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## THE EMPLOYEE HANDBOOK: EVERY WORD COUNTS

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## THE EMPLOYEE HANDBOOK: EVERY WORD COUNTS

### I. DRAFTING OR REVISING A PERSONNEL HANDBOOK TODAY.

Many employers utilize personnel handbooks to communicate employee relations policies and benefit plans to employees and supervisors. Such handbooks, among other goals, serve to:

- advise the workforce concerning important policies, regulations, rules and procedures and benefits, from the commencement of the employment relationship to its termination;
- inform employees of the corporation's policies and benefits that are designed to benefit and assist them;
- reinforce and foster the employer's corporate goals and objectives;
- attempt to protect employers from wrongful discharge litigation by including enforceable employment-at-will language and binding alternative dispute resolution procedures;
- encourage consistent treatment of all employees in personnel matters;
- memorialize the corporation's commitment to comply with all applicable federal, state and local laws affecting the employment relationship, including those pertaining to equal employment opportunity; and
- help shield employers from liability for sexual harassment and other types of discrimination claims by including a published and widely distributed policy prohibiting discrimination and harassment and a procedure for employees to file complaints internally without fear of reprisal.

Throughout the 1980s, 1990s and continuing even beyond the year 2000, the legal landscape governing employment handbooks dramatically changed. Prior to this period, courts considered the vast majority of employees to be employees at-will – meaning they could be terminated for any reason and at any time, as long as a law was not contravened. In addition, prior to this time, employers were free to change any benefit plans that had been offered to their employees without potential liability. As the rule of employment-at-will eroded in the courts and as courts were asked to interpret benefit provisions in

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handbooks and in other documents, personnel manuals – which had been viewed as simply corporate communication documents – suddenly were transformed in some jurisdictions into legally binding “contracts of employment.” Many employers were startled to find that statements that they made in their handbooks were now being enforced by courts as express or implied “promises.” Some employers unfortunately learned that breaching such manual provisions resulted in substantial jury verdicts and damage awards being assessed against the corporation.

While the law concerning personnel handbooks is still evolving – often on a state-by-state basis – one clear message has emerged: every word counts in drafting or revising personnel manuals. While manuals still serve an integral role in the workplace, gone are the days when an employer could communicate with impunity via its handbook. Today, it is extremely important for employers to be aware that in preparing a manual they are drafting a quasi-legal document that must be thoughtfully and carefully assembled.

In addition, case law suggests that the language used should be within the understanding of the average employee. For instance, in *EEOC v. V&J Foods, Inc.*, No. 07-1009, 2007 WL 3274364 (7th Cir. Nov. 7, 2007), the court held that V&J Foods – a fast-food company, which owned and operated a Burger King in Milwaukee that hired many teenage employees – was required to formulate an employee complaint procedure that could be understood by the average teen. There, when a 35 year old manager sexually harassed a 16 year old female employee, she complained to her superiors, but no action was taken. Ultimately, her mother also complained, and when her complaint was relayed to the accused supervisor, he promptly fired the employee. When the EEOC filed suit on her behalf, the lower court dismissed the claims because the employee failed to use the company’s complaint procedure. However, the Seventh Circuit reversed because the reasonableness of a complaint procedure hinges on the capabilities of the employees at issue. The employer’s complaint procedure was likely confusing to its teen employees, and the hotline was designated to be used for comments to the company. It provided no specific information about how employees could report complaints.

As the aforementioned case demonstrates, the laws governing the employment relationship greatly impact the drafting of an employee manual. Accordingly, we have, in the sections below, described: (i) the legal backdrop for personnel manuals generally; and (ii) the key legal requirements concerning commonly included handbook policies.

In addition, the material in this outline discusses the general federal and selected state legal principles an employer will need to consider when drafting and implementing its employee handbook. However, the law within this outline only attempts to highlight some of the important legal issues. It is, therefore, important that the reader of this outline understand that the material contained herein is not exhaustive nor is it legal advice.

**II. MAKE SURE YOUR MANUAL IS NOT AN EMPLOYMENT CONTRACT.**

**A. Manuals Are Interpreted as Creating Express or Implied Contracts.**

1. Courts in many states have found that personnel or employee handbooks, under certain circumstances, create express or *implied* contracts. Some examples are:

**a. Case Law in Arizona**

*DeMasse v. ITT Corp.*, 194 Ariz. 500 (1999). According to the Arizona Supreme Court, a statement in a handbook is contractual only if it manifests a promissory intent on the part of the employer or “is one that the employee could reasonably conclude constituted a commitment by the employer.” A statement describing the employer’s current policies, however, is neither a promise nor a statement that an employee could reasonably consider to be a commitment.

The Court held that an employer may not unilaterally modify an implied-in-fact contract term in its employee handbook. The provision in the employer’s handbook, which provided that employees would be laid off in order of reverse seniority created a contract term offering job security to its employees who might otherwise be terminated at-will. Once the contract is formed, the employer may not modify it without following traditional contract law principles, which require the employee’s acceptance and consideration for the offer of modification. Continued employment alone is not consideration for the contract modification.

**b. Case Law in California**

Section 2922 of the California Labor Code provides, in relevant part, that: “An employment, having no specified term, may be terminated at the will of either party on notice to the other.” CAL. LAB. CODE § 2922. Despite the statute, broad exceptions to this at-will doctrine exist.

Employer policies, such as those set forth in handbooks, may sometimes create contractual obligations between the employer and its employees which the employer is then legally required to honor. *Stillwell v. Salvation Army*, 167 Cal. App. 4th 360 (4th Dist. 2008) (finding that personnel policies, including a grievance procedure, contained in a handbook were inconsistent with an at-will employment relationship and supported a finding that the employer promised to terminate the plaintiff only for cause); *Scott v. Pac. Gas & Elec. Co.*, 11 Cal. 4th 454, 463 (1995) (“In the

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employment context . . . courts will not confine themselves to examining the express agreements between the employer and individual employees, but will also look to the employer's policies, practices, and communications in order to discover the contents of an employment contract.”); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988) (Termination guidelines alone may be sufficient to create an implied contract that an employee may be terminated only for cause).

However, provisions in employee handbooks, applications and contracts that clearly state that the employment is at-will provide solid evidence of the employer's intent to terminate employment at-will, despite disciplinary and termination guidelines. *Slivinsky v. Watkins-Johnson Co.*, 221 Cal. App. 3d 799, 805 (6th Dist. 1990). Nevertheless, language in an employee handbook alone is not enough to insulate an employer from a wrongful discharge claim. *See Walker v. Blue Cross of Cal.*, 4 Cal. App. 4th 985, 993 (1st Dist. 1992) (court looked to the “totality of the circumstances” to determine that a triable issue of fact existed as to whether the employee was at-will; although the employer's handbook stated that its employees were at-will, the employee worked for the company for over 19 years, and received consistent promotions and satisfactory evaluations). Regardless of whether the disclaimer is determinative, that language will be relevant to the inquiry into the terms by which an individual was employed. *See Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 340 (2000) (stating that disclaimer language is relevant to the determination of what the parties intended and that “the more clear, prominent, complete, consistent, and all-encompassing the disclaimer language set forth in the handbooks, policy manuals, and memoranda disseminated to employees, the greater the likelihood that workers could not form any reasonable contrary understanding”). Therefore, it is important for employers to have the employee sign an acknowledgment form which separately and clearly states that their employment is at-will. It is also important to indicate that the employment agreement may not be modified except in writing by a high official of the company.

### **c. Case Law in the District of Columbia**

D.C. courts have recognized that provisions of a personnel handbook can become the terms of an implied contract of employment.

*Austin v. Howard Univ.*, 267 F. Supp. 2d 22, 28 (D.D.C. 2003). The court found that an issue of fact existed as to whether a provision included in an employee handbook establishing “preconditions to the termination of a regular employee” (*i.e.*, a discipline plan) created a contract. The court

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found that the employer had “relied on language in the handbook as support for its decision to terminate plaintiff,” but had not adhered to the handbook’s preconditions for termination. Thus, the court found that it was unclear whether the handbook’s disclaimer that it was “not to be construed as a contract” relieved the employer of “any obligations to its employees pursuant to the provisions of its Handbook.”

*United States ex. rel. Yesudian v. Howard Univ.*, 153 F.3d 731 (D.C. Cir. 1998); *Martin v. Arc of the Dist. of Columbia*, 541 F. Supp. 2d 77 (D.D.C. 2008). Under District of Columbia law, an employee manual that sets forth a distinction between probationary and permanent employees, providing that the former could be discharged summarily but the latter could only be discharged after specific preconditions had been met, overcomes the presumption of at-will employment. Such manuals generally create a factual question for a jury as to whether a contract exists.

- Disclaimers, however, can be effective to defeat contract claims raised by an employee. Moreover, a contract will not be implied if the manuals are not generally distributed to all employees.

*Byrne v. Nat’l R.R. Passenger Corp.*, 184 F. App’x 6 (D.C. Cir. 2006). The court found that the employee’s claim that the personnel manual created an implied employment contract failed because the evidence indicated that the manual was not distributed to all management employees and therefore the court refused to imply a contract. The court noted that assurances made by an employer to all employees in a personnel or policy manual could overcome the presumption at-will, but such manual must be distributed to all employees.

*McCauley v. Thygerson*, 732 F.2d 978 (D.C. Cir. 1984). The court found that the company’s employment application and policy made clear the “at-will” status of the employee, and thus did not support the existence of a contractual right.

### **d. Case Law in Connecticut**

Connecticut has recognized that handbook provisions may become an enforceable employment contract under a unilateral contract theory.

*Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 234 Conn. 1, 11 (1995). A “gainfully employed chemist who was seeking reassurance that a trans-continental relocation would be a worthwhile career move” was

told during his employment interviews that if he did a “good job” the company would “take care” of him; and (ii) it was hoped he would “stay forever.” In addition, the chemist was told that he “would have the opportunity to examine the company’s employee manual to determine whether it provided the guarantees that he sought.” The Supreme Court of Connecticut affirmed the trial court’s finding that the oral representations created an implied contract. In addition, because the manual contained language that employees could be terminated only “for cause,” the court stated that the company would need the chemist’s consent to modify the manual. Where the company did not get the chemist’s consent and issued a new manual which did not contain the “for cause” language, the court held that the old manual governed the chemist’s employment relationship with the company and the company was in breach of an implied contract of employment when it terminated the chemist without cause.

**e. Case Law in Delaware**

Delaware generally does not recognize an employment contract based on a unilateral expression of company policy in an employee handbook.

*Brooks v. Fiore*, No. 00-0803, 2001 U.S. Dist. LEXIS 16345 (D. Del. Oct. 11, 2001), *aff’d*, 53 F. App’x 662 (3d Cir. 2002). The court stated that Delaware law is well-settled that an employee handbook containing a unilateral expression of company policy does not create an employment contract. The court ruled that an employee handbook, even when interpreted in conjunction with other documents, such as performance evaluations and compensation statements, cannot serve to alter the status of an at-will employee.

**f. Case Law in Florida**

Florida courts generally have refused to find an implied contract arising from an employer’s policy statements or manuals.

For instance, in *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 268 (Fla. 2d DCA 1983), the court ruled in favor of the employer in a case brought by a discharged employee, stating: “[The Employee] feels that we should find an enforceable inference of . . . contract terms from the company policy. We cannot agree. We see no justification to depart from long established principles that an employment contract requires definiteness and certainty in its terms. . . . Mere expectations are insufficient to create a binding term of employment.”

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*Quaker Oats Co. v. Jewell*, 818 So. 2d 574 (Fla. 5th DCA 2002). The appellate court overturned the decision of a lower court that held Quaker Oats responsible for creating a contractual obligation as a result of its employment handbook. Nine employees sued Quaker Oats alleging breach of contract because Quaker Oats failed to pay overtime in accordance with the policies set forth in its handbook. The court held that based upon well established Florida law, policy statements in an employee handbook do not constitute the terms of a contract of employment.

Other cases in Florida similarly suggest that certainty, definiteness, and mutuality between the parties are necessary before a contract will be formed, and that policy manuals generally do not bind the employer, but merely express expected policy. *See, e.g., Osten v. City of Homestead*, 757 So. 2d 1243, 1244 (Fla. 3d DCA 2000) (holding that the personnel manual was a “policy manual containing unilateral expectations and do not otherwise give rise to an enforceable contract.”); *Linafelt v. Bev, Inc.*, 662 So. 2d 986 (Fla. 1st DCA 1995) (employer’s unilateral policy statement, without more, does not give rise to an enforceable employment contract without express reference in statement to period of employment and benefits to accrue); *McConnell v. Eastern Air Lines, Inc.*, 499 So. 2d 68, 69 (Fla. 3d DCA 1986) (noting that an employee handbook expressing policy statements “cannot, without more, give rise to enforceable contract rights”).

Importantly, the Florida cases do not foreclose the possibility that language in a policy might be drafted with such definiteness and certainty that an implied contract might be found. In *Falls v. Lawnwood Medical Center*, 427 So. 2d 361 (Fla. 3d DCA 1983), the court reversed the grant of summary judgment in favor of the employer hospital and remanded the case back to the trial court to consider whether certain policy manuals were part of the employee’s employment contract. Thus, *Falls* leaves open the possibility that, under certain circumstances, a policy manual might be viewed as constituting an enforceable contract in Florida. *See also Walton v. Health Care Dist.*, 862 So. 2d 852, 855 (Fla. 4th DCA 2003) (stating that “while Florida’s courts have expressed a decided reluctance to find that provisions in an employee handbook or policies and procedures manual rise to the level of enforceable contract rights, the courts have acknowledged it is possible for such handbooks or manuals to create enforceable rights if there is language in the employee manual expressly providing that the manual constitutes a separate employment agreement or the parties have reached a mutual agreement to this effect.”) (citations omitted).

**g. Case Law in Georgia**

An employee manual setting forth policies and information concerning employment is not necessarily a contract.

*Ellison v. DeKalb County*, 236 Ga. App. 185 (1999). Not all provisions in employee manuals are binding agreements. Specifically, statements in a manual regarding the promotion process merely are statements of policies and information, not of a binding contract. Provisions relating to additional compensation, however, of which the employee is aware, may amount to a binding contract between the employer and employee.

**h. Case Law in Illinois**

*Harden v. Playboy Enters.*, 261 Ill App. 3d 443, 448–49 (1st Dist. 1993), *appeal denied*, 157 Ill. 2d 500 (1994). The Illinois Appellate Court applied a three-prong test to ascertain whether Playboy's employee handbook created contractual employment rights. Under this test, an employee handbook creates enforceable contract rights if: (1) the language of the policy statement is "clear enough [for] an employee [to] reasonably believe that an offer [had] been made"; (2) the manual was disseminated to the employee in such a manner that he/she is aware of its contents; and (3) the employee has accepted the offer by commencing or continuing to work for the employer after learning of the handbook's contents. The court found that because these three conditions were present, Playboy had terminated an employee in violation of its discipline and discharge provisions outlined in its employee handbook.

*Denis v. P&L Campbell, Inc.*, 348 Ill. App. 3d 391, 392–97 (5th Dist. 2004). The court held that a general provision in the employee handbook stating that an employee's "failure to follow [handbook] guidelines . . . will result in disciplinary action which is: 1. Verbal warning 2. Written Warning 3. Grounds for dismissal," was ambiguous and did not constitute a contract of employment. Notwithstanding the fact that the handbook did not contain a disclaimer, the court determined that the language in question was "ambiguous and subject to several interpretations." Accordingly, the court held that the language was not sufficiently "clear" to convey a contract "offer" to the plaintiff.

*Duldalao v. St. Mary of Nazareth Hospital Center*, 115 Ill. 2d 482, 505 N.E.2d 314 (1987). The Illinois State Supreme Court has also held that employers may be contractually bound to follow handbook provisions or other policies statements if three elements are present: 1) the handbook or

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policy contains a promise sufficiently clear to make employees reasonably believe that an offer has been made; 2) the statement is communicated in such a way that the employee is aware of its content and reasonably believes that it constitutes an offer; and 3) employees must accept the offer by either beginning or continuing employment after learning of the provision or policy.

### **i. Case Law in Indiana**

In *Peters v. Gilead Sciences, Inc.*, No. 06-4290, 2008 WL 2719579 (7th Cir. July 14, 2008), the Seventh Circuit held that Indiana employers can be equitably bound by the representations they make in their employee handbooks. Moreover, the court held that the employer can possibly be contractually bound. Although the question of whether an employee handbook can create a binding contract remains unresolved in Indiana, the Seventh Circuit left open the possibility that Indiana employees can bring breach of contract claims based on employee handbook policies. In *Peters*, the court reversed and remanded the case for further consideration of plaintiff's promissory estoppel claim, concluding that the representations in Gilead's FMLA policy in its handbook and in a separate letter were sufficient to support a promissory estoppel claim. The Seventh Circuit would not allow the company to retreat from its commitment to provide all employees with 12 weeks of leave even if plaintiff himself might not have been eligible for FMLA leave.

