manager stopped by plaintiff's office daily to check up on her. The alleged harasser was fired when the department learned that he lied during the investigation. Jackson sued the department and her supervisors in district court for Title VII violations. Ultimately, the district court granted summary judgment for the defendants and plaintiff appealed to the Eighth Circuit.

The appeals court affirmed the lower court ruling, finding the employer adequately responded when it became aware of the sexual harassment. An employer has an affirmative defense if: (I) the employer took reasonable care to prevent and correct any harassment; and (2) the plaintiff

unreasonably failed to take advantage of preventive or corrective opportunities made available by the employer. The Eighth Circuit held that the company adequately prevented and corrected the sexual harassment by having a harassment policy, conducting an investigation, communicating with plaintiff to make sure the harassment ceased, rescheduling her work hours, and encouraging the plaintiff to report further incidences. Secondly, the court determined that plaintiff acted unreasonably by neglecting to report the harassment for nine months and failing to take advantage of anti-harassment procedures instead of filing an EEOC charge.

***Woods v. Delta Beverage Group, Inc.,* 274 F.3d 295 (5th Cir. 2001)**

Plaintiff worked as a telephone sales clerk and was harassed by a co-worker. Three weeks after she was hired she informed another employee. Two district managers began an investigation and the company informed the alleged harasser that his conduct was inappropriate and would be noted in his file. Also, the company warned him that further harassment would warrant disciplinary action. The managers told plaintiff to notify them immediately if any further inappropriate behavior took place. The next day the managers followed-up with plaintiff and she said everything was fine. Later, the harassment continued, but plaintiff did not report it.

Plaintiff filed a claim for sexual harassment. The district court dismissed her claim and plaintiff appealed. The Fifth Circuit affirmed the decision. The circuit court focused primarily on the issue of whether the employer took prompt corrective action when it became aware of the harassment. The court concluded that prompt remedial action was taken since the company told the supervisor to stop his conduct or else disciplinary action would result. In addition, the employer told plaintiff to report further incidents and followed up with her the next day. Later, after the harassment resumed, plaintiff failed to inform anyone of further problems. Plaintiff argued that the company should be liable because Delta Beverage failed to stop the harassment. However, the court concluded that the defendant took reasonable steps to correct the situation and plaintiff "had an obligation to give the company another opportunity to remedy the problem before deciding she could not work there anymore."

***Rheineck v. Hutchinson Technology, Inc.,* 261 F.3d 751 (8th Cir. 2001)**

Plaintiff was a supervisor in a manufacturing facility. A topless picture of a woman, which resembled plaintiff, was circulated among the employees. Management notified plaintiff of the situation and told her that they were collecting the photos and destroying them. An investigation took place in one day and all of the photos were collected. The company stated that anyone caught with the photo would receive disciplinary action. The investigators identified nine employees who had copies of the photo. These employees received disciplinary action and attended mandatory sexual harassment training. Plaintiff continued to feel uncomfortable because she felt that there were still rumors surrounding the picture. She resigned in March of 1999, after she did not receive a raise at her yearly performance review. Plaintiff filed suit for sexual harassment and retaliation under Title VII. The district court granted summary judgment in favor of defendant. Plaintiff appealed and the Eighth Circuit affirmed the lower court decision.

The court addressed the reasonableness of the remedial action. The court considered factors such as the time lapse between notice and the investigation, and the options available to the employer such as training sessions, disciplinary actions, reprimands, etc. In addition, the court looked at whether the remedial action ended the harassment. The court noted that the investigation took place within 48 hours of notice and no incidents of a similar nature occurred.

Furthermore, the plaintiff failed to show that the rumors altered a term, condition, or privilege of employment. Therefore, the employer was not liable for sexual harassment.

***Department of' Health Services v. Superior Court of Sacramento County (McGinnis), 94 Cal.* App. 4th 14 (2001)**

Plaintiff worked at the Department of Health Services (DHS) and was sexually harassed by her supervisor for an extended period of time beginning in 1995. The supervisor's conduct included inappropriate remarks and touching. Plaintiff discussed the incidents with a co-worker, but did not report the conduct to management until November 1997. The company investigated the matter and took disciplinary action.

Plaintiff filed a sexual harassment complaint under the California Fair Employment and Housing Act. In response, the employer filed a summary judgment motion arguing that the *Faragher,* 524 U.S. 775 (1998), defense applied. In *Faragher,* the United States Supreme Court outlined a defense available to an employer sued for sexual harassment if a supervisor commits the conduct and no tangible employment action is taken. To meet the requirements of the defense the employer must exercise reasonable care to prevent and promptly correct sexually harassing behavior. In addition, the plaintiff employee must have unreasonably failed to take advantage of the corrective or preventive opportunities provided by the employer or otherwise failed to avoid harm. DHS argued the defense applied because it had a sexual harassment policy, provided training programs for employees, and took corrective action. Furthermore, DHS argued plaintiff unreasonably failed to follow reporting procedures in a timely fashion. However, the trial court denied the motion and held that the *Faragher* defense does not apply under California law.

As a consequence, employers may be strictly liable for sexual harassment by supervisors under state law claims. However, this decision was ordered depublished upon the Supreme Court of California's grant of review on February 13, 2002. The case is currently pending. Therefore, whether employers can invoke the *Faragher* defense under California state law remains unresolved for now.

III. TERMINATION OF EMPLOYMENT

OVERVIEW

Your client company and the employee begin an employment relationship. Eventually, that relationship ends. Whether an individual or a large group termination is involved, it is often the basis for allegations of "wrongful" (or "unfair") discharge – a term incorporating several common law and statutory theories that have emerged within the past four decades.

A basic overview of the current status of the employment "at will" standard reveals that the ability of employers to terminate employment relationships at will, while still viable in many contexts, has been curtailed. Allegations based on contractual and other limitations which serve to restrict the at will standard include:

- Breach of Contract of Employment (written or oral express contract)
- Breach of Implied-in-Fact Contract of Employment
- Discharge in Violation of Public Policy (including violation of statutory and constitutional protections)

The factual setting for a wrongful discharge usually involves a direct discharge by the employer. However, another theory has developed to support the case for wrongful discharge wherein the employee claims that he or she quit involuntarily due to unlawful or egregious conditions. This is discussed under:

- Constructive Discharge

Special considerations in the context of terminations based on staff reductions or reorganizations are discussed under:

- Reductions in Force

Other employer violations may be alleged in addition to those claims directly addressing the employment termination itself. We recognize them in different settings, but they may also appear in relation to, or as a result of, an alleged wrongful discharge. Among the many theories are: false imprisonment, invasion of privacy, defamation, wrongful interference with contractual relations, infliction of emotional distress, fraud, and misrepresentation. These other red-flagged areas are included under:

- Other Laws and Considerations Relating to Employment Terminations

While providing legal advice in employment matters, the concern surely is for technical compliance with the various and changing federal, state and local statutes, administrative regulations and judiciary holdings. However, legal compliance reviews and careful drafting of documents and at-will provisions do not assure a "no risk" environment. A simultaneous consideration of whether the actions taken likely will be perceived as fair, both technically and procedurally, may also provide your client with valuable insight into whether the termination action should go forward and, if so, how. You will no doubt develop your own checklists and resources, but examples are provided under:

- APPENDIX A - Termination: General Considerations Checklist
- APPENDIX B - A Comparison of WARN Provisions and California's AB 2957
- APPENDIX C - Examples of At Will Employment Provisions

"AT WILL" EMPLOYMENT

"At will" employment refers to the ability to terminate the employment relationship at the will of either party. That is, the *employee* can terminate the employment relationship at any time for any reason. Likewise, the *employer* can terminate the employment relationship at any time for any reason.

    - Generally, the three exceptions to terminating freely at-will are: (1) breach of an express written or oral contract; (2) breach of an implied-in-fact employment contract; and (3) termination in violation of public policy.
    - Thus, the at will employment standard does not apply if a contract for a specified period of employment exists, or if termination for cause is preserved in agreements or policies, or if the jurisdiction requires "for cause" and/or notice. Also, while the employer generally may terminate for any or no reason, it cannot terminate for a reason protected by law (such as, discrimination or harassment based on protected characteristics, retaliation for the exercise of protected rights, whistleblower, public policy, etc.).
- The "at will" standard may be imbedded in a statute or it may be a common law presumption. Without an express at will relationship, the presumption may be easily overcome by implied contract allegations evidenced by length of service, management promises, satisfactory performance reviews, raises, bonuses, or other contradictory statements or actions.
- In order to avoid reliance on a presumption, written employment agreements specifically setting forth the parties' agreement to an "at will" relationship may be advisable. The employer should be vigilant to retain the at will relationship, through careful draftsmanship and by placing the "at will" provision in relevant policies and documents, such as any progressive discipline policy or a long-term incentive program.
    - While the employer generally may terminate at any time, it must be aware of any obligations it has under the federal WARN Act (Worker Adjustment and Retraining Notification Act, see below) and similar applicable state or local laws pertaining to "mass layoffs" and "plant closings," or whether the jurisdiction may require notice in other situations.
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Advantages:

- Having an at-will employment agreement signed by the employee may result in a dismissal of breach of contract claims without going to a jury.
- Expectations for the employee are set up front.
- Allows flexibility for the employer to layoff or terminate based on the employer's judgment of factors such as skills, abilities, knowledge, experience, and flexibility.

Disadvantages:

- May make recruiting more difficult.
- May encourage union organizing.
- While breach of contract may be dismissed, tort claims and damages are still available if the employee sues under other theories (*e.g.*, misrepresentation, fraud, false

imprisonment, defamation, infliction of emotional distress, breach of public policy, discrimination, and retaliation).

Where to Place At Will Provisions:

- Employment Applications
- Offer Letters and Employment Agreements (*e.g.*, consider whether a limited term employment agreement will turn into an at-will employment agreement if employment continues beyond the limited term. Or, without an express provision, will it continue under deemed renewal of original provisions in the jurisdiction in question?)
- Employee Handbooks (Cases in several jurisdictions address handbooks as contracts and encourage conspicuous disclaimers - being careful, however, not to disclaim the at-will standard.)
- Employee benefit and compensation plans/programs (Watch for stock options and restricted stock agreements, bonus and incentive plans.)
- Promotion memos, retention incentive agreements, and similar documents that could give the wrong expectation or be seen as an amendment to an otherwise at will relationship.

Other Resources:

See Employment Coordinator, Vol. 8, ¶EP-22831, "State-by-state status of at-will exceptions," (Thomson West); Montana CA39-2-901 *et seq*. (wrongful discharge statute); Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P2d 373 (1988); Lorson v. Falcon Coach, Inc., 522 P2d 449 (Ks. 1974); Hejmadi v. AMFAC, Inc., 202 Cal. App.3d 525, 249 Cal.Rptr. 5 (1998); Guz v. Bechtel National, Inc., 24 Cal.4th 317, 3 P.3rd 108 (Cal. 2000).

BREACH OF CONTRACT OF EMPLOYMENT

First, consider how the employment relationship began. A breach of an express written or oral agreement may be based on express provisions to terminate only for cause or to employ for a specified period of time.

- Determine if there is an express agreement. Does the employer have written employment agreements with employees or with executives or other employees? Does the employer have only written confidentiality and/or intellectual property assignment agreements and rely on presumptions of at will employment to control the ability to terminate the employment relationship? Does the employer have written employment agreements setting forth a specific at-will employment understanding? Does the employer have oral agreements under which termination only for cause has been established?
- Consider specificity of offer letters and employment agreements while drafting, as if in anticipation of litigation. Is it too rigid with regard to termination provisions? Did the employer determine that it is in its best interest to give up the flexibility to terminate "at will" employment or can it otherwise live with the "cause" definition it adopts? Did the employer preserve the ability to terminate for financial reasons, acquisitions, or mergers (perhaps preserving at will, but providing a severance payment or change in control agreement including certain severance benefits)? Is the employer locking itself in to the job title, position, reporting relationships, pay and benefits without preserving flexibility for the future? Is it an *integrated* agreement? Who has the right to amend and how?

Early involvement with the company's signatory allows legal counsel to help address unintended and unexpected consequences down the road.

- If not already in place, consider a written document specifically setting forth an agreement that the employment relationship is "at-will." For current employees, consider whether this is desirable from an employee relations perspective and whether it can be done in exchange for consideration to which the employee is not otherwise entitled (*e.g.*, stock, stock options, etc.)
- Labor agreements between unions and employers frequently require "just cause" for discharges.
- Limitations on the employer's right to discharge "at will" which are based on contract are usually scrutinized under state law, which may vary widely from state to state.

Other Resources:

See Cotran v. Rollins Hudig Hall International, Inc. 17 Cal. 4th 93, 69 Cal. Rptr.2d 900, 948 P.2d 412 (Ca. 1998); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 88 (Mich. 1980); Darlington v. General Electric, 504 A2d 306 (Pa. 1986); Delzell v. Pope, 294 S.W. 2d 690, (Tenn. 1956).