### **j. Case Law in Iowa**

*Jones v. Lake Park Care Ctr.*, 569 N.W.2d 369 (Iowa 1997). The Iowa Supreme Court found that the terms in an employee handbook outlining the procedures for disciplining employees were sufficiently definite to form an implied contract that the employer breached when it terminated the employee without written warning.

- Courts will, however, refuse to enforce a handbook as a contract where a reasonable person reading the handbook would understand from the disclaimer that the company has not agreed to be bound by the provisions contained in the manual. See *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277 (Iowa, 1995). See also *Travillion v. Heartland Pork Enters.*, No. 3-151/02-1429, 2003 Iowa App. LEXIS 540 (Iowa Ct. App. June 25, 2003) (stating that a handbook could create an implied contract if it is sufficiently definite in its terms, it is communicated to and accepted by the employee, and the employee provides consideration; but because

of the clear and unambiguous disclaimer in the handbook, the handbook was not an offer).

**k. Case Law in Kansas**

*Phox v. Atriums Mgmt. Co.*, 230 F. Supp. 2d 1279 (D. Kan. 2002). A federal court in Kansas found that an employee handbook was an “illusory contract” because the handbook did not bind the employer; therefore, an employee was not bound by the handbook’s arbitration clause. In addition to recognizing that the acknowledgment form that the employee signed expressly stated that the handbook was “neither a contract of employment nor a legal document,” the court also relied on the employer’s ability to “modify or cancel the provisions of the employee handbook at its sole discretion” in finding that the handbook was an illusory contract. Therefore, because the employer’s promise to arbitrate was illusory, the entire arbitration clause was not enforceable.

The possibility of recognizing a contract based on an employee handbook, however, is not foreclosed. See *Brown v. United Methodist Homes for Aged*, 249 Kan. 124 (1991) (affirming lower court’s denial of summary judgment where there were factual questions as to the intent of the parties and whether a contract could be implied).

**l. Case Law in Louisiana**

There is no reported Louisiana jurisprudence holding that an employee handbook creates a contract that can modify an at-will employment relationship. However, Louisiana courts have not established a per se rule on the issue; instead they examine handbooks on a case-by-case basis.

*Leger v. Tyson Foods, Inc.*, 670 So. 2d 397, 401–02 (La. App. 3d Cir. 1996). The court held that seniority provisions in the employee manual concerning job opportunities, layoffs and recalls did not create a contractual exception to the plaintiff’s employment-at-will status. The court determined that the employment manual was “merely a unilateral expression of company policies and procedures. Any benefits conferred by the manual were “gratuitous” and were not binding on the employer. Significantly, the court noted, “[t]here is no Louisiana jurisprudence in which an employee manual has been held to confer any contractual rights upon an employee or to create any exceptions to the employment-at-will doctrine.”

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### m. Case Law in Maryland

Maryland recognizes implied contract claims arising from employee handbooks.

*Staggs v. Blue Cross of Maryland*, 61 Md. App. 381, 391 (1985). The court held that a policy that provided for counseling sessions prior to termination could create an implied contract. “Accordingly, we hold that provisions in such policy statements that limit the employer’s discretion to terminate an indefinite employment or that set forth a required procedure for termination of such employment may, if properly expressed and communicated to the employee, become contractual undertakings by the employer that are enforceable by the employee.”

### n. Case Law in Massachusetts

Under Massachusetts law, a personnel manual can be shown to form the basis of an express or implied employment contract.

- *Ortega v. Wakefield Thermal Solutions, Inc.*, 20 Mass. L. Rep. 337 (2006). The plaintiff was an employee for the company for 22 years and was terminated “on the spot” after he returned back to work from a vacation three days later than scheduled because he missed his return flight, despite the fact that he informed his supervisor of his situation after he missed the flight. The employee policy manual included progressive discipline procedures and a statement that employees will generally receive advance notice of a serious problem with their work. The court denied summary judgment for the employer, finding that a jury could find that the employee manual was deceptively written in that it informed employees that they have rights under the manual, but only if the employer wants to let them use these rights. Moreover, the court held that a jury could find that the employee relied on the employee manual as a condition of his continuing employment.

*Derrig v. Wal-Mart Stores, Inc.*, 942 F. Supp. 49, 54 (D. Mass. 1996). Referring to an earlier Massachusetts case, *O’Brien v. New England Tel. & Tel. Co.*, 422 Mass. 686 (1996), the court held that the “[a] personnel manual may form the basis of an express contract, where the parties agree that a personnel manual will spell out the relative rights and obligations of employer and employee; or its terms may be part of an implied contract.” Applying the *O’Brien* test to the case at hand, the court concluded that

both the employer and the employee were bound to the terms of the handbook where “both the mandatory language and the detail of the Handbook and the Club manual reasonably suggest their binding nature.” *Id.* at 55.

**o. Case Law in Michigan**

Under Michigan law, employment relationships are presumptively terminable at-will. Although this presumption is rebuttable by contractual obligations, it can only be overcome with proof of either a contract provision for a definite term of employment, or one that forbids discharge absent just cause. A policy that lacks specificity or requires action only at the employer’s command cannot become a promise of just-cause employment.

*Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579 (1980). An employee can prove contractual terms for a definite term of employment when an employer’s policies or procedures instill a “legitimate expectation” of job security in the employee.

**p. Case Law in Nevada**

Under certain circumstances, an employee handbook can give rise to an enforceable promise of employment if both parties considered themselves bound by the handbook’s reference to termination rights and processes or the handbook itself specifically said that an employee could be terminated only for cause.

*Yeager v. Harrah’s Club*, 111 Nev. 830 (Nev. 1995). Employee handbook did not convert the employment-at-will status to a for-cause limitation on that status. Nothing in the handbook stated that the list of infractions were exclusive causes for termination, or that an employee could not be terminated on other grounds or for no reason at all.

*D’Angelo v. Gardner*, 107 Nev. 704 (1991). The court acknowledged that an appropriately worded disclaimer can prevent the inference that a handbook creates an employment contract. *See also Southwest Gas Corp. v. Vargas*, 111 Nev. 1064 (1995) (stating that a disclaimer can preclude a finding of a contract but that given the handbook policy at issue provided that an employee can only be terminated for cause and the language in the disclaimer provided that there were no contracts for any employees, there was a ambiguity that precluded summary judgment in the employer’s favor).

**q. Case Law in New Jersey**

In New Jersey, a number of courts have found that language in the employee handbook can create an employment contract.

*Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 296-97 (1985). The employer's distribution of a comprehensive personnel manual, which advised employees of benefits and termination procedures, constituted an offer that became a legally binding unilateral contract. According to the court, "when an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary . . . should construe them in accordance with the reasonable expectations of the employees." *See also Wade v. Kessler Inst.*, 172 N.J. 327 (2001) (stating that an employment manual can create an implied contract but a disclaimer can prevent a contract from being implied. The court stated that if the facts surrounding a disclaimer in the manual are clear and uncontroverted, the court can resolve the issue as a matter of law but in other cases the jury will determine if a disclaimer is effective).

*Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 950 (D.N.J. 1991). The United States District Court in New Jersey noted that "if the company expressly reserves the right to fire for any reason during the probationary period," an argument can be made that "the employee who survives [the probationary period] has earned the protection of a 'just cause requirement' for termination."

*Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385 (1994). Referring to *Fregara*, the New Jersey Supreme Court found that there was a factual issue as to whether the employee manual created an implied contract because, among other things, it established a three-month "trial period" for new hires followed by the employee becoming a regular employee with a just-cause progressive discipline system for termination.

*Mardini v. Viking Freight, Inc.*, 92 F. Supp. 2d 378 (D.N.J. 1999). The United States District Court in New Jersey held that "prominent placement" was required to effectuate a valid disclaimer. The court found that a legally ineffective "at-will" employment disclaimer in the back of a 70-page manual was "cured" from defect when it was placed on the first page of the subsequent handbook. Both provisions were substantively identical. *See also Normand v. Goodyear Tire & Rubber Co.*, No. 05-1880, 2005 U.S. Dist. LEXIS 24487, at \*4 (D.N.J. July 13, 2005) (granting summary judgment to an employer when the disclaimer stated that the handbook was to "be used as a source of information only" and that it is "not intended to create nor to be

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construed to constitute a contract or implied contract of continued employment or future employment with any associate or associates.”).

### **r. Case Law in New Mexico**

*Hudson v. Village Inn Pancake House of Albuquerque, Inc.*, 131 N.M. 308, 310 (N.M. Ct. App. 2001). The appellate court found that witness testimony, the Village Inn Pancake House Employee Handbook, and the contents of forms used by the employer supported the district court's decision that there was an implied employment contract between Village Inn and its employee. The court based its decision on the general proposition that implied employment contracts have been upheld where the employer either has made a direct or indirect reference that termination would be only for just cause or has established procedures for termination. *See also Mealand v. Eastern. N.M. Med. Ctr.*, 131 N.M. 65 (N.M. Ct. App. 2001).

*West v. Wash. Tru Solutions, LLC*, 2010 NMCA 1, 28 (N.M. Ct. App. 2009). The appellate court reversed summary judgment in favor of the employer and remanded to the trial court, holding that there were questions of material fact as to whether there was an implied contract based on the employee handbook and guide for managers that the employee would only be fired for cause and after the application of progressive disciplinary procedures.

### **s. Case Law in New York**

New York, unlike many states, is generally inhospitable to employee handbook-based breach of contract claims. It has recognized, however, a very narrow exception to the employment-at-will doctrine outlined in *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S.2d 193 (1982).

In *Weiner*, the employer's manual stated that “[t]he company will resort to dismissal for just and sufficient cause only, and only after all practical steps toward rehabilitation or salvage of the employee have been taken and failed.” *Id.* at 460, 457 N.Y.S.2d at 194. The court then outlined rigorous reliance standards that employees must satisfy in order to succeed on a handbook-based breach of contract claim.

The decision in *Weiner* has been strictly applied by the New York Court of Appeals and New York lower courts.

*Horn v. New York Times*, 100 N.Y.2d 85, 760 N.Y.S.2d 378 (2003). The New York Court of Appeals dismissed an implied breach of contract claim

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and held that an at-will employment relationship existed. The employee attempted to rely on a very narrow exception to the at-will employment doctrine that was carved out in *Wieder v. Skala*, 80 N.Y.2d 628, 593 N.Y.S.2d 752 (1992). In that case, the court held that a law firm associate could bring a lawsuit against his law firm employer for breach of an implied contract because it was implicit in his employment relationship with his law firm that both associates and partners would engage in their “common professional enterprise” in accordance with the Code of Professional Responsibility. The court in *Horn* refused to apply this limited exception to the medical profession. In other words, the court refused to hold that the employment contract “implied the fundamental understanding, which requires no written expression, that the physician will conduct her practice on the employer’s behalf in accordance with the ethical standards of the medical profession.”

*See also De Petris v. Union Settlement Ass’n*, 86 N.Y.2d 406, 633 N.Y.S.2d 274 (1995) (mere existence of employee manual, without any indication that manual procedures were violated, was insufficient to limit employer’s right to discharge at-will employee); *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 514 N.Y.S.2d 209 (1987) (holding that the pleading burden outlined by the *Weiner* decision made it difficult for a terminated employee to assert a valid breach of contract claim where the employee was unable to cite to any explicit provisions in the employer’s manual limiting the at-will employment doctrine); *McGimpsey v. Robert Folchetti & Assoc.*, 19 A.D.2d 658 (N.Y. App. Div. 2d Dep’t 2005) (affirming summary judgment where employee failed to raise a triable issue, and there was no agreement of fixed duration or an express written policy limiting their right to discharge employees upon which the employee relied); *Cronce v. Steuben Foods, Inc.*, 306 A.D.2d 875, 761 N.Y.S.2d 759 (4th Dep’t 2003) (dismissing employee’s complaint when, even assuming manual created an express limitation on defendant’s right to discharge, the employee did not show the type of detrimental reliance required by *Weiner*); *Fieldhouse v. Stamford Hosp. Soc’y*, 233 A.D.3d 540, 649 N.Y.S.2d 527 (3d Dep’t 1996) (manual that gave employer option of terminating employee immediately and stated that there was no express assurance that termination would only be for cause failed to rebut presumption of at-will employment); *Diskin v. Consol. Edison Co.*, 135 A.D.2d 775, 522 N.Y.S.2d 888 (2d Dep’t 1987), *appeal denied by*, 72 N.Y.2d 802, 530 N.Y.S.2d 554 (1988) (employee must show such circumstances as: (1) inducement to leave prior employment by assurance that new employer maintains for-cause dismissal policy; (2) incorporation of such assurance into employment application; and (3) employment subject to handbook or manual provision providing for just cause

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dismissal); *but see Tiranno v. Sears, Roebuck & Co.*, 99 A.D.2d 675, 675, 472 N.Y.S.2d 49, 50 (4th Dep't 1984) (in one of the few cases finding that the *Weiner* factors were met, the court held that a manual provision stating that "[the] Company may terminate an individual's employment at any time that his/her work . . . does not measure up to Company standards" could be interpreted as requiring *just cause* for termination "since it indicates objectivity in employee evaluation and termination.").

New York federal courts, however, have appeared more receptive to employees' claims that their employment was not at-will. The Second Circuit in *Baron v. Port Authority*, 271 F.3d 81, 87 n.4 (2d Cir. 2001) acknowledged the discrepancy between federal and state court and stated that it was the federal court's responsibility to eliminate that divergence. The court applied a totality of the circumstances test and held that based on the fact that policy was only distributed to supervisory official and that the employee was not given any assurances that the policy was controlling, the employee handbook did not imply contractual obligations on the part of the defendant.

*Marfia v. T.C. Ziraat Bankasi*, 147 F.3d 83 (2d Cir. 1998). A former bank employee successfully sued his employer for breach of implied employment contract. The employee demonstrated that he detrimentally relied upon the bank's express written policy against dismissal without cause as well as the bank manager's assurance of "lifetime employment."

*Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847 (2d Cir. 1985). Here, the court rejected the strict application of *Weiner* and applied a more liberal "totality of the circumstances" test to determine whether the employment was at-will. In addition, in some cases, other factors besides the handbook provisions were considered, such as oral statements made to the employee. *See Ohanian v. Avis Rent A Car System*, 779 F.2d 101 (2d Cir. 1985) (upon reliance of oral assurances, the employee could only be fired for just cause); *Yaris v. Arnot-Ogden Mem'l Hosp.*, 891 F.2d 51, 53 (2d Cir. 1989) (applying the "totality of the circumstances" standard, the court held that the employee's reliance on a draft of the employer's policy manual not yet in effect was sufficient to defeat the employer's motion for summary judgment).

Although *Weiner* established burdensome standards that employees must meet in order to bring a wrongful discharge claim, employees may be able to rebut the presumption of at-will employment by evidence of a limitation by an express agreement. In at least one case, a court has held that

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specific language in an employee handbook may be enough to create such an express agreement.

*Skelly v. Visiting Nurse Ass'n*, 210 A.D.2d 683, 685, 619 N.Y.S.2d 879, 882 (3d Dep't 1994). The court found that specific language in an employer's handbook may have expressly rebutted the at-will presumption. Here, the court refused to grant the employer's motion for summary judgment in an employee's wrongful discharge action. The court found that the personnel manual may have: limited the employer's authority to terminate employees because the manual: (i) established a "probationary period, which indicate[d] a change in the employment relationship upon the successful completion of the period"; (ii) "contain[ed] a specific provision for dismissal which referr[ed] only to unsatisfactory job performance and illegal activities as grounds for dismissal," with no provision for dismissal or termination without cause; (iii) made "no reference to termination without cause"; and (iv) established a "five-step disciplinary process" whereby dismissal was invoked only when "all other problem-solving and disciplinary steps" had failed.

However, this reasoning seems at odds with the majority of New York courts who hold that in order for an employment agreement to exist, it must be made expressly by the parties, and not just by language in a handbook.

*Melnyk v. Adria Labs., Div. of Erbamont, Inc.*, 799 F. Supp. 301 (W.D.N.Y. 1992). The court stated that a statement in the handbook that probationary employees were subject to termination if work was unsatisfactory did not limit the employer's right to discharge an employee after completion of the probationary period under the New York employment-at-will rule.

It should be noted, however, that although the above case illustrates an example of the court's holding that an express agreement is necessary for a finding of an employment agreement, language in a handbook regarding probationary periods is risky because a number of courts in other states have found an employment contract based upon statements in a handbook regarding such probationary periods. *See Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 950 (D.N.J. 1991), discussed above.

In the context of promises to provide whistle-blower protection to employees, a court might impose liability on an employer for a violation of this type of express provision in a handbook.

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*Mulder v. Donaldson, Lufkin & Jenrette*, 208 A.D.2d 301, 623 N.Y.S.2d 560 (1st Dep't 1995), *appeal denied by*, 93 N.Y.2d 989, 695 N.Y.S.2d 741 (1999).

The court held that where the handbook provided that employees had a duty to report financial wrongdoing violations and the company promised to protect those employees from retaliation for reporting such violations, the handbook was an express limitation on the right of the company to terminate employees who made such reports. *See also Brady v. Calyon Sec. (USA) Inc.*, 406 F. Supp. 2d 307 (refusing to dismiss wrongful discharge claim where employee manual advised employees to report misconduct and assured protection from any retaliation).

However, in New York, it is important to note that limitations on the at-will doctrine are rare, and even where promises are made to employees in the handbook, a disclaimer may serve to avoid contractual obligations (see discussion below).

### **t. Case Law in Ohio**

The general rule in Ohio is that employment relationships are at-will. However, absent an effective disclaimer, handbooks that contain specific requirements for employment and discipline may be interpreted as creating binding contracts.

*Golem v. Village of Put-In-Bay*, 222 F. Supp. 2d 924 (N.D. Ohio 2002). An employer's manual contained "very specific requirements for employment and discipline." Although the manual permitted the employer to unilaterally amend the manual, it lacked a statement disclaiming the creation of a contract. Plaintiff, a police officer, signed an acknowledgment form stating that he understood that he was subject to the disciplinary rules set forth in the handbook. The employer subsequently terminated plaintiff without adhering to its progressive discipline policy. The court found that the manual created a binding contract that the employer breached when it fired plaintiff without first engaging in progressive discipline.

### **u. Case Law in Oklahoma**

Under Oklahoma law, an implied or express contract that restricts an employer's power to terminate an employee can alter the employment-at-will relationship. However, unless the substantive restrictions on the

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employer's power to discharge are proven by the employee, the employment is considered at-will.

*Vice v. Conoco, Inc.*, 150 F.3d 1286 (10th Cir. 1998). An employer's manual that provided suggestions to help supervisors in disciplining employees, but which did not define or mandate specific termination procedures, did not alter the employee's at-will relationship with the employer. Such a manual did not restrict the employer's power to terminate its employees.

### **v. Case Law in Pennsylvania**

Under well established precedent of Pennsylvania law, most employees are considered at-will employees. Pennsylvania courts, however, have interpreted employee handbooks as creating an implied employment contract.

*Martin v. Capital Cities Media, Inc.*, 354 Pa. Super. 199 (1986), *appeal denied by*, 514 Pa. 643 (1987). The court held that an employee handbook could be contractually binding where the handbook or oral representations about the handbook indicated that it was to have that effect. While the court did not find the handbook in this case binding, this case established a standard to determine whether an employment handbook forms a binding contract. "It is for the court to interpret the handbook to discern whether it contains evidence of the employer's intention to be legally bound and to convert an at-will employee into an employee who cannot be fired without objective just cause." *Id.* at 221-22.

*Grose v. P&G Paper Prods*, 866 A.2d 437 (Pa. Super. Ct. 2005), *appeal denied by*, 585 Pa. 697 (2005). The court held that to overcome the presumption of at-will employment, the party must establish an agreement for a definite duration, an agreement specifying that the employee will be discharged for just cause only, sufficient additional consideration, or an applicable recognized public policy. *Id.* at 441. Based on this test, the court held that an employee handbook will not overcome the at-will presumption unless the language of the handbook clearly expresses the employer's intent to do so. The employee did not introduce any evidence of a specific agreement and therefore his claim failed.

*Carlson v. Arnot-Ogden Mem'l Hosp.*, 918 F.2d 411 (3d Cir. 1990). The court found an employment contract where the employer gave the prospective employee the employee handbook before he accepted his offer of employment. The court held that it was reasonable for the

employee to believe that the handbook had created a contract because the employee manual clarified what the employee was to expect from the job; and as such, it could have been part of the bargaining process between the two sides.

**w. Case Law in South Carolina**

South Carolina has recognized that an employee handbook may create a contractual relationship. By statute, however, handbooks issued after June 30, 2004, will not create and express or implied contract if it contains a conspicuous disclaimer. To be effective under the statute, the disclaimer in the handbook must be in underlined capital letters on the first page and signed by the employee. S.C. CODE ANN. § 41-1-110.

*Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271 (2002). The South Carolina Court of Appeals held that when an employee handbook contains both promissory language and a disclaimer, the handbook becomes ambiguous and thus is subject to more than one interpretation of whether it creates an employment contract. Here, although the handbook stated that it did not change the “at-will” nature of the employment relationship to a contractual relationship, the handbook’s discharge, discipline, and grievance procedures were couched in mandatory terms. Therefore, “the question of whether a contract exists is for a jury when its existence is questioned and the evidence is either conflicting or admits of more than one inference.” *Id.* at 281. See also *Conner v. City of Forest Acres*, 363 S.C. 460 (2005) (stating that an employee handbook with mandatory statements regarding disciplinary and grievance procedures can be enforced against an employer and that a disclaimer is only one factor to determine whether the handbook gives rise to a promise, expectation and a benefit).

**x. Case Law in Texas**

Texas requires that an agreement to modify an at-will relationship must be express, rather than implied, and it must be clear and specific.

*Matagorda County Hosp. Dist. v. Burwell*, 189 S.W.3d 738 (Tex. 2006). The Texas Supreme Court reversed the Appeals Court's finding that a dismissal provision in an employee handbook created an employment contract modifying the at-will employment relationship. The Court held that a statement that "[e]mployees may be dismissed for cause" should not be interpreted to mean that employees may *only* be dismissed for cause.

*Miksch v. Exxon Corp.*, 979 S.W.2d 700 (Tex. App. 1998). The Court of Appeals of Texas held that a discharged employee could proceed with her breach of contract claim against her employer. An oral assurance could modify the employment-at-will relationship, so long as the statement to modify "unequivocally indicate[s] a definite intent to be bound not to terminate the employee except under clearly specified circumstances." See also *El Expreso, Inc. v. Zendejas*, 193 S.W.3d 590, 595 (Tex. App. Houston 1st Dist. 2006) (holding that employer's oral statements contained clear and specific terminology not to terminate the employee for attempting to comply with federal and state safety laws and therefore the agreement modified employment at-will).

**y. Case Law in Vermont**

Vermont recognizes that employer personnel manuals that are inconsistent with an at-will relationship may be used as evidence that the employment contract requires good cause for termination.

*Trombley v. Southwestern Vt. Med. Ctr.*, 169 Vt. 386 (1999). The company updated its 1981 employee handbook in 1992 and promulgated an ambiguous discharge procedure. The court held that because the 1992 discharge procedure was unclear as to whether the 1981 procedure was incorporated, the employee had a right to the contractual relationship created by the 1981 handbook, even though employees had notice of the change.

*Dillon v. Champion Jogbra, Inc.*, 175 Vt. 1, 2-6 (Vt. 2002). The court held that there was a triable issue of fact as to whether the company's employee manual, which contained a delineated progressive discipline procedure, created an employment contract. The court explained, "[a]n employer not only may implicitly bind itself to terminating only for cause through its manual and practices, but may also be bound by a commitment to use only certain procedures in doing so." Thus, notwithstanding its disclaimer stating that the employment was at-will, there was an issue of fact as to whether the manual created a contract that the employer

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breached when it terminated the employee without adhering to its “elaborate system governing employee discipline and discharge.”

### **z. Case Law in Virginia**

Virginia recognizes that an employer’s handbook may constitute an implied promise to discharge for cause only.

*Thompson v. American Motor Inns, Inc.*, 623 F. Supp. 409 (W.D. Va. 1985). The company promulgated a warning procedure prior to dismissal in its handbook. This procedure created a specific promise to the employees that they would not be fired without three warnings or just cause, the violation of which is equivalent to a breach of an implied contract. Thus, when the employer terminated the employee without properly warning him, it had breached its contractual obligations. *But see County of Giles v. Wines*, 262 Va. 68, 71 (2001) (noting that just cause provisions can limit employment at-will but that the provision of the employer’s personnel policy that states that an employee can be discharged “for inefficiency, insubordination, misconduct or other just cause” did not overcome presumption of employment at-will)

### **aa. Case Law in Wyoming**

Wyoming will recognize an implied contract based on an employment handbook or personnel policies that requires termination for cause only, unless it contains a sufficient disclaimer. However, courts will not recognize an implied-in-fact contract from an employee handbook when there is a separate express agreement recognizing the at-will employment relationship.

*Finch v. Farmers Co-Op Oil Co.*, 109 P.3d 537 (Wyo. 2005). The Wyoming Supreme Court found that there was no implied contract based on the employer’s employment manual. The court held that while an employment handbook, personnel policies, letters of employment, performance evaluations or course of dealings can supply terms for an employment contract, the employee did not allege the existence of a progressive discipline policy or any other provision that would imply that there was a contract for continued employment.

*Trabing v. Kinko’s, Inc.*, 57 P.3d 1248 (Wyo. 2002). The Wyoming Supreme Court found that an employee handbook did not create an implied-in-fact contract that would alter the at-will employment relationship. The court initially found that “absent any other writings or

representations prior to beginning employment, a question of fact would exist as to whether the handbook creates an implied contract altering the presumption of at-will employment and requiring cause for termination.” In this case, however, there were “other writings;” the employee had signed separate employment and co-worker agreements on the day she began her employment with the company acknowledging that she was an at-will employee. Thus, these separate agreements created an unambiguous express contract that the employee was an at-will employee.

2. At least one court has recognized a tort-like duty of reasonable care emanating from a performance review provision in an employee handbook.

- *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067, 1081-82 (W.D. Mich. 1982). Liability was established on a *negligent evaluation* theory where an employer did not inform an employee that it was considering discharging him during the performance appraisal given two months prior to his termination. Since the employer had promulgated a written policy calling for annual performance reviews, under Michigan law it “had a contractual obligation to conduct performance reviews, and since it actually undertook to conduct these reviews, it follows that [the employer] had a duty to use ordinary or reasonable care in performing the [employee’s] reviews.” This duty was breached, the court concluded, since a reasonable person would have informed the employee that he faced possible termination. The evaluation policy, coupled with the just-cause provision of the manual, “tended to create an expectation among employees that they would be given notice and an opportunity to improve prior to discharge.”

Other courts have criticized this approach, however, and have refused to recognize this new cause of action.

- *Gossage v. Little Caesar Enters., Inc.*, 698 F. Supp. 160 (S.D. Ind. 1988). The court rejected Chamberlain’s negligence cause of action under Indiana law.

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- *Brock v. Consol. Biomedical Labs.*, 817 F.2d 24 (6th Cir. 1987). The court applied Michigan law and dismissed the argument that negligent performance of a contract may constitute a tort. The court stated that there must be a breach of duty distinct from the breach of contract to support a negligence claim.
3. Courts have awarded substantial verdicts against employers for breach of their employee handbook provisions.
- *Trombley v. Southwestern Vt. Med. Ctr.*, 169 Vt. 386 (1999). The court affirmed a jury verdict of \$125,000 to the employee when it held that the employer violated the terms of its handbook by discharging an at-will employee without following the handbook's required disciplinary procedures. The employer claimed to follow the procedures in a new version of the handbook, which did not include the progressive discipline system. However, the court found that because the new handbook was only in effect for a very short period of time, and because the supervisor followed the procedures in the original handbook, the ambiguity gave rise to a jury question regarding the terms of employment. Further, an employee handbook provision committing an employer to a progressive discipline system is sufficient for a jury to find that the employer may terminate an employee only for cause.
  - *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1516-17 (10th Cir. 1995). The court affirmed a jury's verdict of \$161,782.50 for the employee because it found that "a binding obligation may arise from a personnel manual even though that manual vests some discretion in the employer, so long as a fact finder could reasonably conclude that the employer was obligated under either contract or estoppel principles to apply the disputed procedures to the employee." Here, the court concluded that under Colorado law, the employer's failure to follow its progressive disciplinary procedures outlined in company personnel documents (including an employee manual) was "sufficient to raise a jury question on whether [the company] assumed an enforceable obligation to provide uniform treatment when disciplining its employees."
  - *Allabashi v. Lincoln Nat'l Sales Corp.*, 824 P.2d 1, 2 (Colo. Ct. App. 1991). The employer's failure to follow the termination policies and procedures contained in its handbook and other documents supported the jury's award of \$250,000 to the employee

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for emotional distress suffered as a result of a “willful, wanton, and insulting breach of contract.”

- *Preston v. Claridge Hotel & Casino, Ltd.*, 231 N.J. Super. 81 (1989). The court affirmed an award of \$67,000 plus interest to a casino floor worker discharged in violation of the progressive discipline provisions of the employee manual, even though the manual did not contain an explicit just cause discharge promise.
4. Despite the fact that manual provisions can be read as a contract, employers may, under certain circumstances, modify previously-announced promises in order to extinguish contractual rights. In some courts, including New York, Michigan and Utah an employer’s right to modify the terms of the handbook is recognized, especially where there is an express reservation of rights to amend provisions of their personnel manuals.
- *Schrul v. Gen. Motors Corp.*, No. 90 cv 0871E, 1994 U.S. Dist. LEXIS 11895, at \*8-9 (W.D.N.Y. Aug. 8, 1994). A provision in GMC’s employee handbook stating that GMC “reserves the right to modify or to change [its policies and procedures] from time to time, or to terminate them” was held by the court to “unequivocally and unmistakably express GMC’s intent not to be contractually bound” and to make the handbook “subject to unilateral modification or even termination by GMC.” *See also McCooey v. Gen. Motors Corp.*, No. 90-CV 0869E, 1994 U.S. Dist. LEXIS 11890 (W.D.N.Y. Aug. 3, 1994) (same)
  - *Preston v. Champion Home Builders, Inc.*, 187 A.D.2d 795, 796, 589 N.Y.S.2d 940, 941 (3d Dep’t 1992). The court rejected the employee’s claim that her employer could not unilaterally modify the employee manual’s terms where the employee signed certification forms consenting to such modifications and one version of the manual explicitly provided that it “may be amended . . . from time to time as [the employees’] job security and business conditions justify.”
  - *Kascewicz v. Citibank, N.A.*, 837 F. Supp. 1312, 1319 (S.D.N.Y. 1993). The court found that Citibank’s job discontinuance policy contained in its employee manual did not “guarantee” continued employment since “the Manual represent[ed] only an expression of current policy, which Citibank reserved the right to change at any time.”

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- *Lytle v. Malady*, 458 Mich. 153 (1998). When an employer added a specific disclaimer of just-cause employment to its handbook, the employer needed to give reasonable notice to all affected employees, and where evidence indicates that the employee had actual notice, the court deemed the notice given.
  - *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395 (Utah 1998). The Utah Supreme Court held that if an employer modifies or replaces an existing employment contract, the modified contract will prevail when that employee has knowledge of the new provision in the handbook and the employee continues to work for the employer after gaining this knowledge. *See also Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306 (Utah Ct. App. 1994) (holding that an existing employment contract can be modified or replaced by a subsequent unilateral contract when the employer makes an offer by communicating the terms to the employee and the employee accepts by continuing employment).
5. Despite reserving the right to modify the terms of the manual at any time, under some circumstances, an employer's annual modification may not extinguish the contractual rights granted by the previously announced policies. In these situations, modifications fail for lack of consideration.
- *LeMaitre v. Massachusetts Turnpike Authority*, *LeMaitre v. Mass. Tpk. Auth.*, 70 Mass. App. Ct. 634 (Mass. App. Ct. 2007) (aff'd and remanded to determine damages by *LeMaitre v. Mass. Tpk. Auth.*, 452 Mass. 753, 756 (Mass. 2008)). Throughout the employee's tenure with the employer (almost 20 years), a personnel policy existed that set forth a sick leave buy-out provision to be implemented upon retirement. Over the years, this personnel policy was revised on numerous occasions to alter the amount of sick leave that would be paid out at the employee's retirement. Upon retirement, the employee was paid a lump-sum for his sick leave that was calculated using the formula set forth in the current personnel policy. The last formula provided less of a buy-out benefit than previous versions of the personnel policy. The Appeals Court held that the promises contained in the previous versions of the policy were enforceable and that the rights accrued under the various versions of the policy could not be extinguished. In other words, there was a contractual obligation to pay the benefits as set forth in each version of the personnel policy created during the employee's tenure.