BREACH OF IMPLIED-IN-FACT CONTRACT

In the absence of an express written or oral contract to terminate only for cause, or an established "at will" employment relationship, a claim for breach of an implied-in-fact contract is based on the course of conduct between the employer and employee.

- Length of employment, granting of long-term incentive plans, personnel policies (such as progressive discipline with specific number of warnings, etc.), and/or oral reassurances may be the basis for the employee to claim a reasonable expectation that he or she will not be terminated except for good cause or only according to a specific procedure.
- Statements in employee handbooks have been the subject of much litigation. Handbooks should contain clear, specific, conspicuous disclaimers of contract - preserving at will employment, and preserving the employers ability to amend its other policies and practices.
- Written employment contracts, utilized when the employment is *not* intended to be at-will, helps to dispel allegations of unintended promises. These should be integrated agreements.
- When "at will" is intended, capture the employee's agreement to "at will" status in a well-drafted integrated agreement.

Other Resources:

See Shapiro v. Wells Fargo Realty Advisor, 152 Cal.App.3d 467, 199 Cal.Rptr. 613 (Ca. 1984); Rochlis v. Walt Disney Co., 19 Cal.App.4th 201 at 211-212 (Ca. 1993); Johnson v. McDonnell Douglas, 745 S.W.2d 661 (Mo. 1988); Gilbert v. Durand Glass Mfg. Co., 609 A2d 517 (N.J. 1992).

DISCHARGE IN VIOLATION OF PUBLIC POLICY

The tort of discharge in violation of public policy arises when the employee is terminated or is otherwise improperly treated (such as demotion and/or other actions spawning a constructive discharge claim) because he or she (a) protested or reported an illegal activity by the employer

or coworkers, (b) refused to participate in an illegal activity, or (c) reported violations to a law enforcement or other government agency.

- The cause of action does not arise from contract, but rather from a duty implied in law that an employer will act in a manner consistent with public policy. Thus, a tort based on a violation of public policy is an exception to the "at will" employment doctrine and may give rise to tort damages.
- The discharge from employment may be done directly by the employer or "constructively."
- Usually requires a substantial policy regarding an interest affecting the public at large versus a personal or proprietary interest of the employee or the employer.
- May require that the policy be fundamental and well established under constitutional provisions, or federal or state statutory or regulatory provisions, depending on the jurisdiction.
- Certain statutes expressly prohibit discharge or retaliatory action, but the cause of action may arise even under statutes not expressly protecting employee from discharge or retaliation.
- May only require a reasonable belief by the employee that information he or she is disclosing to the appropriate authorities reveals an illegal activity (*e.g*, "whistleblower" protections).
- Preventive measures: (1) investigate the concerns raised by the employee; (2) escalate to the appropriate level necessary; (3) report back to the employee; (4) document the steps taken; and (5) do not retaliate or criticize the employee for raising concerns, even if the employee's concerns do not prove to be correct.

Examples:

- Falsifying financial data (*e.g*., Sarbanes-Oxley Act whistleblower provisions)
- Refusal to commit perjury or to violate anti-trust law (*e.g*., price fixing)
- Fulfilling jury duty
- Filing a safety complaint (*e.g*., Occupational Safety & Health Act protections)
- Refusal to enter into non-compete agreement (*e.g*., in violation of California Business and Professions Code §16600)
- Retaliation for participation in protected labor organizing activities (*e.g*., National Labor Relations Act)
- Violation of employment discrimination and harassment laws (*e.g*., Title VII and state laws)

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Other Resources:

See Hunter v. Up-Right, Inc., 6 Cal.4th 1174 (Ca. 1993); Mello v. Stop & Shop Cos., 524 N.E.2d 105 (Ma. 1988); Faulkner v. United Technologies Corp., 693 A.2d 293 (Conn. 1997); McKenzie v. Renberg's, Inc., 94 F.3d 1478 (1996, CA10); Borschel v. City of Perry, 512 N.W. 2d 565 (Iowa Sup, 1994); Cloutier v. Great Atlantic & Pacific Tea Co., 436 A.2d 1140 (N.H. 1981); Pettus v. Cole, 49 Cal App 4th 402, 57 Cal. Rptr. 2d 46, (Cal. 1996, 1st Dist); Phillips v. St. Mary Regional Medical Center, 96 Cal. App. 4th 218, 116 Cal. Rptr. 2d 770 (Cal. 2002, 4th Dist.); Brandon v. Anesthesia & Pain Management Associates (7th Cir. 2003); www.firstgov.gov (for state and federal constitutions and laws).

CONSTRUCTIVE DISCHARGE

"Constructive discharge" may be found where the employee quits and alleges that he or she was forced to do so involuntarily due to intolerable working conditions.

- Usually means working conditions such that a reasonable person would have been compelled to quit.
- The employer is alleged to have caused the intolerable working conditions, either intentionally or by failing to take action to relieve the situation.
- Attempts are being made to extend this theory to constructive "demotion" in support of the element of detrimental action (*e.g.*, where the employee takes a demotion rather than quit or remain in the current job under intolerable conditions due to sexual harassment).
- Ultimate issues: Were working conditions so intolerable that a reasonable person would have resigned as a matter of law or a triable issue of fact? (Factors may include length of time employee remained employed after conditions arose, frequency and intensity of unfair or aggravated actions.) Did the employer intend or know or should it have known of intolerable working conditions? What is the standard in the jurisdiction? (May require that the employer intended the intolerable working conditions to exist either by creating or knowingly permitting the intolerable working conditions. May require that the employer knew employee found them intolerable.)

Examples:

- Forced (involuntary) retirement or termination "encouragement"
- Sexual or racial harassment
- Prolonged shunning after filing an EEOC complaint or blowing the whistle
- Demotion and criticism of job performance following a complaint

Other resources:

See Turner v. Anheuser-Busch, Inc., 7 Cal.4th 1238 (1994); King v. AC & R Advertising, 65 F.3d 764 (9th Cir. 1995); Scott v. Pacific Gas & Electric Co., 11 Cal. 4th 454 (1995); Hukkanen v. Int'l Union of Operating Engineers, Hoisting & Portable Local No. 101, 3 F3d 281 (1993, CA 8); Zabielski v. Montgomery Ward Co., 919 F2d 1276 (1990, CA 7); Nielsen v. Revcor, Inc., 770 F. Supp. 404, 1991, ND Ill); EEOC v. Sears, Roebuck & Co., 23 F3d 432 (2000, CA 7); Suders v. Easton (3d Cir. 2003); Fenney v. Dakota, Minn. & E.R.R. Co. (8th Cir. 2003).

LAYOFFS/REDUCTIONS IN FORCE

Just like any other important business decision, reductions in force (RIFs) should be carefully considered and planned. An employee may easily meet the burden of proof (*i.e.*, member in a protected class, termination as the adverse employment action, and better treatment afforded someone not in the protected class). The employer must be prepared, therefore, to articulate a nondiscriminatory business reason for the RIF and then overcome, through fairness in fact and appearance, any evidence of pretext. Proper planning for a reduction in force provides invaluable assistance in defending it later on.

The Why: Business Justification. Is the employer reducing headcount or laying off employees to reorganize and align itself to meet changing business needs?

- What is the objective to be achieved? Improved efficiencies? Reduced costs? Common reasons include loss of significant contracts (e.g., defense contractors face this frequently), reduced production due to technology changes (e.g., the buggy whip), consolidation of facilities, streamlining or combining functions or departments, abandoning a particular line of business, outsourcing certain functions to a vendor for cost, efficiencies, and/or expertise needs, and reorganizing and restructuring operations due to acquisitions, mergers, or divestitures.
- Whatever the business reason, it should be consistent with the facts. For example, RIFs based on financial reasons followed by big bonuses and pay increases may be viewed as inconsistent with the reason given. RIFs followed by increased hiring activity may be viewed as inconsistent with an announced need to cut costs.
- Having a consistent, articulated legitimate business reason provides the foundation for future actions. Counsel the client to document the rationale in advance.

The What: The Resulting Organization. What will the resulting organization look like?

- Will it be structured to meet the business needs?
- What functions, skills and knowledge are essential for the future? Preparing the future organizational chart with this in mind (and not yet considering the people who will be filling the slots) is helpful.

The Who: The Decision-Makers. Who will be making the decisions?

- In some cases, individual managers in conjunction with Human Resources consultation may be appropriate, depending upon the size and scope of the RIF or reorganization.
- In other cases, a management team approach may be more appropriate. Having more individuals with varied characteristics and backgrounds may bring more business insight and may appear to be more objective.

The How: The selection. What selection method will be used?

- Are less drastic measures available (*e.g.*, curtailment of travel and other expenses)?
- Are other alternatives available (*e.g.*, early retirement programs, exit incentives, voluntary terminations in exchange for severance pay not otherwise available)?
- Will whole departments be laid off? Will certain classes of jobs be eliminated entirely? This may be viewed as more objective.
- Will seniority be used? Throughout the company or for certain jobs only? A bona fide seniority system has traditionally been viewed as a "safe harbor" objective method. However, a seniority method may not result in an organization that can meet future demands since it only recognizes time with the current employer, and not the skills and flexibility that may be needed for the future organization. In situations where a skills and competencies method is used, seniority may be preserved as a deciding criteria when all other factors are substantially the same.
- Performance review methods may be viewed as too subjective. The method used for performance reviews may not be complete, may be inflated, may stress complimentary and encouraging statements, may not be devised as a predictor of future performance under different circumstances, and may not be designed to compare individuals with others. Some companies that have adopted forced ranking performance evaluation processes (where managers evaluate employees by ranking one's performance against another) in attempts to overcome inflated performance reviews, have been met with multi-million dollar discrimination lawsuits.

- A blended look at skills, competencies, performance and value to the resulting organization, especially when considered by more than one individual may result in a more objectively articulated process. Special ratings may be established to assess and compare the various components of the job, including unique skills, required levels of competencies for the future, past and present effectiveness on the job, flexibility to adapt to the changing organization, etc. A process for consistent review, rating and final ranking can be established and distributed to the decision makers ahead of time. Focus can be given first to employees with documented factual inadequate performance and/or conduct issues. Elimination of subjective input where possible is a goal.
- For every individual selected, be prepared to provide a legitimate business reason to answer why he or she was selected, to demonstrate the fairness of the reason, and to show the reasonableness of the process. Credibility of the decision-makers may be reinforced by review and confirmation of the choice by more than one individual.
- The process should be reviewed to verify statistical results, in consideration of a possible claim of disparate impact, and if necessary, the process should be revisited and adjustments made.

The How: Implementation

- Consider whether the WARN Act or similar state laws apply (*See* Appendix "B"). This may impact when notice must be given.
- Determine whether any employment agreements or other contracts must be considered for any termination provisions.
- Prepare consistent termination letters and company announcements.
- Arrange for contracts with outplacement and employee assistance services.
- Prepare waivers in compliance with federal and other jurisdictional laws (if waivers for consideration are to be offered).
- Counsel the client to plan for the actual termination meeting with the employee (When? Where? Who present?).
- Counsel the client to be prepared to answer questions from employee (benefits, rehire potential, severance benefits, waiver of claims, unemployment insurance claims, etc.)

OTHER LAWS AND CONSIDERATIONS RELATING TO TERMINATIONS

WARN ACT - The Workers Adjustment and Retraining Notification Act, 29 USC §§2101 *et seq*., 20 CFR 639. This federal law is designed to protect employees by requiring that the employer give 60 days written advance notice if it plans to conduct a "plant closing" or "mass layoff." Applies to any business enterprise that employs either at least 100 employees, not including part-time employees, or at least 100 employees (including part-time employees) who perform at least an aggregate of 4,000 hours of straight time in a week. The WARN Act provides information regarding who should receive the notice besides the employees (such as certain government officials and agencies). Also, a number of states (and a few jurisdictions, such as cities or local counties) have notification requirements similar to the WARN Act, but they may have differing definitions, threshold and notice requirements. Thus, state and local requirements should also be reviewed prior to implementing terminations from plant closings or mass layoffs. Also, may be implicated in acquisitions, mergers, divestitures, or outsourcings. *See* "Appendix B."

OWBPA - The Older Workers Benefit Protection Act, 29 USC §626; 29 CFR §1625.22. In order for a waiver of claims to be valid under the Age Discrimination in Employment Act ("ADEA") and the OWBPA, this law requires employers to provide certain information to employees who are offered waiver of age discrimination claims in exchange for consideration or for the benefits of an exit incentive or other termination program. Waivers must be "knowing and voluntary." For exit incentives or other termination programs affecting two or more employees, information must be provided to the affected employee including the ages and job titles of employees in the "decisional unit" who are eligible and ineligible for the benefits. The agreement must be in writing and specifically refer to rights and claims arising under the ADEA. The waiver cannot apply to claims that may arise in the future. The waiver must be in exchange for consideration not otherwise due from the employer. The employee must be advised in writing to consult with his or her own attorney before signing the agreement. The employee must be given certain time periods in order to consider the agreement – 21 days for individual termination situations and 45 days for exit incentives or other termination programs – and a 7-day revocation period. Many practitioners recommend providing the same kind of "knowing and voluntary" provisions whether or not employees affected are over the age of 40. *See* the EEOC website for the December 2000 "*EEOC Fact Sheet on Waivers Under Age Discrimination in Employment Act*." Among other things, this fact sheet addresses the non-applicability of the contract principles of tender back and ratification, under the U.S. Supreme Court decision, Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998).