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- *Doyle v. Holy Cross Hosp.*, 289 Ill. App. 3d 75 (1st Dist. 1997), *aff'd*, 186 Ill. 2d 104 (1999). An amendment made to a hospital's handbook seeking to establish at-will employment does not modify the underlying, valid employment contract between the hospital and the employee. Continued employment was insufficient consideration for taking away the employee's rights under the handbook's economic loss policy.
- *McIlravy v. Kerr-McGee Corp.*, 119 F.3d 876 (10th Cir. 1997). The Tenth Circuit ruled that rights outlined in a 20 year-old handbook, including the statement that employees would be terminated only "for cause," were enforceable in court. The court allowed the employees to bring a breach of contract claim based on a 1976 handbook, despite two subsequent editions of the handbook which were more equivocal in their terms regarding termination. The court also ruled that the company failed to show that the subsequent disclaimers in the later editions modified the pre-existing contract with the employees, holding that continued employment is not sufficient consideration for a modification that restores at-will.
- *Brodie v. Gen. Chem. Corp.*, 112 F.3d 440 (10th Cir. 1997). Under Wyoming law, an employer could not revoke a prior employment manual that provided certain employment rights and implement a new handbook that limited employment to "at-will" without providing some additional consideration for the modification.
- *DeMasse v. ITT Corp.*, 111 F.3d 730 (9th Cir. 1997). Applying Arizona law, a court held that a provision in an employee handbook stating that employees would be laid off in order of seniority was part of an employment contract, and the employer could not unilaterally change the policy without following traditional contract principles, including obtaining the employees' assent and providing valid consideration for the offer of modification. The employee's continued employment would not meet the assent and consideration hurdles. Therefore, the subsequent publishing of a new handbook permitting unilateral modifications or recession did not negate implied-in-fact contractual terms.

### **B. Disclaimers Assist To Prevent the Creation of Implied Contracts.**

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1. Employers can seek to prevent the creation of implied employment contracts through drafting and implementing effective disclaimers. A disclaimer, among other essential statements, should advise employees, in a prominently displayed section of the manual, that the policies and procedures described are not intended to create a contract of employment. Courts often recognize such disclaimers as binding. Obtaining a signed receipt upon distribution of the manual also will assist in the defense of later claims by showing that the employee received the manual and had notice of the disclaimer prominently displayed therein.
  - Day v. Staples, Inc., 555 F.3d 42, 58 (1st Cir. 2009). Applying Massachusetts law, the Court found that no implied contract was created where the employee had signed the Handbook Acknowledgement form, which contained language that employment was at will. Further, the Handbook itself contained a further notification that the first 90 days of employment were considered the introductory period, and that since employment is at the will of the company and of the associate, completion of the introductory period is not a guarantee or a right to continued employment.

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- *Turner v. Fed. Express Corp.*, 539 F. Supp. 2d 404 (D.D.C. 2008). No implied contract was created where the employee handbook expressly stated the handbook was not a contract of employment and should not be read or implied to provide for one. Furthermore, that language was repeated on the acknowledgement of receipt signed by the employee.
- *Denis v. P & L Campbell*, 809 N.E.2d 773, 777-78 (Ill. App. Ct. 2004). The court affirmed the lower court, stating that important to the lower court's analysis of whether the employee handbook constituted a contract with its employees was the fact that the employee handbook contained no disclaimers to negate the promises made.
- *Lobosco v. N.Y. Tel. Co./NYNEX*, 96 N.Y.2d 312, 727 N.Y.S.2d 383 (2001). The court held that the employer made it clear through its employee manual — upon which the employee claimed reliance — that it may terminate employment at-will. This effective disclaimer precludes the employee from establishing an express or implied contractual obligation that would limit the employer's right to terminate the employee.
- *Warner v. Fed. Express Corp.*, 174 F. Supp. 2d 215 (D.N.J. 2001). The court held that the terms of the former employee's employment handbook were sufficiently clear to make an employee aware that the provisions of the handbook did not provide any contractual rights, and, thus, the former employee could not establish an implied contract. *See also Gil v. Related Mgmt. Co.*, No. 06-2174, 2006 U.S. Dist. LEXIS 56757 (D.N.J. Aug. 14, 2006) (granting employer's motion to dismiss where disclaimer in handbook clearly stated it did not create a legally binding obligation and it did so in a prominent location, on the first page).
- *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317 (2000). In 2000, the California Supreme Court reiterated that while at-will language in a handbook is not necessarily dispositive as to the nature of the employment relationship, it is helpful in providing evidence regarding the parties' intent as to the nature of the employment relationship.

Additionally, the employer should specifically reserve the right, at any time, to modify or discontinue the policies and benefits set forth in the

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manual. The following cases discuss prevention of an implied contract by placing disclaimer language in the handbook.

- *Premick v. Dick's Sporting Goods, Inc.*, No. 02:06cv0530, 2007 U.S. Dist. LEXIS 3702, at \*8-10 (W.D. Pa. Jan. 18, 2007). The court held that the employer was not contractually bound to pay its employees holiday bonuses based on the terms of the employee handbook. The court held that the disclaimer in the handbook, which stated that the handbook "is not an employment contract and does not create any contractual commitment upon the Company" and that it did not "create an express or implied contract or covenant" and was located on page 5 in bold type and underlined, clearly stated that it did not create a binding obligation
- *Smith v. Hous. Auth.*, No. 05-0519-WS-M, 2007 U.S. Dist. LEXIS 16287 (S.D. Ala. Mar. 6, 2007). The Housing Authority's handbook included specific disclaimers that the personnel policy was merely "a guide to administrative action," that all employees without a written contract would be considered at-will, that the section on discipline and termination "is for guidance only" and "is not a contract between the Authority and its employees," and that the handbook policy statements merely summarize the Housing Authority's "general philosophy" on termination procedures. *Id.* at \*22. Thus, as a matter of law, the handbooks were sufficiently clear to preclude construction of the handbook as an offer for a contract.
- *Kerstien v. McGraw-Hill Cos.*, 7 F. App'x 868 (10th Cir. 2001). An employee manual that contains a conspicuous disclaimer, which maintains employees' at-will status and reserves the right to amend the manual, will defeat an employee's breach of contract claim.
- *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 307-09 (N.J. 1985). Manual provisions concerning job security must be considered binding "unless the manual elsewhere prominently and unmistakably indicates that those provisions shall not be binding or unless there is some other similar proof of the employer's intent not to be bound." The court instructed that "[a]ll that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or

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provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause."

- *Nicosia v. Wakefern Food Corp.*, 136 N.J. 401, 413 (1994). The court described what the disclaimer in New Jersey must include. Applying *Woolley*, it refused to apply a disclaimer stating that "the terms and procedures contained [in the manual] are not contractual and are subject to change and interpretation at the sole discretion of the Company, and without prior notice or consideration to any employee." The court held this disclaimer failed to constitute an "appropriate statement" because it did not use "straightforward terms" and was not prominent in the text. The court made it clear that an effective disclaimer must be displayed prominently, set off from the other text so that it is noticeable immediately, *e.g.*, set in bold type, capitalized, italicized and underlined, or set off by a different color or border. In addition, in order for the language to be straightforward, the disclaimer might include: (i) that the employment relationship is terminable at the will of either party; (ii) that it is terminable with or without cause; and (iii) that it is terminable without prior notice.
- *Lytle v. Malady*, 458 Mich. 153 (1998). Employee handbook provision that no employee would be terminated without proper cause did not create reasonable expectation of just-cause employment where handbook contained a specific disclaimer that its contents were not intended to create a contract.
- *Stanton v. Highland Hosp.*, 197 A.D.2d 854, 855, 602 N.Y.S.2d 278, 279 (4th Dep't 1993). "[The Employee's] reliance on the Employee Handbook and the Policy Manual is misplaced because neither document limits or restricts [the employer's] right to discharge [the employee] at-will. Indeed, the Employee Handbook contains an explicit disclaimer."
- *Slue v. New York Univ. Med. Ctr.*, 409 F. Supp. 2d 349 (S.D.N.Y. 2006). The Southern District of New York emphasized the narrow exception to employment at-will under New York law, requiring facts similar to the *Weiner* case, discussed above. The court found that the handbook in *Slue*, unlike in *Weiner*, did not give any express statement that employees would only be terminated for

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cause. Even if the manual were a contract, the manual also included a disclaimer that the policies were “guide posts in the administration of its personnel activities” and are “not a contract of any kind” such that the employee’s claim for breach of contract was dismissed as a matter of law.

- *Schrul v. Gen. Motors Corp.*, 1994 U.S. Dist. LEXIS 11895 (W.D.N.Y. Aug. 8, 1994). The employee claimed that the handbook's policy of giving recall preference to laid-off employees created a contractual obligation to rehire him. The court dismissed the complaint because it held that the disclaimer in the handbook explicitly denied the existence of any contractual agreement between the company and its employees.
- *United States ex. rel. Yesudian v. Howard Univ.*, 153 F.3d 731 (D.C. Cir. 1998). Under District of Columbia law, an employer's reservation of rights in its handbook did not provide it with unfettered discretion in its termination decisions. The court held that “a manual purporting to restrict the grounds for termination must contain language clearly reserving the employer's right to terminate at-will.” Thus, because the “the provisions in the handbook relating to termination of employment are phrased in such a manner as to lead an employee to believe that the employer does not have unfettered discretion in its termination decisions,” the employee’s reasonable expectation of performance by the employer continues.
- *Ewald v. Wal-Mart Stores*, 139 F.3d 619 (8th Cir. 1998). The court ruled that a handbook would not be construed as a contract because it contained a clear disclaimer by the employer of any intent to form a contract.
- *Nguyen v. CNA Corp.*, 44 F.3d 234, 239 (4th Cir. 1995). Under Virginia law, “even where a statement in one part of an employment manual indicates for-cause termination only, a clear disclaimer in the manual . . . trumps contrary statements in the manual indicating for-cause termination.
- *Palazzo v. Kopelman*, No. C-93-3796-VRW, 1994 U.S. Dist. LEXIS 16591 (N.D. Cal. Nov. 15, 1994). The employer’s evidence of a signed “acknowledgment of receipt card” for the company’s employee handbook, which specifies that all employees

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are employed on an at-will basis, supported the court's conclusion that employment was at-will.

- *Hessenthaler v. Tri-County Sister Help, Inc.*, 365 S.C. 101 (2005). The employee brought suit against her former employer, claiming constructive discharge in violation of the nondiscrimination provisions in the employee handbook. The Supreme Court of South Carolina held that the disclaimer, which stated that the language in the personnel policies was not intended and should not be interpreted to create a legal contract or agreement, appeared in bold, capitalized letters on the first page and therefore the disclaimer was conspicuous as a matter of law. Moreover, the provisions that the employer would not discriminate in employment decisions did not create an expectation of guaranteed employment or that a particular process would be followed in termination decisions that would alter employment at-will.
- *Arch of Wyoming, Inc. v. Sisneros*, 971 P.2d 981 (Wyo. 1999). "If an employer wants to reserve the right to unilaterally modify its handbook, it must make sure that the reservation language is conspicuous and unambiguous."
- *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1003 (Utah 1991). The clear and conspicuous language disclaiming any contractual liability and stating that the employer's intention is to maintain an at-will relationship with its employees was sufficient to relieve the employer from liability where the disclaimer stated in pertinent part: "This book is provided for general guidance only. The policies and procedures expressed in this book, as well as those in any other personnel materials which may be issued from time to time, do not create a binding contract or any other obligation or liability on the company. Your employment is for no set period and may be terminated without notice and at-will at any time by you or the company. The company reserves the right to change these policies and procedures at any time for any reason."
- *Evans v. Med. Mut. of Ohio*, No. 77092, 2001 Ohio App. LEXIS 1148 (Ohio Ct. App., 8th Dist. Mar. 15, 2001). The rules and regulations of the employee handbook did not alter the at-will character of the employment relationship between the parties because there was no evidence of any specific promise of job security or that an implied contract for a definite term of

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employment existed. The employee handbook contained unambiguous provisions reserving the employer's right to modify.

- *Gale v. Hayes Microcomputer Prods., Inc.*, 192 Ga. App. 30 (1989). The employee could not establish that the employee handbook was a contract where the handbook, by its specific terms, stated it was not a contract and the employer did not limit its right to terminate the employee.
2. Disclaimers, however, still must be carefully drafted and disseminated in order to be effective — especially where they are being inserted into revised manuals.
- *Whittington v. City of Crisfield*, 204 F. App'x 183, 184 (4th Cir. 2006). The Fourth Circuit reversed summary judgment in a breach of contract claim, finding that the disclaimer language was ambiguous and therefore there is a question of fact as to whether the employee justifiably relied on the terms of the handbook. The manual contained a provision that stated that employees with the employer for less than 90 days could be discharged for any reason and those employed longer than 90 days can only be discharged for specified reasons; at the end of the list of the specified reasons the language that the lower court relied on as the disclaimer stated “discipline for any of the foregoing violation can include. . .” and indicated that two violations would result in suspension and three would bring about dismissal. The Fourth Circuit held that this was not a clear disclaimer because the language did not clearly specify that the employer was not contractually obligated to follow the disciplinary procedures outlined in the manual.
  - *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487 (D. Colo. 1997). A Colorado casino employee who was fired shortly after her return from maternity leave was allowed to proceed with her claims for willful breach of contract despite a disclaimer contained in the employment manual disclaiming any intent to form a contract. The court held that the phrase “termination without cause” was unclear and had no meaning on its own without accompanying explanatory language. Furthermore the disclaimer “consisted of a single sentence located in a paragraph with unrelated sentences under an uninformative heading” entitled “Authorization.” Under these circumstances, the court held that the disclaimer was not conspicuous as a matter of law.
  - *Preston v. Claridge Hotel & Casino, Ltd.*, 231 N.J. Super. 81, 87 (1989). The court refused to apply a disclaimer which stated that

the manual's provisions were "not intended to create, nor should be construed to constitute, a contract of employment." The court found that the language failed to explain its impact on the manual's job security provisions and did not "indicate, in straightforward terms, that the employee is subject to discharge at-will." If, in the court's view, the employer "wished to advise its employees that they could be discharged at-will, such a warning should have been set forth expressly." In addition, the court found that here the necessity of providing an adequate disclaimer was "particularly compelling" since the employer conducted orientation meetings where it implemented and distributed the original manual, which did not contain a disclaimer, and did not "reorient" employees as to the significance of the disclaimer in the revised manual.

- *Durtsche v. Am. Colloid Co.*, 958 F.2d 1007, 1008, 1011 (10th Cir. 1992). An "employer's attempt to change the terms of its handbook or to disclaim the effect of the contract created thereby must be conspicuous and must clearly explain to the employee the nature of the change." A disclaimer "buried in a glossary definition [with] no effort to highlight the fact or the effect of the disclaimer," such as an amendment to the handbook "delet[ing] the term 'permanent employee' and replac[ing] it with the term 'regular employee,' defining the latter to be an employee at-will," was ineffective to alter the terms of the handbook providing for termination for cause.
- *Haselrig v. Pub. Storage, Inc.*, 585 A.2d 294, 299-300 (Md. Ct. Spec. App. 1991). In analyzing whether a specific disclaimer is sufficient in barring an employee's suit for breach of an employment contract, the court stated that "[t]he clarity with which a provision in the employee handbook disclaims contractual intent will determine the viability of an employee's claim that he or she justifiably relied on provisions in that handbook." The court held that a trial was required to determine if an employment contract existed because the particular disclaimer was not so clear and unequivocal and "the provision [was] simply a declaration of the relationship, not an attempt to disclaim the employer's intention to limit the contractual relationship, *i.e.* to foreclose any expectation on the part of the employer." Here, the employer's disclaimer stated, "[t]he relationship between you and PSI is predicated on an at-will basis. That is to say that either the Employee or the Company may terminate their employment at their discretion."

**C. Even with a Disclaimer, It Is Important for an Employer To Follow its Manual Policies.**

1. An employer's failure to abide by its own rules, procedures and policies may result in the drawing of a negative inference by a court or administrative body examining a challenged employment action.
  - *Taylor v. USAir, Inc.*, No. 86-1943, 1991 U.S. Dist. LEXIS 12386, at \*25 (W.D. Pa. Apr. 25, 1991). The court stated that the job qualifications of an applicant claiming that he was rejected for a pilot position because of his race "must be judged by the standards appearing in the Flight Operations Manual, not those articulated at trial."
2. On the other hand, an employer's compliance with its personnel policies can be asserted in support of the proposition that the challenged employment action was not a pretext for unlawful discrimination.
  - *Ruth v. M M M Foods*, No. 89-3260, 1991 U.S. Dist. LEXIS 4344, at \*7 (N.D. Ill. Apr. 4, 1991). Employee was unable to establish pretext by claiming that "she was not fired for the reasons provided as grounds for termination in the employee handbook" since the handbook explicitly provided that "the Company has the right to terminate immediately for other reasons which it determines to be serious, with the concurrence of the appropriate personnel director."