COBRA – The Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, 29 USC §§1161 *et seq*., 26 CFR 54.4980B, 29 CFR 2590. This federal law requires employers to offer terminated employees (and covered dependents) the opportunity to continue health insurance coverage for certain periods of time following termination (and other "qualifying events"). Employers must provide appropriate notice of this right to employees in a timely manner following termination.

Other Benefits and Programs. In addition to health benefits, employers should check benefit provisions under other programs (such as deferred compensation, stock options or other long-term incentive programs) to determine any contract provisions triggered by the employee's termination. Under ERISA (the Employment Retirement Income Security Act, 29 U.S.C.§§ 1001 *et seq*.), the employer is prohibited from terminating employees in order to foreclose their rights to receive benefits under applicable plans (such as retirement plans and welfare benefits plans). Also, termination rights and notice provisions under these plans and applicable DOL and IRS regulations may be triggered by termination of employment**.**

Unemployment Compensation. Usually, this area is regulated by state and local laws. Employers who may be contemplating a mass layoff or plant closing may need to factor in the effect of the payout of these benefits into the overall cost of the action. Many states require that the employer notify terminated employees of their right to seek these benefits and provide the employee with applicable contact information to apply or file a claim for benefits.

Immigration. Employees who are currently on nonimmigrant employer sponsored visas will be affected by termination. Employers have certain agency notification requirements and may be required to provide for the reasonable cost of a return ticket to the employee's home country. Employers should check with immigration attorneys when employees are here on H1-B, L-1, or TN visas to determine the impact of employment termination and any time requirements within which the employer and employee must take action.

Pay Obligations. This is an area generally regulated by state and local laws. The particular jurisdiction may have certain time limits and manner of payment requirements applicable in termination situations. Many states address such things as whether or not accrued vacation or paid time off are considered wages which must be paid out upon termination. In addition to possible applicable laws or regulations, the employer should check its own policies and procedures to determine when commissions, incentives and bonuses are considered earned for pay-out upon termination.

Outplacement. Many employers provide outplacement services to employees who are terminated in reductions in force or in individual situations where it may be appropriate or advisable. The cost of this service may be included as consideration for a waiver of claims if it is not otherwise a benefit owed to the employee.

Employee Assistance Program. This type of assistance is usually provided through a third-party and can assist terminated employees in getting on with life after the employment relationship ends. Many provide not only psychological support but also certain employment and financial counseling. This program may already be in place or contracts may be available for services on an individualized basis.

Workplace Violence. Termination can be as a result of threats or violence and/or there may be concern that violence may erupt at the termination meeting or thereafter. If there is any indication or concern, employers should be encouraged to seek legal counsel to help plan for this contingency.

Companion Allegations. While the focus in termination actions is understandably on allegations of unlawful discrimination and/or retaliation, violation of public policy and/or of statutory requirements, and breach of express or implied-in-fact contract, other allegations may surface upon termination, frequently resulting from the termination process, implementation or aftermath. The goal is to avoid these types of companion claims in the first place. Providing counsel to management starts with building an awareness of how these claims may arise under the implementation of the discharge itself, the actions leading up to the discharge, and the actions taken after the discharge.

- ***False Imprisonment.*** Allegations may arise from not allowing the employee to leave the termination or disciplinary meeting. Is the employee free to leave or is his/her exit blocked? Is the employee held against his/her will during searches or investigations? *See* DeAngelis v. Jamesway Department Store, 205 N.J. Super. 519, 501 A.2d 561 (App. Div. 1985), Hanna v. Marshall Field & Co., 279 Ill. App. 2d 784, 665 N.E.2d 343 (1st Dist. 1996), Karow v Student Inns, Inc., 43 Ill.App.3d 878, 357 N.E.2d 682 (4th Dist. 1976), Vincent v. Williams, 279 Ill. App. 3d 1, 664 N.E. 2d 650 (1st Dist. 1996), Dobiecki v. Palacios, 829 F.Supp. 229 (N.D. Ill, 1993).

- ***Invasion of Privacy***. Is off-duty conduct protected by statute or employee assurances? Is there a romantic relationship with the employee of a competitor? Is there an expectation of privacy in an employee's locked desk? Can you videotape and use the videotape of restroom or locker room drug dealing activity? Has the employer appropriately dispelled any expectation of privacy in the workplace? Can you require the employee to take a polygraph test? *See* Rulon-Miller v. International Business Machines Corp., 162 Cal. App. 3d 241, 208 Cal Rptr. 524 (Ca. 1984); Cramer v. Consolidated Freightways, Inc., 209 F.3d 1122 (9th Cir. 2000); Schowengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987); The Employee Polygraph Protection Act, 29 U.S.C.

§§2001-2009; Alaska Constitution, article I, §22; California Constitution, article I, §1; Hawaii Constitution, article I, section 6; Montana Constitution, article II, §10.

- ***Defamation*.** Allegations may arise based upon what co-workers, prospective employers, prospective lenders, etc. are told. What are co-workers told during an investigation? What are co-workers told after a discharge? Who has a business need to know what? What are prospective employers told? Who handles reference checks by prospective employers and what do they disclose *(i.e.*, Confirm employment dates and salary? Give reasons for termination?)? Is there a statutory protection for employers who provide truthful information? Is the information complete? What duty do you owe to the prospective employer, if any? Can self-publication (by former employee providing reason for termination from last job) support the "publication" element in that jurisdiction? Does any absolute or qualified privilege apply? What statements are made in labor organizing campaigns, strikes, or labor disputes? Are statements made in performance reviews truthful (supportable)? *See* Note, Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace, 40 Hastings L.J. 687 (1987), Davis v. John Crane, Inc., 261 Ill. App. 3d 419, 633 N.E. 2d 929 (1st Dist. 1994), Gibson v. Phillip Morris, Inc., 292 Ill. App. 3d 267, 685 N.E. 2d 638 (5th Dist. 1997); Cox v. Nasche, 70 F3d 1030 (9th Cir. 1995).

- ***Wrongful Interference with Contractual Relations***. Is the employer improperly and intentionally "interfering" with the former employee's relationship with his/her new employer? Does a privilege apply? *See* Restatement (Second) of Torts §766, Haddle v. Garrison, 119 S.Ct. 489 (1998); Sterner v. Marathon Oil Co, 4 EIR Cases 593 (Tex. 1989); and Halvorsen v. Aramark Uniform Services, Inc., 65 Cal.App.4th 1383, 77 Cal.Rptr. 2d 383 (Ca. 1998).

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- ***Infliction of Emotional Distress***. What constitutes outrageous conduct, exceeding the bounds of societal norms? How is the intent (or possibly reckless disregard) to inflict emotional distress shown? What constitutes emotional distress severe enough to support the claim? *See* Kovatch v. California Casualty Management Co., 65 Cal.App. 4th 1256 (Cal. 1998); Trujillo v. Federal Deposit Ins. Corp., 3 IER Cases 38 (C.D.Cal. 1988); Lewis v. Oregon Beauty Supply Co., 302 Or. 616, 733 P.2d 430 (Or. 1987); Coors Brewing Co. v. Floyd, 1999 WL 9769, 14 IER Cases 1232 (Colo. January 11, 1999).

- ***Fraud/Misrepresentation***. Did the employee relocate or quit other employment to take the position? What was the employee told about job security? Future promotions? Future pay? Did the employee waive claims in exchange for training opportunities that never occurred? Was there detrimental reliance? Is the action barred under the exclusive remedy provision of workers compensation law? *See* Burdette v. Mepco/Electra, Inc., 673 F.Supp. 1012 (S.D. Cal.1987); Restatement (Second) of Torts §552; California Civil Code §1710(2); Miller v. Fairchild Indus., Inc., 885 F. 2d 498 (9th Cir. 1989); Lazar v. Superior Court, 12 Cal.4th 631 (1996); Rochlis v. Walt Disney Co., 19 Cal.App.4th 201 (Cal. 1993); Stromberger v. 3M Co., 990 F.2d 974 (7th Cir. 1993); Lenk v. Total-Western, Inc., 89 Cal. App. 4th 959, 108 Cal Rptr2d 34 (2001).

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APPENDIX A

TERMINATION: GENERAL CONSIDERATIONS CHECKLIST

Courts and juries take into account a number of different factors when deciding whether the discharge was unjust. Employers should be advised to be non-discriminatory in their actions and assess their actions for "fairness." In addition, they should be prepared to demonstrate both even if everything they have done is lawful and fair. Employers can assess their potential for liability for terminations by asking a number of questions and taking appropriate measures to reduce or eliminate problems. Examples of the types of questions and consideration checklists abound in Human Resources and Legal resource guides. The three areas of concentration include considerations of actions taken: (1) before termination; (2) the termination meeting with the employee; and (3) after termination. Here is an example:

CHECKLIST

____ Is there a specific written or oral contract of employment? What are the provisions for termination (i.e. for cause, definition of cause, at will provisions, payment or buyout provisions)?

____ Is the termination sufficiently related to work?

____ What will be the specific articulation of the reason(s) for termination? Is there proof that the incident(s) leading to the termination decision actually occurred? Has the employee been given an opportunity to explain? What does the employee say about the incident(s)? What does the employee say about the poor performance? How long has the performance or misconduct been tolerated? Has the performance or incident(s) been documented?

____ Has the employee been given an opportunity to explain performance or other events? If so, did any mitigating circumstances arise? Were they investigated or considered?

____ If applicable, has any investigation been performed? Has it been documented?

____ Are there any protected category concerns? (race, color, national origin, sex, religion, age, disability, pregnancy, marital status, sexual orientation, etc.) Is there any evidence that disparaging remarks about protected characteristics have been made?

____ Has the possibility of any extenuating circumstances been considered? Are there any circumstances that might make the employee's plight sympathetically compelling? Has the employee indicated that health or other personal problem have been interfering with work? If indicated, is a disability accommodation available? (e.g., open position for which employee is qualified, etc.) Has interactive process taken place and been documented?

____ Has the employee recently complained of unequal or dissimilar treatment?

____ Any recent demotions, denial of promotions, refusal to transfer, refusal to reinstate after a leave of absence, changes in working conditions?

____ On protected leave of absence or recently returned? (FMLA, Military, Workers Comp, other state protected absences)

____ Any recent worker's compensation claims?

____ Any concerns for claims of retaliation? Has the employee recently exercised a protected right or participated in a protected activity? Whistleblower? Did the criticism of employee's work or conduct begin after employee raised concerns about workplace procedures or company conduct? What is the timing of the discharge in relation to any protected actions taken by the employee?

____ Have any applicable Company policies or practices been reviewed? Followed?

____ Has the employee been given an opportunity to improve? Are there any previous warnings? If so, are they documented? What do they say? Are they based on fact and are expectations clearly stated? Has the employee file been reviewed? What do performance reviews show? What do more recent performance reviews say? Has poor performance been documented?

____ How long has employee been employed with the Company?

____ Who hired the employee? Who is making the termination decision? Who recommended? Has the employee recently begun reporting to another supervisor? What was the history prior to this supervisor?

____ Did the employee relocate to take the position? When? Was the employee told or "promised" anything in exchange for relocating?

____ Has the employee received company awards? For what? How recently? When was last merit increase, bonus, or long-term incentive?

____ Have all wages, overtime, commission, been paid? Any equal pay concerns?

____ Are there alternatives to termination? Have alternative actions been considered (e.g., transfer, warnings, sufficient opportunity to improve, etc.)? How have similar situations been handled?

____ Is this a reduction in force? How have employees been selected?

____ Do layoffs raise any adverse impact concerns?

____ How close is the employee to vesting in benefits? (Retirement plans, stock options, restricted stock, etc.) If soon, can the termination be postponed or the employee be otherwise retained until vesting occurs?

____ Have you planned who will be present for the termination meeting? Where?

____ Have the reason(s) for termination been clearly explained? Has employee been given opportunity to review documents relied upon (e.g., falsified documents, etc.)? Is a Termination Letter required in jurisdiction or otherwise advisable?

____ Is there any indication of a potential for violence at or following the termination meeting?

____ Have you anticipated any questions the discharged employee may have? (Reference checks, expense reimbursement, benefits, deferred compensation plan payouts, option exercise periods, outstanding loans from 401(k) plan or advances from company, commission payments, return or purchase of company car etc.)

____ Will last paycheck be prepared for timely delivery? (See state laws for any requirements regarding delivery, timing and what must be included) Are any offsets or deductions from last paycheck planned? If so, are deductions permitted in the jurisdiction?