**D. In Some Jurisdictions, In Order To Enforce its Provisions, an Employer May Want its Manual To Be Treated as an Employment Contract.**

In some jurisdictions, where handbooks are generally treated as creating contractual promises (*e.g.*, California), employers may seek to have their personnel handbooks treated as binding contracts if they contain provisions that they would like enforced by the courts. This is especially true, for instance, where the employee handbook contains employment-at-will language or an alternative dispute resolution procedure.

- *Bakri v. Cont'l Airlines*, No. 92-3476, 1992 U.S. Dist. LEXIS 22162, at \*3 (C.D. Cal. Sept. 24, 1992). An employee who properly followed the employer's internal grievance procedure, which was described in its employee handbook, was precluded from raising his breach of contract claims in federal court. The

court held that the internal hearing process was equivalent to an arbitration. Thus, the hearing officer's award of proper discharge was upheld by the court. The employee argued that he was forced to submit to these grievance procedures because of the handbook, but he also claimed that the employer violated its own handbook procedures on termination. Quoting *Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 951 (D.N.J. 1991), the court stated that "[i]f the [employee] seeks to rely on provisions in the employee handbook as the source of an implied contract of employment, then he must accept that agreement as a whole with its attendant responsibilities."

### **III. COMMUNICATE YOUR COMMITMENT TO EQUAL EMPLOYMENT OPPORTUNITY.**

The personnel handbook, usually distributed to all employees and supervisors, provides an opportunity to communicate or reaffirm the employer's commitment to equal employment opportunity. An *Equal Opportunity Policy Statement* has become an essential feature of most personnel manuals. However, because of the increasingly complex anti-discrimination legal requirements, employers should carefully consider whether other equal employment-related policy statements should be included in their handbooks.

#### **A. Sexual (and Other) Harassment Policies and Complaint Procedures.**

The establishment of comprehensive policies forbidding sexual (and other types of) harassment and mechanisms for addressing complaints of harassment is crucial for avoiding employer liability for hostile environments created by supervisors or other employees. This is especially important because courts may broadly interpret the definitions of protected categories.

For instance, recently, a Seventh Circuit U.S. Court of Appeals held that the lower court misinterpreted the definition of race under § 1981 of the Civil Rights Act of 1866. It ruled that a former Prada saleswoman who is Iranian, could rightfully bring a race discrimination suit against Prada and that the district court had also wrongfully dismissed her retaliation claim, in which she alleged that Prada spread derogatory rumors about her after her termination because she had filed a charge against it with the EEOC. As Judge Posner explained, although "Iranian" may not be considered a "race" in the usual definition of the word, the employer could still have experienced discrimination based on her Iranian ethnicity. As he further noted, "Some Iranians, especially if they speak English with an Iranian accent, might, though not dark-skinned, strike some Americans as sufficiently different looking and sounding from the average American of European ancestry to

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provoke the kind of hostility associated with racism. Yet hostility to an Iranian might instead be based on the fact that Iran is regarded as an enemy of the United States, though most immigrants to the United States from Iran are not friends of the current regime. So one would like to know whether the plaintiff is charging that the discrimination against her is based on politics or on her seeming to be member of a foreign 'race.'” See Amanda Ernst, “7th Circuit Reinstates Race Bias Suit Against Prada,” EMPLOYMENT LAW 360 (Mar. 25, 2008).

In June 1998, the Supreme Court issued two opinions clarifying employer liability for sexual harassment perpetrated by supervisors. These decisions articulated an affirmative defense to liability for use by the employer in cases where the harassment by a supervisor does not culminate in a “tangible employment action.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

In both cases, the Supreme Court held that an employer will be strictly liable for an actionable hostile environment created by a supervisor with immediate, or successively higher, authority over the employee when a tangible employment action (such as discharge, demotion, or undesired reassignment) is taken.

However, when no tangible employment action is taken, an employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence: (a) “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the . . . employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

Whether the employer exercised reasonable care to prevent any sexually harassing conduct will be determined based on what actions the employer took to prevent such behavior in its workplace prior to receiving a sexual harassment complaint. Accordingly, in order for an employer to increase the likelihood of success in arguing that it exercised reasonable care to prevent any sexually harassing behavior, the employer, at a minimum, should take the following actions:

- implement a written non-discrimination and anti-harassment policy;
- ensure that the policy is written in plain English, not legalese, and is tailored to the comprehension capabilities of the employees;

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- ensure that the policy provides employees with effective avenues to bring complaints forward (not just through their supervisor);
- include the policy in a prominent place in an employee handbook;
- widely disseminate the policy (independent of the employee handbook) throughout the workplace on a periodic basis to make sure all employees know of its existence and understand the complaint procedures; and
- train appropriate parts of the workforce, such as senior management, managers/ supervisors, and complaint-receivers, in understanding and applying its policy.

After *Faragher* and *Ellerth*, courts generally have found that employers exercised reasonable care where they are able to show that they adopted and distributed a policy that clearly communicates that harassment is not tolerated, and that they have a complaint or grievance procedure in place. These policies and procedures should, at a minimum, include a definition of sexual harassment and a description of the types of conduct forbidden, establish complaint procedures that do not require employees to lodge grievances with the accused harasser, make non-retaliation assurances, set forth investigation procedures and describe that appropriate discipline, including the possibility of discharge, could be taken if the employer makes a finding of harassment. Proof that its employees received the policy also is effective in establishing the first prong of the affirmative defense. It is important to note that courts are applying these same principles not just to sexual harassment, but to all forms of workplace harassment (*e.g.*, race, religion, etc.).

- *Robinson v. Truman Coll.*, No. 97 C 896, 1999 WL 33887, at \*7 (N.D. Ill. Jan. 19, 1999). The court found that the employer exercised “reasonable care” to prevent and correct promptly any sexually harassing behavior because it had in place a written sexual harassment policy that it distributed to every full- and part-time employee and provided a mechanism for employees and students to report incidents of sexual harassment.
- *Bauer v. Carson Tahoe Hosp.*, 212 F. App’x 654, No. 04-17495, 2006 U.S. App. LEXIS 30909, at \*4 (9th Cir. Nov. 17, 2006). The Ninth Circuit affirmed summary judgment in favor of the employer, holding that the employee did not rebut the employer’s *Faragher/Ellerth* affirmative defense. The employer promulgated

an anti-harassment policy in the employee handbook, which defined harassment and provided examples of harassing conduct and established reporting procedures. The employer also circulated a document titled “Preventing Sexual Harassment” to all employees, which reiterated the anti-harassment policy and reporting procedures. The employer also demonstrated that it took reasonable steps to remedy the employee’s complaint, including transferring the employee to another department and demoting the alleged harasser.

- *Duhe v. United States Postal Serv.*, No. 03-476, 2004 U.S. Dist. LEXIS 3737, at \*58 (E.D. La. Mar. 8, 2004). The court held that the employer satisfied both prongs of the *Faragher/Ellerth* affirmative defenses because the employer established and maintained an extensive anti-harassment program containing a “zero tolerance” policy with respect to both quid pro quo and hostile environment sexual harassment, disseminated harassment prevention information to employees and provided multiple avenues through which an employee could report sexual harassment. Moreover, the employer took prompt remedial action by instituting an investigation into plaintiff’s allegations within days of receiving her complaint. The employer subsequently counseled the alleged harasser and sent him to undergo additional sexual harassment training and offered plaintiff another position at a nearby post office. Finally, the court determined that, notwithstanding the fact that the alleged harasser was plaintiff’s supervisor, the employer’s procedures were “more than adequate and . . . the sexual harassment policy provided [plaintiff] with multiple avenues of relief which she unreasonably failed to pursue.”
- *Duviella v. Counseling Serv.*, No. 00-cv-2424, 2001 U.S. Dist. LEXIS 22538 (E.D.N.Y. Nov. 20, 2001), *aff’d*, 52 F. App’x 152 (2d Cir. 2002). The court held that the employer satisfied both prongs of the *Faragher/Ellerth* affirmative defense because the employee handbook had a section that delineated a clear procedure for cases of sexual harassment. By virtue of the sexual harassment complaint procedure in the handbook, the employer exercised reasonable care in preventing and correcting the harassing behavior. The employee also alleged that the procedure was inadequate because it required complaints to be in writing before an investigation would commence. The court held that this policy was acceptable because it still allowed an employee who believed

he or she was being sexually harassed to complain to various supervisors either orally or in writing. “By allowing [an employee] to notify various personnel orally, [the employer’s] policy does not limit or in any way deter an employee from complaining of sexual harassment.” *Id.* at \*41.

- *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999). The employer met its burden under the first prong of the *Faragher/Elzerth* affirmative defense by having a clear and specific anti-harassment policy defining sexual harassment, prohibiting sexual harassment during the period in which the employee claims she was being harassed, providing avenues of complaint, and describing disciplinary measures that the company may use in a harassment case. The employee admitted that she knew about the policy and received it in the employee handbook when she was hired and also received pamphlets regarding the policy on two separate occasions. *See also Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1177 (9th Cir. 2003) (holding that the employer’s policy was reasonable when the employer promulgated a written policy on more than one occasion and this policy defined prohibited behavior, identified contact personnel and established procedures to investigate and resolve claims).
- *Romero v. Caribbean Rests., Inc.*, 14 F. Supp. 2d 185 (D.P.R. 1998). The court found that the employer satisfied the first prong of the affirmative defense by having a policy against sexual harassment and a mechanism in place to deal with any claim of sexual harassment by employees (present complaint to either the human resources director or the administrative director by telephone or mail). The employee received a copy of the employer’s sexual harassment policy and signed a receipt to that effect. The employee also successfully completed the employer’s training program that ordinarily entailed a lecture on sexual harassment policy. The employee’s lack of memory concerning training, therefore, did not create a genuine issue of material fact regarding the employer’s promulgation of the anti-harassment policy and procedure.
- *Robinson v. Truman College*, No. 97 C 896, 1999 WL 33887 (N.D. Ill. Jan. 14, 1999).

The court found that the employer exercised “reasonable care” to prevent and correct promptly any sexually harassing behavior

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because it had in place a written sexual harassment policy that it distributed to every full- and part-time employee and provided a mechanism for employees and students to report incidents of sexual harassment.

- *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999). The employer satisfied first element of affirmative defense by having an anti-harassment policy, including a complaint procedure, in place to deter sexual harassment. Where there was no evidence that the policy was adopted or administered in bad faith or that it was defective, public policy militates strongly in favor of a conclusion that the employer “exercised reasonable care to prevent” harassment.
- *Mandy v. Quad/Graphics, Inc.*, 49 F. Supp. 2d 1095 (E.D. Wis. 1999). The employer exercised reasonable care to prevent harassment by having in place a formal, written anti-harassment policy that: (i) prohibited harassment in clear and forceful terms; (ii) included a formal complaint procedure; (iii) promised a prompt investigation of complaints; (iv) stated that the complainant’s position or opportunities for advancement would not be jeopardized as a result of a complaint; (v) prohibited retaliation; (vi) allowed an employee to complain to the Director of Employee Services if the employee’s direct supervisor was the perpetrator of the harassment; and (vii) was set forth in the employee manual.
- *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773 (W.D. Ky. 1998). The court found that it was undisputed that the employer had an effective policy in place because it provided every new employee with an employee handbook which specifically stated that sexual harassment is discrimination and considered a violation of company policy. The handbook and employment manual also described the types of conduct that would not be tolerated and provided the employees with the ability to submit complaints to one of three offices. Accordingly, the employer had established the first prong of the affirmative defense.
- *Maddin v. GTE, Inc.*, 33 F. Supp. 2d 1027 (M.D. Fla. 1999). The court found that the employer’s sexual harassment policy, distribution, and training were reasonable to prevent and correct sexual harassment. The sexual harassment policy made it clear that sexual harassment would not be tolerated and provided a number of avenues through which sexual harassment could be

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reported. Training about sexual harassment was provided for the employees and supervisors, and the employer posted the policy on the employee bulletin boards on every floor of the building in which the employees worked.

- Small employers need not have sexual harassment policies that are as formal as larger employers. For instance, in *Leopold v. Baccarat, Inc.*, No. 95-6475JSM, 2000 WL 174923, at \*3 (S.D.N.Y. Feb. 14, 2000), *aff'd*, 239 F.3d 243 (2d. Cir. 2001), the court noted that “in a very small company . . . an oral statement that harassment will not be tolerated and an open door policy on the part of management may be sufficient. The law is very clear that any reasonable policy will do.”

However, just having an anti-harassment policy may not be sufficient. That policy must actually be received by employees.

- *Wilburn v. Fleet Fin. Group, Inc.*, 170 F. Supp. 2d 219 (D. Conn. 2001). The court held that the employer did not show by undisputed evidence that it exercised reasonable care to prevent sexual harassment. The policy upon which the employer relied stated that managers will conduct a staff meeting every year to address the policy and to ensure distribution of the policy. There was testimony, however, that no meeting occurred and it was unclear whether the policy was actually distributed during the time at issue. Thus, the employer did not show that as a matter of law it was entitled to the *Faragher/Ellerth* affirmative defense.
- *Meng v. Ipanema Shoe Corp.*, 73 F. Supp. 2d 392 (S.D.N.Y. 1999). The court denied summary judgment where there was a question of fact as to the timing and circumstances under which the employee received the Employee Handbook that contained the employer’s sexual harassment policy. While the employer alleged that the handbook was distributed to all new employees, and that employees attended a seminar on sexual harassment, the employee testified that she did not receive a copy of the handbook until late in her employment, that she did not read applicable parts until after her termination, and that although the seminar discussed sexual harassment, the employee did not distribute the sexual harassment policy, or did it provide instructions for reporting incidents of harassment.

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- *Pyne v. Procacci Bros. Sales Corp.*, No. A.96-7314, 1998 WL 386118, at \*1 (E.D. Pa. Jul. 10, 1998). In denying summary judgment, the court reasoned that a jury could reasonably find that the employer had not promulgated an anti-harassment policy and complaint procedure or otherwise exercised reasonable care to prevent or to correct promptly any sexually harassing behavior.
- *Brandrup v. Starkey*, 30 F. Supp. 2d 1279 (D. Or. 1998). The court found that the employer failed to exercise reasonable care where it had not disseminated its harassment policy to its employees, even though the employee knew that she could go to Human Resources, and that another employee had done so, because there was no evidence that the employee was aware of the actual protections provided by the policy, especially regarding retaliation by her supervisor. Moreover, the affirmative defense was unavailable to the employer because it did not exercise reasonable care in correcting the alleged sexual harassment after the employee complained — the employee was instructed to voice her complaints directly to the harassing supervisor.
- *But see Guerra v. Editorial Televisa-USA Inc.*, No. 97-3670, 1999 WL 581844 (S.D. Fla. Jun. 4, 1999). As long as the employer provides a reasonable avenue of complaint and the employee knows of it, the employer meets its burden under the first prong of the affirmative defense, even if the employee never actually receives a copy of the anti-harassment policy.

Additionally, the policy must be written in plain English, not legalese, and tailored to suit the comprehension level of the employees.

- *E.E.O.C. v. V&J Foods, Inc.*, No. 07-1009, 2007 WL 3274364 (7th Cir. Nov. 7, 2007). When a high school student employed at a Burger King filed suit against her ex-employer, alleging sex discrimination, the district court granted summary judgment to V&J Foods, Inc. (the restaurant owner) on grounds that the employee failed to invoke the company's complaint procedure. However, the Seventh Circuit reversed, holding that because V&J knew that it had many teenage employees, it was obligated to suit its complaint procedure to the understanding of the average teenager. Instead, V&J adopted confusing and ineffective complaint procedures, and consequently, was unable to meet its burden of proving, as an affirmative defense, that it has established and implemented an effective complaint machinery.

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Post-*Faragher* cases show how important it is to delineate not only an anti-harassment policy, but also to create open and effective complaint procedures. Where an employer has complaint procedures in place, and an employee fails to use them reasonably, courts often have refused to hold the employer vicariously liable for a supervisor's misconduct.