____ How will return of company property be handled? How will gathering of employee's personal property be handled?

____ Any severance benefits plans apply? Any severance agreement planned? Advisable?

____ Any job search assistance offered? Is referral to employee assistance program advisable?

____ Will the employee's immigration or visa status be affected? Does the employer have any responsibilities to the employee, such as payment to return to country of origin?

____ Is the employee involved in any patent matters? Should patent attorney be contacted?

____ What will co-workers be told? What will be disclosed to prospective employers? Who will handle this?

APPENDIX B

COMPARISON CHART OF WARN PROVISIONS TO STATE PROVISIONS

An employer must follow the stricter (more generous for the employee) standard whenever federal, state and local laws address the same area. While charts comparing the laws should not serve as a substitute for review of the statutes, the regulations, and the case law construing them, they provide a discussion guide for use with the client employer. The following chart is an example (prepared by request in substantive parts by Richard J. Simmons of Sheppard, Mullin, Richter & Hampton LLP, Los Angeles, California):

	WARN 29 U.S.C. §2101, et seq.	California's AB 2957 Labor Code §§1400-1408	Laws Differ
Effective Date	February 4, 1989	January 1, 2003	Yes
Employer Coverage Standards	(a) 100 employees (excluding part-time employee) or employees who, in the aggregate, work at least 4,000 hours a week. (b) All private sector employers who qualify as "business enterprises" and satisfy the standards in (a)	(a) Covered establishments include any "industrial or commercial facility" in California that employs 75 or more persons.[1] NOTE: WARN refers to "any business enterprise" that employs the requisite number of workers. WARN excludes part-time employees from the 100-employee standard. No exclusion for part-time workers in California.	Yes
Definition of Employee	Part-time employees who work less than an average of 20 hours a week or who have worked less than 6 of the last 12 months preceding the notice date are not counted when determining if a triggering event occurs. (However, if a covered event occurs, such employees are entitled to notice.)	(a) "Employee" means a person employed for at least 6 of the last 12 months prior to the required notice date. (b) Unlike WARN, there is no exclusion or definition of "part-time employees" and no exclusion of individuals working under 20 hours a week.	Yes
Triggering	(a) Mass layoff (i.e., where	(a) Mass layoff[2]	Yes

[1] "Employer" is defined as any person who directly or indirectly owns and operates a covered establishment. Parent corporations are covered with respect to covered establishments owned and operated by their corporate subsidiaries.

[2] "Mass Layoff" means a "a layoff during any 30-day period If 50 or more employees at a covered establishment." A Layoff means a separation from a position for "lack of funds or lack of work." Unlike WARN, there is no "employment loss" standard. Under WARN, "employment loss" means employees are terminated, laid off for over 6 months, or subjected to a reduction in hours of more than 50% for a 6-month period.

Events	over 500 employees or 50-employee & 33% standards are met). (b) Plant closing (i.e., where 50-employee standard is met). Note: The requisite number of employees must experience an "employment loss." Note: "Part-time employees" (as defined) are not counted when measuring these standards. Note: Employees offered transfers under some circumstances are not counted.	(b) Relocation[3] (c) Termination[4] Note; 50 or more persons must be displaced under the "mass layoff" definition. Unlike WARN's "mass layoff" definition, there is no 33% or 500-employee standard. Note: Unlike WARN, there is no "plant closing" trigger. Note: Unlike WARN, "part-time" employees are not excluded when performing the count. (But, those with less than 6 months' service are not "employees" and are probably excluded from the "mass layoff" count.) Note: Unlike WARN, employees are not excluded from the count where they are offered a transfer.	
Key Concepts:[5] (a) 30-Day Standard	WARN requires that the requisite number of employees experience an "employment loss" during a 30-day period.	AB 2957 requires a layoff during a 30-day period for a "mass layoff" to occur, but does not explicitly incorporate that rule in the "relocation" or "termination" definitions.	Yes
(b) 90-Day Standard	WARN requires that a 90-day look-back and look-ahead rule be used instead of the 30-day rule unless employment losses are the result of separate and distinct actions.	AB2957 does not have a 90-day aggregation rule.	Yes
(c) Part-time employee	"Part-time employee" is defined to mean an	Unlike WARN, there is no exclusion of part-time	Yes

[3] "Relocation means "the removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away." Unlike the definition of "mass layoff," does not explicitly include a 50-employee standard, but may be implied under legislative history.
[4] "Termination" means the cessation or substantial cessation of industrial or commercial operations in a covered establishment. Unlike the definition of "mass layoff," the definition does not explicitly include a 50-employee standard, but may be implied under legislative history.
[5] Unlike WARN, AB2957 does not contain definitions of the terms (1) "plant closing," (2) "affected employees," (3) "employment loss," or (4) "part-time employee"

	employee working less than an average of 20 hours a week or who has worked less than 6 of the 12 months before the notice date. Such employees are not counted when determining (a) employer coverage under the 100-employee standard or (b) if a plant closing or mass layoff occurs.	employees when determining employer coverage or whether a triggering event occurs.	
Definition of "Employment Loss"	Means (a) a termination (other than a discharge for cause, voluntary departure, or retirement), (b) a layoff exceeding 6 months, or (c) a reduction in hours of more than 50% during each month of any 6-month period.	No definition of "employment loss" exists under state law	Yes
Advance Notice	60 days	Same	No
Notice Recipients	(a) Unions (b) Affected employees (c) EDD (State dislocated workers unit) (d) Chief elected official of the city or county within which the triggering event occurs. (If there is more than 1 unit of local government, the unit to which the employer paid the highest taxes in the prior year must receive the notice.)	(a) Affected employees (b) EDD (c) Local workforce investment board (d)Chief elected official of each city and county government within which the triggering event occurs. *Note:* There is no mention of notice to union representatives. *Note*: State law does not limit the notification obligation to the unit of government receiving the highest tax payments.	
Notice Contents	Written notice must include specified information set forth in the law.	State notice must include elements required under WARN	No
Exceptions to Notice Rules	(a) For closing of a temporary facility. (b) Where closing or layoff results from completion of a particular project or undertaking and employees were hired with knowledge that their employment was limited. (c) Where closing or layoff constitutes a strike or lockout not intended to evade the law.	(a) Physical calamity (b) Act of war (c) For employers in broadcasting, motion picture, construction, drilling, logging, and mining industries if the closing or layoff is the result of the completion of a particular project or undertaking. *Note:* WARN does not limit this exception to employers in these industries. (d) For employees hired with the	Yes

	(d) For unforeseeable business circumstances. (e) For faltering businesses that meet specific standards. (f) For natural disasters, such as a flood, earthquake or drought.	understanding that their employment is seasonal and temporary. (e) Faltering business exception to notice rules exists for "relocations" or "terminations" (but not mass layoffs) where the EDD certifies that the employer was actively seeking capital or business and other conditions are satisfied. *Note:* Unlike WARN, there are no exceptions for "unforeseeable business circumstances or for events caused by a strike or lockout. *Note:* Unlike WARN, AB2957 does not expressly allocate the responsibilities of sellers or buyers where there is a sale of a business.	
Liabilities and Sanctions	(a) Back pay (b) Benefits (c) Civil penalty of $500 per day for failure to provide notice to local government unit. (d) Attorney's fees can be awarded to the prevailing party.	(a) Failure to provide required notice can result in back pay and value of lost benefits (including the cost of any medical expenses) for the period of the violation, up to 60 days, or, if shorter, the period equal to one-half the number of days the employee was employed. (b) Liability is reduced by certain items, such as (1) wages paid during the period of the violation, (2) voluntary and <u>unconditional</u> payments that were not required to satisfy any legal obligation of the employer, and (3) premiums for health benefits or payments to certain benefit plans. (c) Civil penalty of up to $500 for each day of the violation. *Note:* Unlike WARN, this $500-per-day penalty is not limited to situations where government entities do not receive the required notice. (d) Attorney's fees *Note:* Unlike WARN, AB2957 permits only prevailing plaintiffs to recover fees.	Similar Similar Yes Yes
Enforcement	DOL has limited rule-making authority. Others may sue.	Employees, employee representatives, a local government or the Labor Commission may initiate enforcement actions.	Yes

APPENDIX C
EXAMPLES OF "AT WILL" EMPLOYMENT PROVISIONS

Examples of "At Will" Provisions

-- "No contract of employment other than "at will" is expressed or implied, and all employment and compensation with [employer] is "at will." This means that employees may be terminated with or without cause, and without notice, at any time, at the option of either [employer] or the employee, except as otherwise provided by law. Further, no circumstances arising out of the employment relationship may alter this at-will status unless the understanding is specifically set forth in writing and signed by the employee and the [employer's official]."

-- "Employment with the company is not for a specified term and is at the mutual consent of the company and the employee. Accordingly, either the employee or the company can terminate the employment relationship at will, with or without cause at any time. The at-will nature of the employment relationship cannot be modified, unless done so in a written agreement specifically stating that it is modifying the at-will employment relationship which is signed by the employee and [company designated official]."

-- "If I am employed by [Company], I understand that my employment will be on an at will basis. Accordingly, my employment may be terminated at any time, either by me or by the company, either with or without cause or advance notice. I also understand that no representative of the company, other than [company designated official for this purpose], has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing."
(Employment Application)

-- "Employment is at the will of either the employee or employer. This means the employee may quit at any time with or without notice and the employer may terminate your employment at any time with or without notice. There is no promise that employment will continue for a set period of time. Nor is there any promise that your employment will be terminated only under particular circumstances. No one has the authority to make representations inconsistent with this policy. This policy supersedes all written and oral representations that are in any way inconsistent with it." (Employee Handbook)

-- "Employee's employment with [Company] can be terminated at will, with or without cause, and with or without notice, at any time, either at the option of Employee or [Company]. No employee or representative of [Company] has the authority to modify this at will employment relationship except for the _____ of [Company], and any such modification of this at will employment relationship must be in a written agreement signed by both Employee and the _____. This is an integrated agreement with respect to the at will nature of the employment relationship, and there are not now and may not be in the future any implied or oral agreements that in any way modify this at will employment relationship.

-- "Maker agrees that nothing in this Note shall alter the "at will" nature of Maker's employment with Holder nor shall this Note be construed as a guarantee of employment for any specific time period. Maker understands and agrees that this Note is not an employment contract, and nothing in this Note creates any right to Maker's continuous employment by Holder, or to Maker's employment for any particular term. Nothing in this Note shall affect in any manner whatsoever the right or power of Holder to terminate Maker's employment, for any reason, with or without cause." (Promissory Note)

IV. CONDUCTING AN EFFECTIVE INTERNAL INVESTIGATION*

Introduction

As an employer, you strive to treat your employees fairly. For example, you always make employment decisions without regard to race, color, religion, sex, sexual orientation, national origin, ancestry, marital status, medical condition, pregnancy, age, physical or mental disability, or veteran status. Fair treatment is an essential statement of your company's values.

But no matter how hard you try to treat people fairly, there are going to be times when someone feels he or she was treated unfairly. When an employee feels his or her rights have been trampled on or that company policies or guidelines have not been applied fairly, the company must be prepared to conduct a comprehensive, objective, and professional investigation. An investigation may involve many employees: the human resources department, in-house legal staff, internal auditors, environmental safety and health officers, and ombudspersons. The investigative process permits your company to monitor itself - to ensure that its managers, supervisors, and employees comply with both the letter and the spirit of federal and state laws, as well as internal policies and guidelines.

Conducting an objective and thorough investigation minimizes the risk that an employee will be disciplined or terminated for something he or she did not do. Perhaps things are not as they initially seemed, and the institution can avoid making an incorrect, devastating, and costly decision.

The purpose of an investigation is to gather facts so that the investigator can make a credible determination as to what happened in a given situation. If someone is thought to have violated a policy, guideline, or procedure, conducting an effective investigation helps reach a conclusion that is based on the best facts available. Having accurate facts leads to a sound conclusion.

Conducting an effective investigation is an *acquired* skill. People who conduct investigations with skill know how to ask questions; they know how to extract information from people who are reluctant to communicate. Sorting relevant from irrelevant details and being comfortable making credibility resolutions are also skills that can be developed. People who conduct investigations with skill rest secure in the knowledge that the people involved were treated objectively and fairly, i.e., the way the person conducting the investigation would want to be treated in the same situation.

SUMMARY CHECKLIST

I. YOUR INITIAL MEETING WITH THE EMPLOYEE RAISING THE ISSUE

A. Be sure the person raising the issue is comfortable with your handling any investigation.

B. When conducting your initial interview, get the facts - WHO, WHAT, WHEN. WHERE, HOW and WHY.

II. DETERMINING IF AN INTERNAL INVESTIGATION IS NEEDED

A. Will a single answer resolve the issue?

B. Are other employees involved?

C. Do you need more facts than the employee is able to provide?

D. Do you need the help of any other resource in order to reach a conclusion?

III. DETERMINING THE NATURE OF AN ISSUE BEFORE INITIATING AN INFORMAL INVESTIGATION

A. Identify what the employee is complaining about (e.g., which company policy, guideline or procedure).

B. Determine what the company's obligation is with respect to resolving the issue.

C. Decide who else is necessary to assist you in resolving the issue.

IV. PLANNING THE INVESTIGATION

A. Determine what policies, guidelines or practices apply to this situation.

B. Obtain all relevant documents that will assist you in conducting your investigation.

C. Determine who is suited to conduct this investigation.

D. Decide who you should interview.

E. Decide the order of your interviewees.

F. Determine if any interim actions are necessary before you initiate the investigation.

G. Outline the questions you will ask.

V. CONDUCTING THE ACTUAL INVESTIGATION

A. Anticipate the questions that each of your interviewees will ask.

B. Before you begin the interview, be prepared to explain what you are investigating, why the interviewee is being interviewed and how the information obtained will be used.

C. Remember to stress that no conclusion has yet been reached.

D. Be sure to emphasize your company's policy regarding confidentiality and reprisal.

VI. CONDUCTING AN EFFECTIVE INTERVIEW

A. Give the person who is the focus of the investigation a detailed account of the claim.

B. Obtain the interviewee's detailed account of the events surrounding the claim.

C. Get as much information as possible from the interviewee.

1. Understand what policy or guideline forms the basis of the issue.

2. Understand what facts are necessary to reach a conclusion.

D. Effective techniques for asking questions.

1. Draft a preliminary list of questions you want to ask.

2. Save unfriendly or embarrassing questions until the end of the interview.

3. Don't begin with hostile or tough questions.

4. Start with "broad" questions.

5. Do not put words into the interviewee's mouth.

6. Ask the tough questions

7. Go beyond your pre-planned questions.

8. Ask questions designed to elicit relevant facts.

9. Ask *who, what, when, where, why,* and *how* type questions.

VII. BEFORE CLOSING THE INTERVIEW

A. Relate the seriousness of the investigation

B. Remind the interviewee of the confidentiality of the investigation.

C. Ask if there is anyone else you should talk to.

D. Review the interviewee's answers with the interviewee.

E. Encourage the interviewee to come back with any additional information and/or documents.

VIII. ASSESSING CREDIBILITY

A. Make notes that will help assess credibility as soon as the interviewee leaves.

B. Review the interviewee's chronology of events.

C. Note the interviewee's demeanor.

D. What, if any, admissions were made during the interview?

E. Did the interviewee deny anything

F. Were there conflicting statements made?

G. Was the interviewee's explanation plausible?

IX. MAKING A RECOMMENDATION AFTER COMPLETING YOUR ANALYSIS

A. Were any of the company's policies, guidelines or practices violated?

B. Is the violation serious or minor?

C. Do any local, state, or federal laws require you to take certain actions?

D. What is the employee's history at your company regarding length of employment, prior complaints and/or problems, performance, etc.?

E. What, if any, factors would mitigate against instituting discipline in this case?

F. Follow-up as appropriate.

X. COMPLYING WITH THE COMPANY'S POLICIES REGARDING DOCUMENTATION

A. Review the documentation guidelines to be sure you have documented your investigation properly.

B. Distribute your findings and conclusions to appropriate people pursuant to your company's guidelines.

C. Be sure that the "personnel files" of the employee raising the issue and the employee who was the focus of the issue are appropriately documented.

XI. UTILIZING AND CONSULTING WITH COUNSEL

A. Should in-house counsel be consulted?

B. Will in-house counsel's role be as counselor or active investigator?

C. Should outside counsel be consulted?

D. Make a decision on attorney-client privilege and work product privilege.

V. WAGE & HOUR LAWS

IN GENERAL

- Governed by federal, state, and local laws, regulations, and/or wage orders.
- When a conflict exists, the law providing the higher standard (most generous for employee) applies.
- May be regulated by industry (e.g., agriculture, manufacturer, retail, restaurant, hospital, etc.).
- Additional requirements for government contractors and subcontractors.
- Applies to "employees" and not independent contractors.

FEDERAL LAWS

The Fair Labor Standards Act of 1938, as amended ("FLSA") (29 U.S.C. 201 *et seq.*)
Regulations: 29 CFR Part 5

Addresses minimum wage, overtime pay, and child labor standards. Administered by the U.S. Department of Labor's Wage and Hour Division. Generally, applies to businesses in interstate commerce with at least $500,000 annual dollar volume (some businesses have no minimum dollar volume, such as hospitals and schools). If business does not meet annual dollar volume test, employees are still covered in any workweek in which they are individually engaged in interstate commerce, or the production of goods for interstate commerce, or an activity closely related and directly essential to production of such goods.

The Davis-Bacon Act (40 U.S.C. §276a) Regulations: 29 C.F.R. Parts 1, 3, 5, 6, and 7

Regulates minimum wages. Contracts over $2,000 with the federal government involving employment of mechanics and/or laborers must require that the minimum wage to be paid will be the prevailing rate for similar projects in the area. Prevailing rate determined by the Department of Labor.

The Contract Work Hours and Safety Standards Act ("SWHSSA") (40 U.S.C. §§327 *et seq.*) Regulations: 29 CFR Part 5

Regulates overtime. Administered by the Wage & Hour Division of the Employment Standards Administration. Applies to contracts in excess of $100,000 involving laborers or mechanics on a public work of the federal government or where the federal government is a party, to contracts made for or on behalf of the federal government, or to contracts for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the federal government. Requires that employees be paid one and one-half times their basic rate of pay for all hours in excess of 40 hours worked on the covered contract during the workweek.

The McNamara-O'Hara Service Contract Act (40 U.S.C. §§351 *et seq.*) Regulations: 29 CFR Parts 4,6, and 8

Regulates minimum wages. Administered by the Wage and Hour Division of the Employment Standards Administration. Applies to contracts with the federal government over $2,500 for

services in the U.S. through the use of "service employees" (excluding bona fide executive, administrative, or professional exempt employees). Requires contractors and subcontractors to pay service employees no less than the wage rates and fringe benefits prevailing in the locale or the rates included in collective bargaining agreements.

The Walsh-Healey Public Contracts Act (41 U.S.C. §§35 *et seq.*) Regulations: 41 CFR Parts 50-201, 202, and 206

Regulates minimum wages. Administered by the Wage and Hour Division of the Employment Standards Administration. Applies to contracts with the federal government or an instrumentality of the U.S. for *manufacture or furnishing materials, supplies, articles, and equipments* in excess of $10,000. Requires that all persons employed for these purposes be paid no less than the prevailing minimum wages for persons on similar work or in similar industries in the locales in which the materials, supplies, articles, or equipment is manufactured or furnished.

The Migrant and Seasonal Agricultural Worker Protection Act ("MSPA") (29 U.S.C. §1801 *et seq.*) Regulations: 29 CFR Parts 500, 501

Regulates treatment of migrant and seasonal agricultural workers by covered farm labor contractors, agricultural employees and agricultural associations. Administered by the Wage and Hour Division of the Employment Standards Administration.

The "Anti-Kickback" Provision of the Copeland Act (18 U.S.C. §874) Regulations: 48 CFR Part 22 (§22.403-2)

Regulates contractors and subcontractors performing under federal funded or assisted contracts (except for assistance by federal loan guarantees). Administrated by the Wage and Hour Division of the Employment Standards Administration. Prohibits contractors and subcontractors from inducing employees to give up any of the compensation to which they are entitled.

Wage Garnishment Law, Consumer Credit Protection Act's Title 3 ("CCPA")(41 U.S.C. §1671) Regulations: 29 CFR Part 870

Protects from discharge employees whose wages have been garnished for any one debt and limits the amount of wages that can be garnished in any one week. Defines wages for this purpose.

See www.dol.gov/esa/welcome.htm .

STATE AND LOCAL LAWS

States, and some cities and counties, address differently those areas also covered under federal laws or they cover areas that are not addressed by federal law at all. Many states have statutes, regulations and/or wage orders and interpretive letters, as well as case law construing these areas. An initial starting list can be found on the federal Department of Labor website at www.dol.gov/esa/programs/whd/state/state.htm . Also, available is a listing of state labor office contacts at www.dol.gov/esa/contacts/state_of.htm . For a list of the "Dollar Threshold Amounts for Contracts Coverage Under State Prevailing Wage Laws," *see* www.dol.gov/esa/programs/whd/state/dollar.htm . *See,* Simmons, Richard J., Wage and Hour Manual For California Employers, (Castle Publications, www.castlepublications .com).

MINIMUM WAGE

For a listing of state minimum wages, *see* www.dol.gov/esa/minwage/america.htm . Federal minimum wage is currently $5.15. State minimum wages range up to $7.15 an hour (Alaska). There may be some exceptions for minors, training programs, tipped employees, etc. The minimum hourly wage rate is also relevant for purposes of some exceptions to the payment of an overtime premium rate (e.g., computer worker exception).

CLASSIFICATION OF EMPLOYEES AS EXEMPT OR NON-EXEMPT

A presumption exists that employees are "non-exempt" and must be paid an overtime premium for all hours of overtime worked. If the employee is classified as "exempt," the employer bears the burden of proving that the exemption applies, and therefore, no overtime premium pay liability exists. Misclassification of employees as exempt has been the focus of numerous federal and state actions, including recent significant multi-million dollar class action activity. *See* Michael F.Cunningham and Thomas R. Simmons, "Exempt or Non-Exempt: A Practical Guide for Avoiding Common Pitfalls under the FLSA," *ACCA Docket* 21, no. 3 (March 2003): 42-59.

NON-EXEMPT EMPLOYEES

Overtime premium rate requirement. Federal law requires that non-exempt employees who work more than 40 hours in the workweek must be paid overtime at a rate of 1.5 times the "regular rate of pay." Federal law does not place limits on the number of hours or number of days an employee may work in the workweek, except in the case of minors. Many states follow the federal rule, but a few states, like Alaska, California, and Nevada, require that the overtime premium rate be paid for work over 8 hours in a day and 40 hours in a week (in California, whichever results in the highest number of overtime hours in that week). (Note, California also requires that work over 12 hours in a day must be paid at 2 times the regular rate and 1.5 times for the first 8 hours on the 7th day worked with 2 times for hours worked over 8 on the 7th day. *See* www.dir.ca.gov/iwc/WageOrderIndustries.htm . *See also* "Fact Sheet #23 – Overtime Pay Requirements of the FLSA" available at www.dol.gov/esa/regs/compliance/whd/whdfs23.htm; "Premium Pay After Designated Hours" listed by state available at www.dol.gov/esa/minwage/america.htm .

"Hours worked". Part of the calculation of compensation due (including regular and overtime pay), includes a determination of "hours worked." The FLSA does not contain a definition of "hours worked" except for clothes changing and wash up time (29 CFR §785.6). In general, the employee is entitled to be compensated for all time he or she is "suffered or permitted" to work. Even if the employee is not authorized to work overtime, "off the clock," or off the employer's premises, the employee must be compensated for the work if the employer knows or has reason to believe that the employee is working. Vacation, sick, holiday or other types of pay for hours not actually worked are not required to be counted as "hours worked," unless the employer establishes their inclusion by policy or practice. (29 CFR §778.102). Certain states also define "hours worked." For example, California's Industrial Welfare Commission ("IWC") Wage Orders define the term as the time under control of the employer and includes all the time the employee is suffered or permitted to work whether or not required to do so. Due to the

potential for differences between federal and state definitions, careful analysis is required to determine which definition applies. *See* Morillion v. Royal Packing Co., 22 Cal. 4th 575 (2000)(wherein the California Supreme Court determined that employees required to travel on employer-provided buses in order to report at a particular site were "subject to the control" of the employer, even though they were not "suffered or permitted" to work while on the bus); Nero v. The Hospital Authority of Wilkes County, 86 F.Supp.2d 1214 (S.D. Ga. 1998)(finding that employer was not liable where employee failed to show that employer knew or should have known of the overtime work performed at home); Davis v. Food Lion, 792 F.2d 1274 (4th Cir. 1986)(finding that employer must have actual or constructive knowledge of the overtime work being performed); and Alvarez v. IBP Inc. (9th Cir., August 5, 2003)(finding that time spent changing into and out of protective gear constitutes "hours worked" under the FLSA).

Standby and Waiting Time. The FLSA does not state whether hours spent on-call, standby or waiting are "hours worked." The determination depends on whether the time was spent primarily for the employer's benefit. In general, time spent by the employee who has reported to work but must spend time waiting (such as waiting for repairs on down machinery) is generally counted as "hours worked." Time spent by the employee who has no duties for a long enough time to use the time for her own purposes is generally not counted as "hours worked." Whether this time is truly off-duty is generally determined on the particular facts and circumstances. *See* 29 CFR §785.15; §785.16(a) and (b.)