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- *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 499 (2007). The Eleventh Circuit held that an employee's failure to take advantage of preventive or corrective measures can occur either when the employee does not use the procedures in place promptly or when the employee does not take advantage of a reasonable corrective measure after the harassment is reported. The court held that the employer made out both elements of the *Faragher/Ellerth* defense where the employee failed to promptly report the harassment. The court further held that the employee's reasons for waiting over three months from the first incident to report the harassment, including a fear of being fired and attempting to serve her career interests, were insufficient to excuse her delay in reporting because all employees would be able to claim that they were afraid of losing their job or damage their career prospects. Therefore, the lower court's grant of summary judgment for the employer was affirmed.
- *Ritchie v. Stamler Corp.*, No. 98-5750, 2000 WL 84461 (6th Cir. Jan. 12, 2000). The employer exercised reasonable care to prevent and correct sexually harassing behavior by publishing and promulgating an anti-harassment policy with a reporting procedure that required employees to present sexual harassment grievances to the president in writing. Furthermore, the employee unreasonably failed to follow this complaint procedure when the president testified that he never received a complaint from the employee.
- *Barrett v. Applied Radiant Energy Corp.*, 70 F. Supp. 2d 644 (W.D. Va. 1999) *aff'd in relevant part*, 240 F.3d 262 (4th Cir. 2001). The company anti-harassment policy required employees to report harassment to any member of the management team. It assured employees that complaints would be kept confidential and that employees would not be penalized for reporting harassment. The employee knew of the policy and signed an acknowledgment that she received it. Where the employee told non-management

employees of the harassment, but did not tell any members of management, the court reversed a jury verdict of employer liability and held that merely because an employee had reasons for not reporting harassment (*i.e.*, scared of retaliation), it is insufficient to bar the employer's use of the affirmative defense. *See also Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 492 (S.D.N.Y. 1998) (“[E]very employee who feels harassed by a supervisor will at some level fear the inevitable unpleasantness which will result from complaining to the employer. . . . However, to allow an employee to circumvent the reasonable complaint requirements of *Faragher* . . . by making conclusory allegations of feared repercussions would effectively eviscerate an affirmative defense. . . .”); *Madray v. Publix Super Mkts.*, 30 F. Supp. 2d 1371, 1375 (S.D. Fla. 1998), *aff’d*, 208 F.3d 1290 (11th Cir. 2000) (“An employee’s generalized fear of repercussions cannot form the basis for an employee's failure to complain to his or her employer.”).

- *But see Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93 (2nd Cir. 2010). The plaintiff alleged a hostile work environment due to sexual harassment. She complained to her direct supervisor, who was also her alleged harasser. Company policy provided that the employee could have complained to her supervisor and/or persons other than her supervisor. The lower court granted summary judgment for the employer, holding that the employer was entitled to the *Faragher/Ellerth* defense as a matter of law because the employee did not utilize the avenues of complaint open to her. However, the Second Circuit reversed, ruling that there is no requirement that the employee exhaust all possible complaint procedures provided for by the employer; and that the employer is not entitled to the *Faragher/Ellerth* defense as a matter of law simply because it offers avenues for complaint in its policy on sexual harassment. There may be reasons why the employee failed utilize those other available avenues, and it may be a genuine issue of fact as to whether it was reasonable for the employee not to pursue those other avenues. The facts and circumstances of each case must be examined to determine whether the employee unreasonably failed to take advantage of alternative avenues of complaint provided by the employer.

Post-*Faragher/Ellerth* authority illustrates that general or ineffective complaint procedures may be insufficient to shield an employer from liability for sexual harassment.

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- *Van Pfullman v. Texas Dep't of Transp.*, 24 F. Supp. 2d 707, 711 n.1 (W.D. Tex. 1998). The court found no actionable harassment, but noted that the employer's harassment policy would be insufficient to support an affirmative defense because the complaint procedure contained strict ten and thirty-day reporting limitations. Such strict time limitations, along with the direction to report the harassment to the immediate supervisor, would be found inadequate.
- *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000). Employer's anti-sexual harassment policy was defective because the wording made it sound like a sexual advance is required in order to be sexually harassed. It was faulty because it did not specifically prohibit discrimination on the basis of gender, but simply banned unwanted "sexual advances and other sexually provocative conduct." Thus, the court held that the policy was an insufficient means of preventing sexual harassment.
- *But see Guerra v. Editorial Televisa-USA Inc.*, No. 97-3670, 1999 WL 581844 (S.D. Fla. Jun. 4, 1999). If an anti-harassment policy is workable and promulgated effectively, it is not deficient merely because it lacks provisions for training, posting notices, or gender-friendly complaint mechanisms.

Employers also should be sure that any prohibition of sexual harassment includes same-sex harassment.

- *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998). In *Oncale*, the Supreme Court recognized a claim brought by a male employee for same-sex harassment. The Court ruled that "nothing in Title VII necessarily bars a claim of discrimination . . . merely because the [employee] and the . . . person charged with acting on behalf of the [employer] are of the same sex."
- Note, however, that in many states, including Illinois, employers are not required to offer spousal benefits to same-sex partners or common law spouses. In Illinois, some municipal governments such as Cook County, the City of Chicago, and the Village of Oak Park do provide these benefits.

Furthermore, in light of the tensions that exist in many workplaces arising from racial, religious and ethnic differences, an employer should expand its sexual harassment policy to cover all types of workplace harassment (e.g., ethnic, religious and/or racial).

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- *Jefferson v. Casual Rest. Concepts, Inc.*, No. 8:05-cv-809-T-30MSS, 2006 U.S. Dist. LEXIS 54178 (M.D. Fla. Aug. 4, 2006). The court applied the *Faragher/Ellerth* defense in the context of a racial harassment claim. The court denied summary judgment on the issue. While the employer established the first prong of the defense by showing that it had an anti-harassment and discrimination policy in place and that it distributed the policy to all employees, the court held that there was a dispute as to whether the employee reasonably took advantage of the complaint procedures.
- *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735, 747 (M.D. Tenn. 1998). The court found that the employer would not have been able to establish the affirmative defense, in part, because it did not come forth with proof that “management ever received any kind of training with respect to issues of racial harassment.”

Any policy that requires confidentiality by the complaining employee, employee witnesses or an employee who is accused and/or receives discipline, may be subject to attack under the National Labor Relations Act (“NLRA”). (See generally the discussion on Confidentiality and Communications Policies, *infra*).

- *Ne. Land Servs. v. N.L.R.B.*, 2009 U.S. App LEXIS 5267 (1st Cir. Mar. 13, 2009). The Court upheld the Board’s finding that the employer’s confidentiality rule prohibiting employees from disclosing the terms of their employment to other parties could reasonably be construed by employees to prohibit Section 7 activity, and was therefore overbroad and unlawful. Particularly, employees could reasonably understand the language in the policy as prohibiting discussions of their compensation with union representatives.
- *Guard Publishing Co. d/b/a The Register Guard and Eugene Newspaper Guild, CWA Local 37194*, 183 L.R.R.M. 1113 (2007) *affd in part, rev'd in part, and remanded*, *Guard Publishing Co., v. N.L.R.B.*, 571 F.3d 53, 56 (D.C.Cir. 2009). The Board held that because employees have no statutory right to use their employer’s email system for Section 7 purposes, businesses may prohibit workers from using office email to disseminate information about union activities. It further held that employers violate no law by establishing workplace policies that prohibit the use of the employer’s computer resources for “non-job-related solicitations.” The Court of Appeals for the D.C. Circuit declined to uphold the

Board's conclusion as to whether the employer discriminatorily enforced its email policy but did not explicitly overrule the standard announced by the Board. The court found that the distinction between solicitations for groups and for individuals in the company policy prohibiting non-work-related solicitations was a "post-hoc invention" that did not actually exist in the company's email policy. The court further noted that the company's disciplinary warning did not invoke the organization-versus-individual line drawn by the Board. To the contrary, the company told the employee in question to "refrain from using the Company's systems for union/personal business." Despite the court's dissatisfaction with the Board's reasoning, the court's decision does not disturb the underlying premise that employers may prohibit union access to its email system so long as it does so in a nondiscriminatory manner.

- *Phoenix Transit Sys.*, 337 N.L.R.B. 510 (2002). The Board held that an employer's confidentiality policy that prohibited employees from discussing their sexual harassment complaints among themselves was a violation of the NLRA. The Board reasoned that: (1) employees have a protected right to discuss their sexual harassment complaints among themselves; (2) the confidentiality rule in this case restricted employees' rights; and (3) a legitimate and substantial justification was not established for the rule, thereby making it unlawful.
- *Cintas Corp. v. NLRB.*, 482 F.3d 463 (D.C. Cir. 2007). The D.C. Court of Appeals held that the confidentiality provision in the handbook, which provided that "We recognize and protect the confidentiality of any information concerning the company, its business plan, its partners, new business efforts, customers, accounting and financial matters" violated the NLRA. The court held that an employee could reasonably construe this provision as limiting their rights under Section 7 of the NLRA and therefore a more narrowly tailored rule was necessary to not interfere with employees' protected rights.
- But see *In re Tradesmen Int'l*, 338 N.L.R.B. 460 (2002). Employer had the following rules in its employee handbook: a "conflicts of interest" rule that prohibited employees from engaging, directly or indirectly either on or off the job, in any conduct which is "disloyal, disruptive, competitive, or damaging to the company," and a rule prohibiting "statements which are slanderous or detrimental" to the

company or its employees. The conflict of interest rule addressed “legitimate business concerns” and was not overly broad since it gave examples of what was prohibited — i.e. illegal in restraint of trade and employment with another organization while employed by the company. Thus, a reasonable employee would understand that this rule was not addressed to any conduct protected by the NLRA. Similarly, the Board found that the rule prohibiting “slandorous and detrimental” activity could not be read to encompass any activity protected by the NLRA.

On May 21, 2008, the Genetic Information Nondiscrimination Act of 2008 (“GINA”) was signed into law. Title I of GINA, which relates to health plans, expands the existing nondiscrimination requirements contained in the Health Insurance Portability and Accountability Act (“HIPAA”) by amending the relevant provisions of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), the Public Health Service Act, the Internal Revenue Code of 1986, and Title XVIII of the Social Security Act (relating to Medigap plans). Title II of GINA creates a new statute to prohibit discrimination on the basis of “genetic information” with respect to employment.

GINA defines “genetic information” as information about an individual or his or her family’s genetic test(s) and/or about a family member’s *manifested* disease or disorder, except information about sex or age. It defines “genetic test” as an “analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.”

GINA prohibits employers, employment agencies, labor organizations, and joint labor-management committees controlling apprenticeship and other training programs from:

- making employment decisions based on genetic information (*e.g.*, hiring, firing, promoting, etc.);
- retaliating against individuals who exercise their rights under GINA;
- requesting or requiring genetic information, except in limited circumstances; and
- disclosing genetic information about an individual, except in limited circumstances.

In response to this legislation, employers should amend their handbooks, policies, and procedures accordingly.

- EEOC spokeswoman Christine Nazer has been quoted saying that, nationally, 80 charges have been filed under GINA as of April 26, 2010. CT Post: <http://www.ctpost.com/local/article/Fairfield-woman-claims-genetic-test-led-to-firing-466136.php>.

**B. Anti-Bullying Policy.**

Laws prohibiting workplace harassment likewise apply only where the harassment is based on protected characteristics. For example, Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). The United States Supreme Court has held that the language of Title VII, however, “is not limited to economic or tangible discrimination” and that the phrase “terms, conditions, or privileges of employment” includes “requiring people to work in a discriminatorily hostile or abusive work environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations omitted).

Of course, other federal statutes have expanded the list of characteristics protected from discriminatory conduct under federal law — *e.g.*, the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* — but the standard governing the level of conduct necessary to establish such claims is the same as that applicable under Title VII.

In the absence of statutory protection, employees who believe they are the victims of workplace bullying might assert claims under common-law tort theories, such as intentional infliction of emotional distress or assault and battery.

To state a claim for intentional infliction of emotional distress under New York law, a plaintiff must show: (1) extreme and outrageous conduct; (2) an intent to cause, or reckless disregard to the probability of causing, emotional distress; (3) severe emotional distress suffered by the plaintiff; and (4) that the conduct complained of caused the plaintiff’s severe emotional distress. *See Lish v. Harper’s Magazine Found.*, 807 F. Supp. 1090 (S.D.N.Y. 1992); *Howell v. New York Post*, 81 N.Y.2d 115, 121, 596 N.Y.S.2d 350, 353 (1993).

Assault is a common law tort whereby an individual intentionally creates a threat of bodily harm, coupled with an apparent ability to cause injury, that arouses fear of the injury in the victim. Certain overt forms of bullying may constitute assault if the victim can demonstrate: (1) an unjustifiable threat of force against

the victim; (2) made with the intention to arouse apprehension; (3) creating a reasonable apprehension of immediate physical harm; and (4) the bully had the apparent present ability to effectuate the threat. A victim of bullying will not be able to bring an action for assault against the bully for snide remarks or subtle backstabbing (of the figurative sort). The bullying must be especially aggressive — the kind where physical violence seems likely — to bring an action for assault.

The tort of battery is a completed assault and has been defined as any nonconsensual touching of another person. The “bully” does not escape liability merely because he or she did not intend to cause injury to the victim. *See Lambertson v. United States*, 528 F.2d 441 (2d Cir. 1976). Thus, victims may be able to bring a claim for battery even though most workplace bullying does not result in physical contact or violence.

### **Recent Trends.**

In recent years, lawmakers in several states have introduced anti-bullying legislation that would prohibit abusive conduct in the workplace. The movement has been gaining momentum since the introduction of the first bill of its kind in 2003 in California (which did not pass). Most experts agree that the effect of these laws would be a dramatic increase in litigation over workplace conduct.

On May 12, 2010, the New York Senate passed the Healthy Workplace Bill, S. 1823-B, which amends the labor law to establish the unlawful act of abusive conduct in the workplace and provides remedies and defenses. It also imposes vicarious liability on an employer who, when made aware of such abuse, fails to make a good faith effort to correct it. The bill has been put on hold and did not get an Assembly floor vote in the 2009-2010 session.

New Jersey’s proposed “Healthy Workplace Act,” first introduced in 2006, and then re-introduced in 2008, would make it an “unlawful employment practice for an employer to subject an employee to abusive conduct or to permit an abusive work environment. The proposed statute defines “abusive conduct” as: “repeated infliction of verbal abuse such as the use of derogatory remarks, insults and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person’s work performance.”

In Illinois, a version of the Healthy Workplace bill that only covers public sector employees passed the Senate Vote on March 18, 2010 and remains in committees.

### **Recommendations for Employers.**

1. To avoid potential liability, employers should consider maintaining and enforcing a clear anti-bullying policy. It should state plainly that bullying behavior will not be tolerated and should spell out the disciplinary action that perpetrators will face for transgressions against the policy. Employers should also establish an accessible complaint procedure to enable victims of bullying to report it. As with other internal complaint procedures, it should be accessible and as confidential as reasonably possible.
2. Conflict Resolution Training: Employers and HR departments can also address workplace bullying proactively. Managers and supervisors should be made aware of such behaviors and must recognize that inaction has financial ramifications. To that end, training in conflict resolution would prove to be a beneficial tool in diffusing workplace tension.
3. Identify “Bully-Victim” Relationships: Employers can also attempt to identify current “bully-victim” relationships and ascertain whether the physical layout of the work site or the reporting structure can be changed to ameliorate interpersonal struggles.

**C. Special Obligations of Federal Contractors.**

1. Employers who hold federal contracts or subcontracts falling within the jurisdictional threshold of Executive Order No. 11246 (“E.O. 11246”) have additional obligations. They must develop and disseminate equal employment opportunity statements notifying employees and applicants that they do not discriminate on the basis of race, color, religion, sex or national origin. 41 C.F.R. §§ 60-2.20, 60-2.21. Policies concerning the handicapped, disabled veterans and Vietnam-era veterans also must be developed and disseminated. 41 C.F.R. §§ 60-250.6(f)-(g).

**2. Affirmative Action Plans**

A federal contractor covered by E.O. No. 11246 also must develop and maintain an affirmative action plan (“AAP”). Although such AAPs are normally separate and distinct from personnel manuals, some employers refer to them in their manuals.

Once an AAP is in place, employers must take care to comply with it; as with any other obligation assumed by an employer, a court (or jury) may draw negative inferences from an employer’s failure to comply. *See, e.g., Gonzales v. Police Dep’t, San Jose*, 901 F.2d 758, 761 (9th Cir. 1990) (“evidence that the employer violated its own affirmative action plan may be relevant to the question of discriminatory intent”).

An affirmative action plan cannot justify an employment decision that would otherwise violate Title VII unless the plan is designed to overcome the effects of past discrimination. In a Seventh Circuit case, the court found that the University of Wisconsin's decision to deny a male professor a tenure track position because it wanted to hold the position open for a woman was discriminatory, despite the University's contention that the decision was based on a valid affirmative action plan. The court held that the plan did not respond to any record of prior discrimination and thus, there was an issue of fact as to whether the University used sex as the sole factor in its hiring decision in violation of Title VII. *Hill v. Ross*, 183 F.3d 586 (7th Cir. 1999).