On-Call ("Standby") Time. If the employee must remain available to be called in to work while off-duty, the determination of whether this time is considered "hours worked" will generally depend on how "tethered" (controlled or uncontrolled) the employee is to the proximity of the work location and the time within which the employee must report such that he cannot use the time for his own purposes. If the employee only has to leave word where he can be reached is generally not working on-call. *See* 29 CFR 785.17; Owens v. Local No. 169, 971 F.2d 347 (9th Cir. 1992); Dinges v. Sacred Heart of Mary's Hospitals, Inc. 164 F.3d 1056 (7th Cir. 1999); Madera Police Officers Ass'n v. City of Madera, 36 Cal.3d 403, 204 Cal Rptr. 422 (1984); Brewer v. Patel, 20 Cal.App.4th 1017, 25 Cal.Rptr.2d 65 (1993

Travel Time. Generally, under the federal Portal-to-Portal Act of 1947 (29 U.S.C. §254), normal travel time at the beginning or end of the workday does not need to be compensated as hours worked. Time traveling a distance to a customer for an emergency after the regular workday is an exception. Special assignments for one-day travel to another city for an employee whose regular work is at a fixed location is considered "hours worked" from the point of departure or arrival (e.g.,depot, airport). If traveling is part of the employee's regular work, it is counted as "hours worked." Federal and state laws may differ in this area. *See* 29); 29 CFR §§785.34, 785.36, 785.39-.41, 790.3-.12; Steiner v. Mitchell, 350 U.S. 247, 76 S. Ct. 330 (1956); Imada v. City of Hercules, 138 F.3d 1294 (9th Cir. 1998); Kavanagh v. Grand Union Co., 192 F.3d269 (2d Cir. 1999)

Training, Lectures and Meetings. Time spend attending training programs, lectures and meetings are counted as "hours worked" unless *all* of certain criteria are met. To be excluded from "hours worked": (1) attendance must be outside the employee's regular working hours; (2) the attendance must be in fact voluntary; (3) the training program, lecture or meeting must not directly relate to the employee's job; and (4) the employee does not perform any productive

work while attending such events. Training will be considered directly related to the job if it is designed to make the employee more effective or efficient at the current job versus training for another job or for a new or additional skill. If the employee attends an independent school of his or her own initiative after hours, even if related to the current job, the time will not be considered "hours worked." *See* 29 CFR §§785.27-785.31; Price v. Tampa Electric Co., 806 F.2d1551 (11th Cir. 1987).

Show-Up Pay. The FLSA does not require payment for the employee reporting to work who is not then put to work. However, some states do require that an employee reporting to work on a scheduled workday who is not put to work or who is put to work for less than half of his or her usual or scheduled day's work, must be paid for some period of time (*i.e*., in California, two hours at the regular rate of pay or, if greater, half his usual or scheduled day's work up to four hours). Generally, however, only the hours actually worked are counted as "hours worked" for overtime purposes.

Meal Periods. Under federal law short periods of twenty minutes or less are "hours worked." If the employee is relieved of his or her duties during a bona fide meal period, the meal period time is not considered "hours worked." The standard applied is usually whether the employee's time is spent predominantly for the employer's benefit, if the employee stays on the premises, and whether he or she is free to use the time effectively for his or her own purposes. State laws may require specific lengths of time for meal breaks, may require that the employee be relieved of all duties during meal periods, and may require that the employee be allowed to leave the premises in order to not be counted as "hours worked." This area has been the subject of recent class action activity. For a list containing the "Minimum Length of Meal Period Requirements under State Law for Adult Employees in the Private Sector," *see* www.dol.gov/esa/programs/whd/state/meal.htm.

Rest Periods. There is no requirement under the FLSA to provide rest periods. However, state requirements may exist. If required by law, negotiated, or voluntarily established by the employer as paid breaks, the time spent on a rest break generally must be counted as "hours worked." This has been an area of recent class action activity. *See* 29 CFR §785.19; Section 12 of all California Wage Orders; for a list containing the "Minimum Paid Rest Period Requirements by State for Adults in the Private Sector," *see* www.dol.gov/esa/programs/whd/state/rest.htm .

"The Regular Rate of Pay". The regular rate cannot be less than the applicable minimum wage. Under federal law (and generally state law), the regular rate of pay includes all remuneration paid to or on behalf of the non-exempt employee. This includes, for example, regular hourly earnings, piecework, bonuses, commissions, and value of meals and lodging. Federal law and state law may differ on how the regular rate of pay is determined. The regular rate of pay for employees who receive no other form of compensation is the hourly rate. Although non-exempt employees may be paid a salary, for overtime purposes the regular rate is always expressed as an hourly rate, the calculation of which may vary under state law. Salary paid non-exempt employees may also have a fluctuating workweek, again requiring special attention. If other components of pay are received, such as a bonus, the total compensation (e.g., hourly rate plus bonus) is divided by hours worked in the workweek to arrive at the regular rate of pay for overtime purposes. *See* 29 CFR §778.110, §778.113 and applicable state

requirements. Bonuses are classified as discretionary or non-discretionary. Generally, nondiscretionary bonuses must be included in the regular rate of pay for purposes of overtime. Careful attention must be paid to the computation of the regular rate if the bonus calculation is deferred over a period longer than a workweek. See 29 CFR §778.209-.211.

Gifts, profit-sharing plans, prizes, etc. are also remuneration components to be addressed in the calculation of the regular rate of pay for overtime purposes. *See* 29 CFR §778.212-.213; 29 CFR §547.0-.3; §549.0-4; 29 CFR §778.331; .333. Also addressed are rules for employees who have two or more different rates of pay (29 CFR §778.115; §778.419). . *See* 29 CFR §778.114; Rainey v. American Forest & Paper Ass'n, 26 F. Supp. 2d 82,101 (DDC 1998); Samson v. Apollo Resources, Inc., 242 F.3d 629, 633-34 (5th Cir.); Griffin v.Wake County, 142 F.3d 712, 716 (4th Cir. 1998).

"Workweek". Federal law allows employees whose duties necessitate irregular hours or work to enter into agreements wherein they may be employed beyond the maximum 40-hour workweek under certain conditions (commonly called "Belo Contracts"). *See* 29 U.S.C. §207(f); 29 U.S.C. §206(a); 29 CFR §§778.402-.414; Walling v. A.H. Belo Corp., 316 U.S. 6224 (1942); Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345 (10th Cir. 1986). California adopted an "Alternative Workweek Schedule" under the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999" allowing workers to agree to an "alternative workweek schedule" to work no longer than 10 hours per day within a 40 hour workweek if certain conditions exist and specified procedures are followed (thus avoiding overtime payments in excess of 8 hours normally required in California). *See* California Labor Code 511; California I.W.C. Wage Orders at www.dir.ca.gov/iwc/WageOrderIndustries.htm .

EXEMPT EMPLOYEES

The three primary exempt classifications under both federal and state law are known as (1) Executive; (2) Administrative; and (3) Professional (collectively generally referred to as "White Collar Exemptions"). Also, there are special rules relating to outside salespersons, commissioned sales employees, and computer programmers and analysts. Federal and state (such as California) laws may define these classifications differently. In general, however, the determination of proper classification is based on the individual facts of each person's job duties and the amount of compensation paid. If the salary and duties tests are met, then overtime is not required to be paid to these exempt employees. The U.S. Department of Labor published on March 31, 2003 proposed revisions to the White Collar Exemptions, including raising the dollar thresholds (last raised in 1975), streamlining the duties tests and creating a new exemption for highly compensated employees (68 FR 15559-15597). As of this printing, these changes are still in proposed status. If adopted, several changes to the following information will occur.

Salary Amount. Employees eligible for executive and administrative exemptions must receive a salary guaranteed to be at least $155 per week. Professionals must receive a salary guaranteed to be at least $170 per week. This salary triggers an analysis of job duties under the "long test." If these employees earn a salary in excess of $250 per week, the more lenient "short test" of job duties is permitted. *See* 29 CFR §§541.1(f), 541.2(e)(2), 541.3(e).

Salary Basis. The "salary basis" test requires that the exempt employees receive a predetermined amount of compensation that is not subject to reduction due to variations in the quality or quantity of work performed. There is also a "fee basis" test. The requirement does

not apply to certain professionals such as lawyers, physicians and teachers. Nor does it apply to certain computer professionals paid at least $27.63 per hour for every hour worked (Note, the required amount is currently $43.58 per hour for computer professionals in California, subject to change). The salary basis test has frequently served as the basis to challenge the exempt classification if any potential or real salary deductions are made from the employee's salary (unless permitted by regulation) or if the employee receive additional compensation above the regular salary. Generally, additional salary does not destroy the exemption. *See* 29 CFR §541.312, .313; §541.118(a), (b); 29 CFR §541.314; 29 CFR §213(a)(17).

Primary Duties. Federal law requires that an exempt employee perform duties that are *primarily* executive, administrative of professional, even if the majority of time is not spent in performing such duties, placing emphasis on the character of the employee's job as a whole. Frequently, however, the percentage of time devoted to "non-exempt" duties may become relevant in the analysis of the applicability of the exempt status. (Note also that California requires that exempt duties comprise more than one-half of the employee's time).

"Executive" Duties. Under the federal "*short test*" (compensation of at least $250 per week) for the executive exemption, the following requirements must be met: (1) the primary duty must consist of the management of the enterprise or of a customarily recognized department or subdivision, and (2) the employee must customarily and regularly direct the work of two or more other employees. Under the "*long test*" (compensation of less than $250 per week), an additional three requirements must be met: (3) the employee must have the authority to hire or fire, or make suggestions or recommendations as to the hiring or firing and as to the advancement and promotion or other changes of status of employees which is given particular weight; (4) the employee customarily and regularly exercises discretionary powers; and (5) the employee must not devote more than 20% (or 40% for retail or service establishment) of hours worked in the workweek to activities not directly related to the above described work. *See* 29 CFR §541.101-.119.

"Administrative" Duties. Under the federal "*short test*" (compensation of at least $250 per week) for the administrative exemption, the following requirements must be met: (1) duties involve either (a) performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers, or (b) performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof; in work directly related to the academic instruction or training carried on therein; and (2) the employee customarily and regularly exercises discretion and independent judgment. Under the "*long test"*(compensation of less than $250 per week), these additional requirements must be met: (3) the employee earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment; (4) the employee regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or, performs under only general supervision along specialized or technical lines requiring special training, experience, or knowledge; or, executes under only general supervision special assignments and tasks. Because the work must be directly related to management policies or general business operations of the employee or employees customers, "production" (or "sales" in retail or service establishments) are characterized as non-exempt duties. *See* 29 CFR §§541.201-.215; Webster v. Public School Employees of Washington, Inc., 247 F.3d 910 (9th Cir. 2001); Bell v. Farmers Ins. Exchange, 87 Cal. App. 4th 805 (2001); Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) (administering the business affairs of the enterprise" vs. "the primary duty of producing the commodity or commodities, whether goods or services, that the enterprise exists to produce or market.")

"Professional" Duties. Under the federal "short test" (compensation of at least $250 per week) for the professional exemption, the following duties are required: (1) work requiring knowledge of an advanced type in a field of science or learning acquired by a prolonged course of specialized intellectual instruction and study; or work that is original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on the invention, imagination or talent of the employee; or teaching tutoring, instructing, or lecturing in the activity of imparting knowledge and who is engaged in this activity as a teacher in a school system or educational establishment or institution; or work that requires theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and (2) work that requires the consistent exercise of discretion and judgment in its performance. Under the "*long test*" (compensation of less than $250 per week) for the professional exemption, the following additional requirements must be met: (3) the work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and (4) the employee devotes no more than 20% of the hours worked in the workweek to activities that are not an essential part of and necessarily incidental to the work described above. *See* 29 CFR §541.300-.315; for computer professionals, *see* 29 CFR §541.303.

"Discretion and Independent Judgment." Since all three of the above exemptions require the standard of discretion and independent judgment, a special comment is necessary. This is one of the most difficult standards to establish. 29 CFR §541.207(a)-(c) points out that the term is applied in light of all the facts involved and is frequently misapplied to employees making decisions "relating to matters of little consequence" and is confused with the "use of skill in applying techniques, procedures, or specific standards." The use of discretion and independent judgment involves "the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." The implication is that "the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance."

Outside Salesperson. Under the FLSA, the following duties are required to qualify under the outside salesperson exemption: (1) the employee is employed for the purpose of, and is, customarily and regularly engaged away from the employer's place(s) of business; (2) makes sales or obtains orders or contracts for services or for the use of facilities for which the customer pays consideration; and (3) whose hours of other work (not including work incidental to and in conjunction with the employee's own outside sales or solicitations) do not constitute more than 20% of hours worked in the workweek. *See* 29 CFR §541.500-.508.

Commissioned Employees. Under the FLSA, this exemption applies to employees of retail or service establishments if: (1) the regular rate of pay for the employee exceeds 1.5 times the minimum wage; and (2) no more than half of this compensation for a representative period represents commissions on goods or services. *See* 9 U.S.C. §207(i).

Deductions for Full and Partial Day Absences. The general rule to meet the salary basis requirement for an exempt employee is that an employee must be paid his or her weekly salary for any week in which any work is performed. *See* 29 CFR §541.118(a). To preserve exempt status, employers need to assure receipt of a constant salary and may only pay less under certain circumstances. Under the FLSA, private employers may not make deductions for absences of less than a day. *See* 29 CFR §541.118. In several opinion letters, the Department

of Labor has stated that if an employer has bona fide benefit plans (such as sick leave or vacation leave), the employer may substitute or reduce the accrued leave under the plans for the time the employee is absent, even for less than a full day, "without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his or her guaranteed salary." The Family and Medical Leave Act ("FMLA") allows exempt employees to be granted unpaid leave without affecting their exempt status and the employer may take deductions for any hours taken as intermittent or reduced leave (but *only* if it qualifies as FMLA leave). *See* FMLA §102(c); 29 CFR §§825.206 and 825.207(a). As a precaution, state laws and opinions also should be consulted before any deduction is taken from an exempt employee's salary.

Deductions for other time off. The converse of the general rule stated above is also true. That is, employees need not be paid for any workweek in which they perform no work. Deductions may not be made for any portion of a workweek due to the employee's service on a jury, attendance as a witness, or temporary military leave. Deductions for disciplinary time off due to infractions of safety rules of major significance are allowed, but this exception may only be applied for safety rules to prevent serious danger to other employees or the employer's premises (this determination has been the subject of many lawsuits, so should be approached cautiously). *See* 29 CFR §541.118(a); Auer v. Robbins, 117 S.Ct. 905 (1997); Hacket v. Lane County, 91 F.3d 1289 (9th Cir.1996); Wage-Hour Opinion Letters Nos. 1614 and 1725.

Miscellaneous.

- Payday frequency is also the subject of regulation. *See* a "Table of State Payday Requirements" at www.dol.gov/esa/programs/whd/state/payday.htm.
- Vacation and paid time off may be considered wages earned under state laws, which will require payout of all such time accrued at the time of termination. Many states do not allow a "use it or lose it" policy since it is "accrued" as wages.
- If an employee performs some duties of one exempt status category (e.g., executive, administrative, professional, outside salesperson) and some duties of another, the employer may combine more than one exemption to determine if the individual is exempt from overtime rules. However, the employee must meet the stricter of the tests of any exemptions combined (e.g., the employee who performs both administrative work and outside sales work must meet the salary requirements of the administrative exemption because there is no salary requirement for outside salespersons).
- Trainees for an executive, administrative, professional or outside salesperson position are not exempt from minimum wage and overtime rules if they are not actually performing the kinds of duties required under each exempt category.
- Sometimes, a person may have an employment relationship with more than one employer at the same time. Joint employer status exists when both employers exercise control over significant personnel matters, such as hiring, firing and discipline. If a joint employer relationship exists, both employers must comply with wage and hour laws and the hours worked for both employers are aggregated to determine any overtime applicability. On a related topic, *see* the Equal Employment Opportunity Enforcement Guidance No. 915.002, *Application of EEO Laws to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms* (December 3, 1997).

INDEPENDENT CONTRACTORS

In conclusion, no discussion of wage and hour law coverage is complete without the understanding that the FLSA and state wage and hour laws apply only when there is an actual employer-employee relationship. If an independent contractor relationship exists, wage and hour rules do not apply to the individual who is the independent contractor and no overtime compensation is required. Proper classification as an independent contractor not only avoids minimum wage and overtime liabilities, but also avoids liability for payment of employment taxes and income tax amounts that should have been withheld (plus interest and penalties), and possible criminal sanctions for willful tax evasion. Drawbacks to the independent contractor relationship do exist, such as the relinquishment of certain types of control. Also, because the contractor is not considered an "employee," workers compensation laws and benefits do not cover injuries to the contractor. Thus, independent contractors injured due to the negligence or fault of the client may be able to sue for tort damages.

No "bright line" test exists to determine if the individual is an independent contractor. However, the "right to control" is a fundamental test. It looks at the company's ("employer's") *right* to control the manner and method used by the individual to perform his or her services, as well as actual control. In addition, the determination criteria may vary depending on the statute or other setting for the review of the relationship. Thus, an individual may be classified as an "employee" for purposes of one statute, but not for purposes of another.

Generally, there are four ways to examine the relationship: (1) the "common law" rules of agency (found in the Restatement of the Law (Second) of Agency Section 220); (2) the common law rules "plus" consideration of the particular statute's purpose; (3) the definition of "employee" used in the particular statute in question; and (4) an "economic realities test" applied by some courts when the common law test is not required by the applicable statute. For instance, under the economic realities test to determine application of the FLSA, the individual's economic dependence on the company is analyzed ("employees" are economically dependent on the company).

In an extension of the common law rules of agency found in the Restatement, the Internal Revenue Service ("IRS") has provided a list of twenty common law factors it considers in reviewing the relationship (employment taxes and withholding obligations apply to "employees"). *See* Morrison v. International Programs Consortium, Inc., 253 F.3d 5 (DC Cir. 2001); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); Barnhart v. New York Life Ins. Co., 141 F.3d 1310 (9th Cir. 1998); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947); S.G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341 (1989); Vizcaino v. Microsoft Corp., 97 F3d 1187 (9th Cir. 1996); Vizcaino v. United States District Court, 173 F.3d 713 (9th Cir. 1999). *See also,* "Employer's Supplemental Tax Guide," Internal Revenue Publication 15-A; Valerie R. Park and Robert D. Thomas, "Are Your Indpendent Contractors Really Independent Contractors?, Morrison & Foerster LLP Employment Law Commentary, vol. 10, No. 8, October 1998; Helen E. Marmoll, Esq. "Employment Status-Employee v. Independent Contractor," Tax Management Portfolios, No. 391-3rd (the Bureau of National Affairs, Inc.); and *Revenue Ruling 87-41* , excerpts attached as *Appendix A.*

A company can take certain measures to help establish and maintain the status as an independent contractor relationship, such as the following:

- The company should have written agreements with all individuals that it seeks to classify as independent contractors. Specifically identify the relationship as an

"independent contractor relationship." Use language such as "contractor," "consultant" or "agent" to refer to the individual or their independent employer. Use language such as "client" or "customer" to refer to the company using the services. Do not use terms such as "hire," "employer," "employee" or other terms usually associated with an employment relationship.

- Give the contractor authority over day-to-day performance of work. Services should be described in terms of the deliverable to the company (the company may reserve the right to insist upon satisfactory results). Managers should be advised to focus on the results, not the way in which the result is obtained. The contractor should be in control of the number of hours needed to complete the project and should only be accountable if they fail to deliver on time. The contractor should determine where the work shall be done (if done on the company's premises, the contractor should be treated as a "business invitee" consistent with visitor policies of the company). If attendance at particular times for a meeting is required, the contractor should be "invited."
- The company may restrict the contractor from working for a direct competitor, but otherwise limiting the arrangement to an exclusive agency, particularly on a long-term basis, should be avoided unless necessary.
- The contractor should decide what equipment and instrumentalities it needs to perform the work and should maintain it at his or her cost (the more the contractor has capital costs to do business, the better).
- Payment terms should be on a project or commission basis, not hourly, daily or monthly, if practicable. Payment on a project basis may be made in periodic installments or professionals may be paid by the hour if this is customarily done. (The client must report the amount paid to the independent contractor on Form 1099 if the amount paid in any year is $600 or more.)
- Expenses should be borne by the contractor, but certain types of expenses (such as travel expenses specifically incurred on the client's behalf) may be specifically addressed in the written agreement.
- The contractor should be able to hire employees or engage subcontractors so long as the contractor is responsible for paying for their services. The contractor should specifically be responsible for providing insurance, retirement, and other benefits. Provisions in the agreement should specify the understanding and agreement that the client does not provide benefits.
- Tax withholding and payment of all taxes pertaining to services should be specifically stated as the contractor's responsibility.
- Termination provisions should allow either party to terminate (either upon notice or without notice in specified situations), setting out each party's rights and obligations in the event of termination.

APPENDIX A

Excerpt from Revenue Ruling 87-41 Listing of the 20 Common Law Factors

"…As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and factual context in which the services are performed. The twenty factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying the twenty factors to assure that formalist aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement (that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual for the individual to be classified as an employee). The twenty factors are described below:

1. **Instructions**. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee ….
2. **Training.** Training a worker by requiring an experienced employee to work with the worker, … by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular manner….
3. **Integration.** Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business….
4. **Services Rendered Personally.** If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results….
5. **Hiring, Supervising, and Paying Assistants.** If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status….
6. **Continuing Relationship.** A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals….
7. **Set Hours of Work.** The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.
8. **Full Time Required.** If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker form doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses….
9. **Doing Work on Employer's Premises.** If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere…Work done off the

premises … indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required….

10. **Order or Sequence Set.** If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services…. It is sufficient to show control, however, if such person or persons retain the right to do so….
11. **Oral or Written Reports.** A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control….
12. **Payment by Hour, Week, Month.** Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by job or on a straight commission generally indicates that the worker is an independent contractor….
13. **Payment of Business and/or Traveling Expenses.** If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. To be able to control expenses, employers generally retain the right to regulate/direct the worker's business activities….
14. **Furnishing of Tools and Materials.** The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship….
15. **Significant Investment.** If the worker invests in facilities used by the worker to perform services and are not typically maintained by employees (such as the maintenance of an office rented at fair market value form an unrelated party), that factor tends to indicate a worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities, and accordingly, the existence of an employer-employee relationship….
16. **Realization of Profit or Loss.** A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee…. The risk that a worker will not receive payment for his or her services, however, is common to both contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.
17. **Working for More Than One Firm at a Time.** If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor… However, a worker who performs for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.
18. **Making Service Available to General Public.** The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship…
19. **Right to Discharge.** The right to discharge a worker is a factor indicating the worker is an employee and the one with the right is an employer. An employer exercises control

through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications….

20. **Right to Terminate.** If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship….

VI. LABOR LAW

Many people confuse the terms "labor law" and "employment law." **Traditional labor laws** generally govern the relationship between unions, employees and employers by, among other things, granting employees the right to engage in certain activities, such as organizing themselves to collectively bargain with their employer. **Employment laws** generally cover most all *other* (non-union) aspects of the employer-employee relationship. Since many people inadvertently use these terms interchangeably, it is sometimes difficult to ascertain the type of employer-employee relationship at issue. To be clear -- this article will discuss traditional labor law, except where specifically noted otherwise.

OVERVIEW

In the late 1800's and early 1900's workers in various craft industries (such as coal mining) organized and formed unions. The initial relationship between unions and employers was unregulated. However, in 1935, the United States Congress enacted the **National Labor Relations Act ("NLRA"** or **the "Wagner Act"),** 29 U.S.C. §§ 151–169**,** to establish a comprehensive regulation of the employer, employee and union relationship. The goal of this seminal labor statute was to equalize the bargaining power between employers and employees.

In 1947, the NLRA was amended by the Labor Management Relations Act (also known as the **"Taft-Hartley Act"**), 29 U.S.C. §§ 141–197. The Taft-Hartley Act, among other things, provided that: (1) unions and employers must service notice on the other party and on a government mediation service before terminating a collective bargaining agreement (discussed below); and (2) the government was empowered to obtain an 80-day injunction against any strike that it deemed a peril to national health or safety.

The NLRA was again amended in 1959 by the Labor Management Reporting and Disclosure Act (also known as the **"Landrum-Griffen Act"**). 29 U.S.C. § 401 et seq. The Landrum-Griffin Act deals with the relationship between a union and its members. It protects union funds and promotes union democracy by: (1) requiring labor organizations to file annual financial reports; (2) requiring union officials, employers, and labor consultants to file reports regarding certain labor relations practices; and (3) establishing standards for the election of union officers.

Congress also established the **National Labor Relations Board ("NLRB"** or **"Board")** to administer and enforce the statutory provisions of the NLRA. Specifically, the Board enforces the NLRA's prohibitions against certain conduct of employers and unions that Congress designated as **"unfair labor practices."**

The Board consists of five (5) members that are appointed by the President of the United States, with the advice and consent of the Senate. The President designates one (1) member to serve as the Board's Chair. The President may remove any member of the Board after notice and a hearing, but only for that member's neglect of his/her duties or malfeasance in office.

The Board has delegated many of its duties to approximately 50 regional field offices located throughout the United States. Employees at the regional offices investigate and prosecute unfair labor practice cases and conduct elections. The Board then decides cases and resolves election disputes that come to it from the regional offices.

The Board conducts investigations of unfair labor practices allegations and holds hearings to determine if a violation of law has occurred. If the Board finds the claim lacks merit, the claim

will be dismissed. Dismissals may be appealed to the Board in Washington, D.C. However, if the Board determines that there is reasonable cause to believe a violation of the law has occurred, the Board will seek a voluntary settlement to resolve the problems, or issue a formal complaint before the case proceeds to a hearing before a NLRB Administrative Law Judge. The Judge can issue written opinions to order an employer or a union to, among other things, reinstate an employee, pay back wages, or cease and desist in certain conduct found to be an unfair labor practice. These opinions may be appealed to the Board in Washington, D.C., and the Board's decision may be reviewed by the United States Court of Appeals.