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court considered a challenge to the University of Michigan Law School's admissions policy. Under the policy, the University sought to admit a "critical mass" of underrepresented minority students to its first-year law school class in order to achieve the benefits of a diverse student body, not because of historical discrimination. Analyzing the policy under Equal Protection standards, the Court held that the University had a compelling interest in attaining diversity among its students. *Id.* at 333. In reviewing the benefits of a diverse student body (including fostering cross-racial understanding and breaking down racial stereotypes), the Court specifically discussed amicus briefs from private companies that "made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330. The Court also found that the law school's goal of attaining a "critical mass" was narrowly tailored, as it did not constitute an impermissible quota; instead, the University used race as a flexible "plus" factor in the context of an individualized consideration of each candidate's qualities and potential contributions to the law school community. *Id.* at 335-40.

The Court reached the opposite result, however, in *Gratz v. Bollinger*, 539 U.S. 244 (2003) finding that the University's undergraduate admissions program violated Equal Protection because it was not narrowly tailored to achieve diversity. In *Gratz*, the applications of all undergraduate candidates were numerically scored based on various criteria, including grade point average, SAT scores, and quality of the applicant's high school. Minority candidates, however, received an additional 20 points based on their minority status, and virtually every qualified minority applicant was admitted. In finding the program was not narrowly tailored, the Court held that an affirmative action program must provide candidates with an individualized assessment, based on his or her unique criteria. As

the automatic award of points to minority candidates did not permit such individualized consideration, the Court found the program to be unconstitutional. *Id.* at 281.

While it is impossible to predict the impact of *Grutter* and *Gratz* on future decisions involving affirmative action under Title VII, it appears likely that an employer who adopts an affirmative action program will need to demonstrate that the plan provides for an individualized assessment of each candidate's qualifications and only uses protected characteristics as a "plus" factor. It is not clear, however, whether courts will permit employers to adopt affirmative action plans without a remedial basis, as it allowed the University of Michigan to do in the educational context. Until the Supreme Court weighs in on the issue, an employer who makes race-based employment decisions without evidence of a "manifest imbalance" takes serious risks under current Title VII jurisprudence.

In addition, some states have imposed their own affirmative action requirements. For example, in Illinois at least 12% of the total amount awarded in state contracts and at least 10% of the dollar amount awarded in state construction contracts must go to businesses owned by the disabled, women, or other minorities; of the latter amount, half must go to female-owned businesses. *See* 30 Ill. Comp. Stat. Ann. 575/1 *et seq.*; 775 Ill. Comp. Stat. Ann. 5/2-105, 5/7-105, 5/7-106; Ill. Admin. Code tit. 44, §§ 750 *et seq.* In addition, the Illinois Municipal Code provides that veterans be given preference for civil service positions, while other laws provide preference for veterans in hiring for state universities and construction positions on public works projects. 65 ILCS 5/10-1-16; 65 ILCS 5/10-2.1-8; 110 ILCS 70/36g; 330 ILCS 55/1 *et seq.*

**D. Other Government Requirements.**

When an employer contracts with or receives financial assistance from federal, state or local government entities, it may be taking on additional affirmative action obligations, which may require specific provisions to be included in the employer's personnel manual.

1. For example, grantees of the Federal Department of Education are prohibited from discriminating on the basis of race, color, national origin, sex and handicap. Furthermore, they must adopt grievance procedures to address complaints of sex and handicap discrimination, and disseminate notifications of nondiscrimination to employees, applicants, unions and others. 34 C.F.R. §§ 104.7, 104.8, 106.8, 106.9.

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2. New York City contractors must comply with Executive Order No. 50 ("E.O. 50"), as amended. Among its many obligations, E.O. 50 requires contractors to maintain and disseminate equal employment opportunity policy statements.

### **E. Sexual Harassment Laws.**

Many states, including Illinois, have enacted legislation to prohibit sexual harassment. *See* 775 Ill. Comp. Stat. Ann. 5/1-101 *et seq.* 5/2-101 *et seq.*; Haw. Rev. Stat. §§ 378-2, 378-3; Me. Rev. Stat. Ann. tit. 5, §§4571, 4572, 4572-A, 4574, 4651 *et seq.*

An excellent example is California's Fair Employment and Housing Act ("FEHA"), which prohibits sex discrimination and parallels the theories of liability under Title VII.

In California, an effective policy against sexual harassment is essential because an employer is strictly liable for the sexual harassment of a subordinate by a supervisor. *State of Dep't of Health Servs. v. Superior Court*, 31 Cal. 4th 1026 (2003).

The California Legislature recently enacted new legislation regarding sexual harassment. Assembly Bill 1825 ("AB 1825"), which became effective in January 2005, requires California employers of 50 or more employees to provide supervisors with at least two hours of sexual harassment training every two years.

- Employers must include their full-time, part-time and temporary service employees as well as independent contractors to determine whether they meet the 50-employee threshold.
- Since the law does not specify that the 50 employees must be within the state, the law applies to California employers with 50 total employees including those outside the state.

The law requires that every two years all supervisory employees receive two hours of training. All new supervisory employees must receive this training within six months of assuming their supervisory position, and then every two years thereafter.

Training requirements:

- The training must include information and practical guidance regarding federal and state sexual harassment laws, including

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harassment prevention and correction, and remedies available to victims of sexual harassment in employment.

- The training must be “interactive,” meaning requiring participation by the trainee, and must be presented by trainers or educators with “knowledge and expertise” in the prevention of harassment, discrimination, and retaliation.
- The training need not be conducted in two consecutive hours.

Employers are required by the California Fair Employment and Housing Commission (“FEHC”) to post their policy against sexual harassment in the workplace and to distribute information regarding employee’s rights to be free from sexual harassment. Employers may use a pamphlet prepared by the Department of Fair Employment and Housing or they may draft their own forms, so long as it includes all of the information required by California Government Code § 12950(b).

#### **IV. PLAINLY STATE EMPLOYER RULES, REGULATIONS AND PROCEDURES.**

A personnel handbook is the logical place to plainly state the employer’s rules, regulations and procedures affecting the workplace. Among other policies, employers commonly communicate in their manuals such policies governing:

- conflict of interest/prohibition on outside employment;
- confidential nature of work;
- job categories (*e.g.*, exempt and non-exempt classifications);
- transfer/promotion guidelines;
- compensation, overtime and payment of salary;
- time-off benefits (*i.e.*, holiday, vacation, sick and personal days);
- leaves of absence (discussed more fully in Section V);
- absenteeism and lateness;
- workplace appearance and comportment;
- use of the employer’s telephones, mail, e-mail, and other facilities;

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- travel policies (e.g., maximum expenditures for meals and lodging);
- accidents, emergencies and safety and fire regulations;
- no solicitation policy;
- no fraternization policy;
- anti-gambling policy;
- examples of conduct giving rise to discipline or discharge;
- reemployment;
- employment-at-will;
- Federal Corporate Sentencing Guidelines, Compliance Program; and
- alternative dispute resolutions.

Having such policies in place often assists in achieving the uniform application of personnel policies. Furthermore, the standard application of policies minimizes claims of favoritism or unfair treatment and assists in the defense of discrimination or wrongful discharge claims.

*However, given the extensive regulation of the employment relationship by federal, state and local governments, an employer must carefully draft its rules, regulations and procedures to comply with the law.* Below we have described some of the principal legal issues that should be considered when drafting some common employer rules, regulations and procedures.

### **A. Access to Personnel Records.**

Some state laws require employers to provide employees access to the documents in their personnel files. Certain documents are typically excepted. *E.g.*, CAL. LAB. CODE ANN. § 1198.5 (requiring employers to allow an employee to inspect his or her personnel file and to inspect those documents contained therein used to determine the employee's qualifications, promotion, additional compensation, termination or other disciplinary action, but excluding inspection of records relating to the investigation of a possible criminal offense and letters of reference); CAL. LAB. CODE ANN. § 432 (entitling employees to copies of all documents signed by them and contained in their personnel file).

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In Illinois, legislation governing employee access to personnel records applies to public and private employers with at least 5 employees. Covered employers must allow employees to review and photocopy their records, but they may require employees to make a written request for such review. Employers must grant at least two inspection requests per calendar year, and copying fees must be limited to actual costs. 820 Ill. Comp. Stat. Ann. 40/1 (employee rights) and 40/1(a) (former employees).

In Nevada, employers and unions are required to allow an employee, or a person that the union referred for employment, to have a reasonable opportunity to inspect any records containing information used to determine the qualifications of the employee and any disciplinary action taken against him or information that the labor organization uses with respect to the person's position on the referral list. NEV. REV. STAT. ANN. § 613.075. The statute also requires the employer or union to make copies for the individual. Exempt from these requirements are confidential reports from previous employers or investigative agencies, other confidential investigative files concerning that individual, or information concerning the investigation, arrest or conviction of that person for a violation of any law. NEV. REV. STAT. § 613.075(1)(b). A person only maintains these rights while he is employed and for 60 days after the termination. NEV. REV. STAT. § 613.075(4).

Florida does not have a statute that allows private sector employees access to their personnel files. Accordingly, a private employee generally may not review or copy his personnel file unless the employer permits him or her to do so. State and federal employees, by contrast, do have access to their records in accordance with Florida's expansive public records statute. *See* FLA. STAT. § 119. In fact, anyone wishing to do so may inspect records relating to state employees so long as they comply with the statutory procedure for doing so. It should be noted, however, that the broad public records statute does contain important restrictions and exemptions. For example, all information relating to the medical condition or medical status of state employees that is not relevant to the employee's capacity to perform his or her duties is expressly exempt from disclosure. FLA. STAT. § 119.07.

Louisiana does not have a statute governing employee access to personnel records. However, it does have a statute that permits workers exposed to toxic substances to obtain information "concerning the nature of the substances and consequential adverse health effects." LA. REV. STAT. ANN. § 23:1016. Accordingly, employees have the right to access employee medical records and their employer's records of employee exposure to potentially toxic materials or harmful physical agents.

Some statutes also provide employees with the right to contest statements contained in such documents and to include in their file their own written version of the issues in dispute. *E.g.*, NEV. STAT. § 613.075(2) (allowing an employee to submit a “reasonable written explanation in direct response to any written entry in the records of employment regarding the employee”).

**B. Anti-Nepotism or No-Spouse Rules.**

Many employers have policies regulating the employment of relatives (*e.g.*, an employee may not supervise or otherwise affect the work, salary or advancement of his/her relative). Employers should be aware, however, that anti-nepotism or no-spouse policies are subject to legal challenge on several grounds. While some policies survive these challenges, others have been invalidated.

1. No-spouse rules have been invalidated under a disparate impact theory where the employer was unable to demonstrate “business necessity for the rule.” The problem to be addressed by the no-spouse rule must be concrete and demonstrable and the rule must be essential to eliminating the problem.
  - *EEOC v. Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986). The court invalidated the policy because it found that the company offered no evidence of the existence of the problems the rule was purportedly designed to remedy — dual absenteeism, vacation scheduling, and decreased production safety.

No spouse rules have also been invalidated on a disparate treatment theory where the rule was applied unequally to male over female employees.

- *George v. Farmers Elec. Coop., Inc.*, 715 F.2d 175, 177 (5th Cir. 1983). The court found that the wife was improperly chosen for termination because her husband was “head of the household.”

Employers also should be certain that their anti-nepotism policy is consistently enforced. Anti-nepotism policies have been invalidated because the employer failed to enforce the policy or applied it in a discriminatory manner.

- *Fuller v. Architect of Capitol*, No. 00-197, 2002 U.S. Dist. LEXIS 7285 (D.D.C. Apr. 17, 2002). An applicant claimed that the employer’s failure to hire her under its anti-nepotism policy because she was married to another employee was discriminatory

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because the employer hired the son-in-law of another employee for that position. The court found there were triable issues of material fact that precluded summary judgment. Among the disputed issues of fact were whether the individual who was hired was similarly situated to the applicant, whether there were other instances of nepotism allowed by the employer, what the terms of the anti-nepotism policy were when the applicant applied for the position, and when the employer began enforcing its long-standing policy against nepotism.

- *Goodyear Tire & Rubber Co. v. Portilla*, 879 S.W.2d 47 (Tex. 1994). The court awarded damages to an employee who was terminated because she could not transfer to another plant. The employee was asked to transfer because she was in violation of the company anti-nepotism policy. The court held that the company waived its right to enforce the policy because the employee worked for 17 years under her brother's supervision with the company's knowledge.
2. Many state and local human rights laws prohibit discrimination based upon marital status. However, anti-nepotism policies may be upheld if they are uniformly applied to all relatives and not just to spouses.
- *Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd.*, 51 N.Y.2d 506, 434 N.Y.S.2d 961 (1980). The court found that an employee's discharge pursuant to the employer's anti-nepotism rule that was applied to all relatives did not constitute discrimination on the basis of marital status in violation of the New York State Human Rights Law.
  - *Thomson v. Sanborn's Motor Express, Inc.*, 154 N.J. Super. 555 (1977). The court found that a policy prohibiting the simultaneous full-time employment of relatives in the same department or terminal does not violate the marital status discrimination prohibition of the New Jersey Law Against Discrimination.
3. Some state anti-discrimination laws explicitly limit the use of anti-nepotism policies. For instance, California prohibits employers from basing employment decisions on whether an individual has a spouse presently employed by the employer, but allows for limitations concerning the placement of such employees for reasons of supervision, safety, security or morale. CAL. GOV'T CODE ANN. § 12940(a)(3).

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4. As with many state human rights laws, both the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*<sup>1</sup> and the Florida Civil Rights Act of 1992 prohibit discrimination on the basis of, *inter alia*, marital status. Discrimination on the basis of marital status may include terminating or refusing to hire an individual because of his or her marriage to a current employee. *See Nat'l Indus., Inc. v. Comm'n on Human Relations*, 527 So. 2d 894 (Fla. DCA 5th Dist. 1988) (acknowledging that "marital status" is broadly defined but firing an employee because of the actions of her spouse, who was also a former employee, was not protected). In *Donato v. AT&T*, 767 So. 2d 1146 (Fla. 2000), *aff'd*, 206 F.3d 1031 (11th Cir. 2000), an employee claimed that he was discriminatorily discharged based on marital status because his wife sued the employer for sex discrimination. However, the court held the termination did not violate Florida's Civil Rights Act prohibiting discrimination based on marital status, because "marital status" is defined as the state of being married, single, divorced, separated or widowed, and does not include the specific identity or actions of an individual's spouse.

### C. Searches on Employer Property.

Under certain circumstances, such as those in connection with an employer's internal investigation of theft, an employer may need to search an employee's work area or personal belongings. The law, however, may limit an employer's ability to conduct searches on its property. These restrictions must be kept in mind when developing handbook policies and before conducting such searches.

1. Challenges to employer searches have generally arisen in the public sector, where public employees may invoke constitutional protections. Under constitutional standards, the reasonableness of a work-related search is based on the particular facts and a two-step inquiry: (i) whether the employee had a reasonable expectation of privacy in the area or property searched; and (ii) if so, whether the employer's legitimate interest in conducting the search outweighed the employee's expectation

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<sup>1</sup> The Illinois Human Rights Act expressly prohibits discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, ancestry, citizenship status (employment only), age (40 and over), marital status, unfavorable military discharge, military status, physical, mental or perceived handicap or arrest record (in employment). The IHRA also prohibits sexual harassment of employees and of students in higher education, as well as retaliation against someone because s/he files a charge of discrimination or opposes discrimination. Moreover, it is unlawful to aid, abet or coerce someone to discriminate or to interfere with the Department or Commission's duties. [http://www.state.il.us/dhr/Charges/Chg\\_bases.htm](http://www.state.il.us/dhr/Charges/Chg_bases.htm).

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of privacy. The following cases illustrate examples of searches in the public sector.