Another obligation of the Board is to be responsible for all facets of the elections in which employees vote for or against union representation. These duties include everything from accepting **an election petition** (supported by a sufficient showing of employees' interested in the election) to determining whether election results should be overturned due to improper conduct by the employer, the union, the Board or a third party.

EMPLOYEES' RIGHTS

The rights of employees are mainly addressed in Section 7 of the NLRA, which provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to *engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." [Emphasis added.]

The NLRA only guarantees employees -- not "supervisors" or other management personnel -- the right to form and join unions and, when they so desire, have unions represent them in discussions with management.

As noted above, Section 7 gives employees the right to engage in **"concerted activities,"** even when there is no union activity and the employees are not planning to engage in collective bargaining with their employer. "Concerted activity" is any activity in which employees unite to pursue a common goal, such as bringing their complaints to management personnel, when the activity is being done with (or on behalf of) other employees – not simply for the benefit of one person.

Concerted activity becomes protected under Section 7 when the activity is "for the purpose of collective bargaining or other mutual aid or protection." If an employee is engaged in protected concerted activity, an employer may violate the NLRA if it knows about the protected activity and engages in an adverse employment action (such as a demotion or termination) that was motivated by the protected activity. In other words, employers may not retaliate against employees for participating in protected concerted activities. Section 8 of the NLRA provides that it is "…an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in [Section 7]."

One tricky thing to watch… these provisions can apply in both the union and non-union work environments. Since employees have the right to self-organization, employers must be careful not to violate employees' rights under Section 7 *even if* there is no union presence in the workplace.

EMPLOYER WORKPLACE INVESTIGATIONS

Another area where the Board regulates both union and non-union workplaces is employer investigations. In 1975, the United States Supreme Court rendered an opinion in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), providing that employers must permit employees who are being questioned about workplace incidents (or other matters that may lead to the employee receiving disciplinary action) may have a union representative present during the interview process. The right to have someone present during the interrogation has become known as the "Weingarten Right."

The employee must make a clear request for someone to be present during the interviews, and it is the employee's responsibility to know he/she must make the request. An employee may not be punished for making such a request. If an employer denies the request and continues to ask questions, it will likely be found to have committed an unfair labor practice and the employee may refuse to answer any questions.

On July 10, 2000, the NLRB extended the Weingarten Rights to non-union workplaces in Epilepsy Foundation of Northeast Ohio. Thus, an employee who is not represented by a union may request that a co-worker be present during an investigatory interview that may lead to disciplinary actions. As a result, all employers must be ready to address a situation where it is conducting an investigation into a claim and the employee/witness requests to have another person in the room while being questioned.

HOW DOES A UNION ORGANIZE AT A WORK SITE?

In order to get the Board to conduct an election, unions must identify a group of employees with similar work responsibilities, hours and other working conditions, then get a majority of the group to sign cards authorizing the union to act as the employees' representative. Although the Board only requires unions to obtain authorization cards from 30% of a group, unions often wait until they have 50% of the group's cards.

Union representatives use a wide variety of tactics to reach a workforce. For example, some unions will have a paid union organizer apply for a job and write on the application that the only reason he/she is applying for the job is to organize the company's workforce. If the applicant is a qualified applicant, but not hired, the applicant will file a charge with the NLRB and state that the only reason he/she wasn't hired was because the employer knew the applicant wanted to organize the workforce. If the applicant *is* hired, then the employer has given the union almost unlimited access to its workforce. Another example of a union organizing tactic is to place banner ads in strategic places on the internet and direct individuals to a website with negative information about their employer. These websites will then state that employees can remedy the workplace problems by signing an authorization card and obtaining assistance from the union.

Some union organizers tell employees that the authorization cards only show that the employee desires to have an election on whether or not to have a union represent them when, in fact, the cards actually indicate that the employees want a particular union to represent them.

Union membership and representation cannot be forced on employees without their consent. Employees must vote to accept union representation.

Once a proper election petition is submitted to the Board, it will hold hearings to determine, among other things, whether the Board has jurisdiction over the employer, whether or not there is a union contract

currently covering the employees, and which individuals should be excluded from the voting due to ineligibility. At this hearing, witnesses give testimony under oath and the parties are allowed to examine and cross-examine witnesses, as well as subpoena records. If, based on the evidence, the Board believes it is appropriate to hold an election, the Board will do so. To ensure that employees are able to freely choose whether they want a representative and, if so, which representative they would like, the NLRA established a procedure by which employees may exercise their choice at a secret-ballot election conducted by the Board.

IMPORTANT! During union organizing campaigns, employers are prohibited by law from certain conduct, such as threatening employees with reprisals if they sign a union card, asking any employee if he/she has gone to a union meeting, promising a pay raise if employees vote against the union, or engaging in surveillance of employees' activities. Employers that suspect a union is attempting to organize at its work site should become intimately familiar with the authority outlining what they can and cannot say or do.

COLLECTIVE BARGAINING

After a union is successfully elected to represent employees, the next step consists of negotiations between the employer and the union representatives selected by the employees. These negotiations will cover the terms and conditions of the workers' employment. This process is known as **"collective bargaining."**

Section 8 of the NLRA imposes on employers and unions **the duty to bargain in "good faith"** certain terms and conditions of employment. The standard of "good faith," although defined in Section 8(d), is continually evolving because it is extremely fact specific. Section 8(d) provides:

> "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement,…but such obligation does not compel either party to agree to a proposal or require the making of a concession…"

Despite the fact that neither party is obligated to agree to any particular proposal or provision demanded by the other party, the Courts and the Board often find that the complete refusal to grant *any* concessions is acting in bad faith. The key is to continue negotiating and agree to some concessions.

The NLRA also establishes regulations on what tactics (such as strikes, lock-outs and picketing) each side may use to further its bargaining objectives.

If the negotiations in the collective bargaining process are fruitful and the parties reach an agreement, the parties enter into a written **collective bargaining agreement** that governs the relationship between the parties. State laws further regulate collective bargaining and make collective bargaining agreements enforceable under state law.

However, if the parties have engaged in good faith negotiations for a "reasonable period of time," but determine they have irreconcilable differences and are unwilling to make any more concessions, the parties are said to have reached an **"impasse."** Pursuant to the NLRA, once an impasse is reached, employers are allowed to unilaterally implement their final offer by, among other things, changing the wages, hours and working conditions of its employees.

WHY EMPLOYEES SEEK UNION REPRESENTATION AND WHAT TO DO ABOUT IT

There are a number of reasons employees seek union representation, but most of those reasons stem from a perception that management personnel do not give employees an avenue to voice concerns and ask questions relating to their work, so discontent grows greater and greater.

To successfully keep its workplace union-free, an employer must provide open communication between management and employees, so employees see that management as fair and willing to address problems in the workplace as they arise. Employers should continually remind their employees to bring forward all claims, and develop procedures for dealing with employees' concerns. If employers manage their workforce fairly and address early warning signs as they arise, the employees should have no reason to seek union assistance.

TRENDS

In recent years, union membership has been declining and the percentage of the private sector workforce represented by unions continues to drop. Some of the reasons for this trend are: federal and state (such as those regulating child labor) now protect workers in a number of areas and protect employees from certain types of unfair practices in areas from safety matters to discrimination; and employers are taking more seriously their responsibilities in the workplace and have become more sensitive to the needs of their employees. In an effort to reverse this trend, organized labor has been pushing a number of legislative initiatives that would make it easier for unions to recruit new members and force employers to negotiate everything affecting the workplace.

VII. INTERNET RESOURCES FOR LABOR AND EMPLOYMENT LAW ISSUES

ACCA Virtual Library	www.acca.com/vl	This should be **the first place** you go to get ANY information! The site has sample forms and articles that can *save you a lot of time and money in outside counsel fees*. Why reinvent the wheel?
ABA Section of Labor & Employment Law	www.abanet.org/labor/home.html	Home page.
ADA Resources	http://trace.wisc.edu/resources/disability-resources.shtml	List of resources and other sites relating to disability information, statistics and organizations.
AFL-CIO	www.aflcio.org	Home page. The site has info. for employees, such as what they should do if they have a grievance or want to form a union where they work.
All Law	www.alllaw.com/topics/Employment	This site contains a list of state and federal resources on the Internet, and contains forms with which you can start the drafting process.
American Law Sources Online	http://trace.wisc.edu/resources/disability-resources.shtml	Great resource for various states' laws on a number of subjects from Arbitration to the UCC. Not a lot on employment law specifically, but the site contains links to states' codes for easy reference.
Americans With Disabilities Act ("ADA") Document Center	www.janweb.icdi.wvu.edu/kinder	This site contains the text of various ADA-related statutes, regulations, and various governmental documents.
BenefitsLink™: The National Employee Benefits website	www.benefitslink.com/index.asp	Access to articles, directories and documents relating to benefits, as well as a list of job openings and a directory of benefit providers.
Bureau of Labor Statistics	http://stats.bls.gov	The site has statistics on many topics. The icon for "Employment and Unemployment" information in the upper right-hand corner.
Cornell Law School	www.law.cornell.edu/topics/topic2.html#employment law	The site contains links to primary and secondary resources.
Cornell University Law School	www.law.cornell.edu/topics/employment.html	This site contains a comprehensive collection of legal resources on employment law.

Courts of Appeals (All Circuits)	www.uscourts.gov/allinks.html	Home page. The site has links to all circuit courts on the Internet.
Dept. of Justice's ADA Site	www.usdoj.gov/crt/ada/adahom1.htm	Home page.
Employment Law Information Network	www.elinfonet.com/pickedpol/189	This site contains links to good articles and information from a number of law firms' websites.
Equal Employment Opportunity Commsn. ("EEOC")	www.eeoc.gov	Home page.
Federal Information Center	www.pueblo.gsa.gov/call/workplace.htm	Information and links to sites on wage and hour, unemployment, discrimination, safety, workplace postings and other issues.
Federal Web Locator	www.infoctr.edu/fwl	This site contains links to almost every federal government site on the Internet, plus AAA and others.
FindLaw	www.washlaw.edu/doclaw/emply5m.html	The site has information on labor and employment law, as well as many other areas of the law.
FindLaw's Labor & Employment Pages	www.findlaw.com/01topics/27labor/index.html	Home page containing links to numerous resources on the Internet.
Gil Gordon Associates Telecommuting	www.gilgordon.com	This site contains links to numerous websites relating to telecommuting.
House of Representatives	www.house.gov	Home page.
Law.com	www.law.com/jsp/pc/emplaw.jsp	The site contains good articles, but readers need a subscription to see the full article – the site is affiliated with American Lawyer Media.
'Lectric Law Library	www.lectlaw.com/temp.html	Workplace related materials for employers and employees.
LexisONE	www.lexisone.com	Lexis' website with both free forms and forms that must be purchased.
National Employment Lawyers Association	www.nela.org	This site contains information from the employees' lawyers' perspective. It also contains summaries of recent employment law cases. Members have access to briefs and other employee-rights oriented information.
National Labor Relations Board (NLRB)	www.nlrb.gov	Home page. The site contains links to manuals, notices, rules, regulations, decisions, forms, and labor facts.

National Organization of Social Security Claimants' Reps.	www.nosscr.org	Home page. This site includes case summaries and other information relating to Social Security.
Ninth Circuit Court of Appeals	www.ce9.uscourts.gov/	Home page. The site contains links to the Court's opinions.
Occupational Safety and Health Administration ("OSHA")	www.osha.gov	Home page.
Office of Federal Contract Compliance Programs ("OFCCP")	www.dol.gov/esa/ofcp_org.htm	Department of Labor OFCCP's home page. The site has a lot of useful information, as well as links to statutes, regulations and compliance info.
Office of Worker's Compensation Programs	www.dol.gov/esa/owcp_org.htm	Department of Labor OWCP's home page.
Palidan Internet Resources for Attorneys	www.palidan.com/legal2.htm	The site includes a comprehensive guide to legal research on the Internet.
Social Security Administration	www.ssa.gov	Home page.
The Practicing Attorney's Home Page	www.legalethics.com/intra.law?law=Labor%2F+Employment	This site has a comprehensive list of links to various websites on labor and employment law.
The State Web Locator	www.infoctr.edu/swl	This site includes links to each state's governmental web sites, as well as the state constitution and other records.
U.S. Department of Labor	www.dol.gov	Home page. The site contains links to statutes and regulations, labor data, and other information.
Workforce Management	www.workforce.com/section/03	This site is geared toward Human Resources professionals and contains articles in plain English.
Workplace Network	www.worknetwork.info	This site is also geared toward Human Resources professionals and contains articles in plain English.
Workers' Comp Executive	www.wcexec.com	Website for executives in the workers' comp community in California. Users can search archives of journal articles for free and purchase articles individually or subscribe.