- *O'Connor v. Ortega*, 480 U.S. 709 (1987). The court stated that whether state hospital officials had a legitimate right of access to a physician's office, the physician had a reasonable expectation of privacy in his file cabinets and desk; *on remand*, No.-C-82-4045-JPV, 1993 U.S. Dist. LEXIS 3882 (N.D. Cal. Mar. 23, 1993), *on remand, summ. judgment denied, mot. denied, request granted*, No. C-82-4045 - MHP, 1996 U.S. Dist. Lexis 4788 (N.D. Cal. Mar. 11, 1996) (search justified at inception due to allegations of misconduct and permissible in scope where it secured only items relevant to the investigation).
  - *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1335 (9th Cir. 1987). The court found that notwithstanding a reasonable expectation of privacy, “a warrantless search of [employee's] office . . . could be legal if the search was both work-related — that is, carried out to retrieve the employer’s property or to investigate work-related misconduct — and ‘reasonable’ under the circumstances.”
  - *Gossmeier v. McDonald*, 128 F.3d 481 (7th Cir. 1997). The court upheld a search for child pornography in the private file cabinet of an employee in the Illinois Department of Children and Family Services. The employee purchased the cabinets with her own money, had her own key to the cabinets and kept them locked when she was not in the office. The court held that the search was reasonable because of the sensitive nature of the material and the specific relation to the employee’s job.
  - *Williams v. Philadelphia Hous. Auth.*, 826 F. Supp. 952, 954 (E.D. Pa. 1993), *aff’d without op.*, 27 F.3d 560 (3d Cir. 1994). The court found that a search, including the removal of a computer disk and review of its contents, was “justified at its inception” and, because the disk contained both personal and work-related information, was “reasonably related to the circumstances that initiated the search.”
2. Employees in both the public and private sectors may attempt to challenge an employer’s search based on a state common law right of privacy, subjecting the employer to possible tort liability where it violates employees’ reasonable privacy expectations. Examples of tort

theories invoking a common law right of privacy include: (i) unreasonable intrusion, physically or otherwise, upon the seclusion of another or his private affairs or concerns; (ii) appropriation of another's name or likeness; (iii) unreasonable publicity regarding another's private life if the matter publicized would be highly offensive to a reasonable person and is not of legitimate concern to the public; and (iv) publicity that unreasonably puts another in a false light, if the false light would be highly offensive to a reasonable person. Restatement (Second) of Torts § 652A (1977).

- *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 637 (Tex. Ct. App. 1984). The employer provided employees with lockers for the storage of personal items during store hours. The employee supplied her own lock. During a general search for stolen or missing items, the employer searched the employee's locker, including the contents of her purse. The court held that the jury was "justified in concluding that the employee manifested, and the employer recognized, an expectation that the locker and its contents would be free from intrusion and interference." The employer could, therefore, be found liable for mental anguish and exemplary damages for invasion of privacy.
- *Overby v. Chevron U.S.A.*, No. S043084, 1994 Cal. LEXIS 7056 (Cal. Dec. 21, 1994). Under a breach of privacy claim, a jury awarded \$550,000 to an employee who was fired for refusing to turn out his pockets and permit company officials to examine his wallet during a random drug search. The employee had permitted the employer to search only his locker and not his wallet because he claimed the employer had no probable cause to search his wallet.

It is, therefore, important that employers balance their need for effective searches with the risk that intrusive or unnecessarily abrasive searches may lead to litigation. Employers might consider observing the following procedures to reduce any litigation risk:

- Put employees on written notice that all company property (including computers, desks and lockers assigned to employees) may be searched at the company's discretion.
- If searches of personal property will be conducted from time to time (*e.g.*, at exits of employer premises), notify employees in writing of such policy.

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- Make plain the consequences of refusing to consent to a search.
  - Conduct searches only when there is a legitimate business reason to do so; if searches are selective, undertake them in a nondiscriminatory manner and only when there is a reasonable suspicion of a violation of company rules.
  - Limit the scope of the search to the business purpose for which it is conducted.
  - Designate employees who are permitted to authorize searches.
  - Conduct searches in the least intrusive manner possible.
  - If practicable and consistent with effective investigation, have the employee present during the search.
  - Have two representatives of management conduct the search, so that there will be corroboration as to its results.
3. At least one state has enacted legislation which may create special problems in conducting employee investigations of an employee's off-duty conduct. N.Y. LAB. LAW §§ 201-d(1)-(2) (prohibiting employers from discriminating against employees and job applicants on the basis of off-duty political activities, lawful recreational activities and legal use of consumable products.) *See infra*, Section VII (D).
4. Other states have enacted laws that prohibit employers from making employment decisions on the basis of an employee's protected off-duty conduct. In Illinois, the Right to Privacy in the Workplace Act prohibits discrimination in the workplace motivated by the use of tobacco products, alcohol, and other "lawful products" outside the workplace. Under the Act, the off-duty use of these "lawful products" constitutes protected activity unless their use interferes with the employee's job performance or the employer's primary purpose is to discourage use of the lawful product. Moreover, for purposes of calculating insurance rates, differentiation of employees who use and do not use the "lawful product" is permissible. *See* 820 Ill. Comp. Stat. Ann. 55/1 *et seq.* Moreover, under the Personnel Records Review Act, employers may not keep records of an employee's off-duty activities and associations unless the employee presents that information to the employer in writing or gives written consent to the employer to keep that information. 820 ILCS 40/9.

**D. Violence in the Workplace Policies.**

1. A recent study found that “the risk of a worker being killed at work was substantially higher in workplaces where employer policy allowed workers to keep guns: workplaces where guns were specifically permitted were 5 to 7 times more likely to be the site of a worker homicide relative to those where all weapons were prohibited.” Dana Loomis et al., *Employer Policies Toward Guns and the Risk of Homicide in the Workplace*, 95 AM. J. PUB. HEALTH 830 (2005). In 2008, more than 75 percent of workplace homicides were caused by a shooting. Bureau of Lab. Stat., Census of Fatal Occupational Injuries (2008), *available at* <http://www.bls.gov>. In response to the increasing levels of workplace violence, many employers have implemented workplace safety policies designed to prevent violent acts committed by employees.

Some states have responded to the rise of violence in the workplace by developing new workplace violence policies barring employees of the state and state contractors from bringing weapons to work or making threats of violence. In 1999, the governor of Connecticut signed Executive Order 16, whereby employees who are subject to or who witness violence or threatening behavior are obliged to report it, and supervisors are obliged to take action. The order declares that state and state contractor employees should not expect privacy with respect to weapons or dangerous equipment in the workplace.

*Calandriello v. Tennessee Processing Ctr.*, No. 3:08-1099, 2009 WL 5170193 (M.D. Tenn. Dec. 15, 2009). Employer learned that the employee had altered a company poster by adding a photo of Charles Manson, and viewed online images of violence, assault weapons, and serial killers all on company equipment. The employer terminated the employee citing to written company policy prohibiting viewing objectionable material on company computers. The district court held that firing an employee based on fear of potential violence by that employee is a “legitimate non-discriminatory reason” for termination, in spite of that individual’s known diagnosis of bipolar disorder. The deciding factors were that it was a high security workplace and the policies concerning computer usage were written.

Nebraska’s new statute provides that an employer in control of a workplace may prohibit a valid permit holder/employee from bringing a concealed weapon to work so long as the employer has posted conspicuous notices of its no-weapons policy. NEB. REV. STAT. § 69-2427-69-2447. Likewise, in Tennessee employers may ban weapons from

the workplace if a notice of the weapons ban is conspicuously posted. *See* TCA § 39-17-1315. However, many other states like Illinois, Vermont, Virginia, and Wyoming have no statutes that specifically address bringing weapons into the workplace.

2. **Legal Uncertainty.** Employers face legal uncertainty in determining whether or not to forbid weapons in the workplace. On the one hand, if a business owner chooses not to prohibit concealed weapons, he or she could be liable for failing to control employees who cause injuries using weapons, for not adequately supervising employees carrying weapons, for failing to protect customers from weapon carriers or for creating an unsafe work environment. On the other hand, if a business owner bans concealed weapons, liability may attach for inadequately enforcing the weapons prohibition, for violent acts that may not have occurred had weapons been permitted in the workplace, or for enabling the business premises to become a target for criminals seeking unarmed victims. Nicole Hartley, *Business Owner Liability & Concealed Weapons Legislation: A Call for Legislative Guidance for Pennsylvania Business Owners*, 108 PENN. ST. L. REV. 637 (2003).
3. Theories Under Which Employers May Be Liable for Workplace Violence.
  - Respondeat Superior. Employers can be found liable for tortious acts committed by their employees during the scope of employment. However, if the employee commits an intentional violent act with a weapon, he or she may be acting outside the scope of employment and the employer will not be liable. *Id.* at 640.
  - Negligence. Employers can be liable for their employees' violent acts under theories of negligent supervision, hiring or retention. An employer has a duty to use reasonable care in supervising, selecting and controlling employees. For example, if an employer permits guns in the workplace, it could be liable if it should have foreseen that an employee could cause harm to a third person or that he should have better supervised those employees who carry guns. *Id.* at 642.
4. Requirements of the Occupational Safety and Health Act ("OSHA").
  - OSHA requires employers to provide a workplace that is "free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." 29

U.S.C. § 654(a)(1). Recent guidelines by OSHA indicate that OSHA may recognize workplace violence as a sanctionable hazard. *See* Nicole Hartley, *Business Owner Liability & Concealed Weapons Legislation: A Call for Legislative Guidance for Pennsylvania Business Owners*, 108 PENN. ST. L. REV. 637, 647 (2003); Raneta Lawson Mack, *This Gun for Hire: Concealed Weapons in the Workplace and Beyond*, 30 CREIGHTON L. REV. 285, 309 (1997).

- While OSHA has yet to consider the specific issue of carrying concealed weapons in the workplace, a determination of an employer's liability would most likely start with an employer's general duty to provide a workplace free of hazards likely to cause death or serious physical harm to its employees. Raneta Lawson Mack, *This Gun for Hire: Concealed Weapons in the Workplace and Beyond*, 30 CREIGHTON L. REV. 285, 310 (1997).

5. State Statutes Limiting Employer Weapons Policies.

Other states have enacted statutes requiring employers to allow employees to bring firearms onto employer property if left in their vehicles.

- In 2005, Alaska enacted a statute prohibiting the enforcement of any rule or policy barring individuals from possessing a legally owned firearm in a legally parked locked motor vehicle. H.B. 184, 24th Leg., 1st Sess. (Ala. 2005). However, employers may prohibit firearms in certain private parking lots within 300 feet of a secured restricted access area. Similar laws have passed in Minnesota, Oklahoma, Kentucky, Mississippi, Kansas, Louisiana, Georgia, Utah, Montana, Idaho, and Florida.
- Illinois has no law that interferes with an employer's right to ban employees from bringing weapons on the premises. However, the Health Care Workplace Violence Protection Act requires healthcare workplaces to develop a plan to promote the reporting and documentation of workplace violence incidents. *See* 405 Ill. Comp. Stat. 90/5(2). By July 1, 2008 covered workplaces must adopt and implement a plan to reasonably prevent and protect employees from violence at that setting. The plan must address security considerations related to the following items, as appropriate to the particular workplace:

- (1) The physical attributes of the health care workplace.
  - (2) Staffing, including security staffing.
  - (3) Personnel policies.
  - (4) First aid and emergency procedures.
  - (5) The reporting of violent acts.
  - (6) Employee education and training.
6. What Employers Should Consider When Implementing a Policy on Gun Possession in the Workplace.
- Whistleblower protection. Employers should consider what protections will be afforded to an employee who reports another employee's violation of a workplace gun policy. *Guns in the Workplace*, 20 TERMINATION OF EMPLOYMENT 1, at 1.2 (Jan. 2004).
  - Gun Check Facility. Employers should determine whether they will provide employees with a secure gun check facility. *Id.*
  - Drafting. If an employer decides to ban weapons in the workplace, the policy should contain the following:
    - "Definitions of terms such as 'weapon,' 'firearm,' and 'possess;'
    - A clear statement of the purpose of the policy;
    - An express statement that despite state law provisions allowing the carrying of concealed weapons the employer has elected to prohibit weapons on its property;
    - Whether the policy applies only to employees or to all entering the employer's premises (customers, delivery services, *etc.*);
    - Explanation of the areas covered (only the inside of the workplace? employee cars in the parking lot?);

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- A specific notice requirement, stating the content;
- Description of the employer's policy on searches in the workplace;
- A requirement of consent to search personal areas;
- Signed, written acknowledgment of the policy;
- A warning of the disciplinary consequences of violating the policy."

*Id.* See also Raneta Lawson Mack, *This Gun for Hire: Concealed Weapons in the Workplace and Beyond*, 30 CREIGHTON L. REV. 285, 314 (1997).

### **E. In-House Investigations.**

Employers should have procedures in place to conduct investigations of matters such as harassment or breaches of security, or to perform audits. Including a section on in-house investigations in the employer's personnel handbook will inform employees that such investigations may occur and that the employees are expected to cooperate with them. In developing these policies and carrying out in-house investigations, a number of legal issues, such as the following, should be kept in mind.

1. The Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-09, and its implementing regulations, 29 C.F.R. Part 801, generally permit private employers to conduct polygraph testing only pursuant to detailed procedural guidelines and only if "the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business," the employee had "access to the property that is the subject of the investigation," and the employer had "a reasonable suspicion that the employee was involved in the incident or activity under investigation." The statute does not apply to federal, state and local government employees and does not preempt any state or local law or collective bargaining agreement that is more restrictive than the federal law.
2. In addition, the federal wiretapping law, the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 to 2520, generally forbids interception, without judicial authorization, of telephone calls by means of an "electric, mechanical or other device" unless: (i) one of the parties to the conversation consents to its interception, 18 U.S.C. § 2511(2)(d);

or (ii) the intercepting equipment (such as a telephone) is furnished to the employee by a provider of communication services and the telephone surveillance is made in the “ordinary course of [the employer's] business,” 18 U.S.C. § 2510(5)(a)(i). The Electronic Communications Privacy Act of 1986 amended the federal wiretapping law to include protection to stored wire and electronic communications, such as e-mail. 18 U.S.C. §§ 2510-2521.

Consequently, absent the consent of at least one party to the conversation, employers may not monitor employees’ telephone conversations or listen to employees’ voice mail messages unless it is in the ordinary course of business (e.g., where a company monitors customer service employees who continuously speak with customers). In addition, in such circumstances, employers should notify employees that an employer representative (e.g., supervisor) may listen to their telephone conversations or voice mail messages. Even in this case, however, if the employer representative determines that the call is personal and not business-related, unless the employer has received employee consent to monitor personal calls, employers should stop listening upon ascertaining this fact. Of course, although the employer may not listen to the personal telephone call, if the employer prohibits personal telephone calls while on work premises, the employer may take appropriate disciplinary action against the employee for the personal telephone call.

- *Arias v. Mutual Cent. Alarm Serv.*, 202 F.3d 553 (2d Cir. 2000).  
An employer recorded a private telephone conversation via 24-hour-per-day recording of all incoming and outgoing telephone calls at the company. The court held that this recording fell within the ordinary course of business exception to the federal wiretap statute, since legitimate business reasons supported the 24-hour-per-day recording of all incoming and outgoing telephone calls at an alarm company, and this recording was standard industry practice. Consent of one party to the conversation is not required in order to apply the ordinary course of business exception to liability for the interception of communications under the federal wiretapping statute.

3. States impose related restrictions as well.

**California:**

- California employers are prohibited from using extension telephones for monitoring employee conversations and

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from intercepting voice mail messages intended for employees. CAL. PENAL CODE ANN. §§ 630 *et seq.*

- Also in California it is a misdemeanor for employers to furnish photographs or fingerprints of applicants to third parties if they could be used to the employee's detriment. CAL. LAB. CODE ANN. § 1051. Due to the potential for discrimination based on information revealed in photographs, the Department of Fair Employment and Housing ("DFEH") takes the position that employers should not require applicants to submit photos. 2 C.C.R. § 7287.3(c). In addition, California also restricts the use of credit checks by employers. Employees are entitled to copies of credit checks, and if they are rejected as the result of a credit check, they must be informed in writing and given an opportunity to dispute its accuracy. CAL. CIV. CODE §§ 1785.20, 1785.20.5, 1785.3(a)(2) and 1785.3(f). California law also prohibits employers' use of polygraph tests as a condition of employment. CAL. LAB. CODE ANN. § 432.2.
- Employees in California have reasonable expectations of privacy in their workplace conversations, even if those conversations may be overheard by others in shared office space. Just because an interaction may be witnessed by others on the premises does not necessarily defeat, for the purposes of tort law, any reasonable expectation of privacy employees have against covert videotaping by a journalist. *Sanders v. Am. Broad. Cos.*, 20 Cal. 4th 907 (Cal. 1999).

### Connecticut:

- Connecticut employers are prohibited from requesting or requiring employees or prospective employees "to submit to, or take, a polygraph examination as a condition of obtaining employment or of continuing employment . . . or dismiss or discipline in any manner an employee for failing, refusing or declining to submit to or take a polygraph examination." CONN. GEN. STAT. ANN. § 31-1g (b)(1).
- Connecticut employers are prohibited from using "any electronic surveillance device or system" to monitor employees "in areas designed for the health or personal

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comfort of the employees or for safeguarding of their possessions, such as rest rooms, locker rooms or lounges.” CONN. GEN. STAT. ANN. § 31-48b(b).

- Connecticut employers are prohibited from intentionally overhearing or recording “a conversation or discussion pertaining to employment contract negotiations between the two parties.” CONN. GEN. STAT. ANN. § 31-48b(d).
- Connecticut employers who engage in any type of electronic monitoring are required to “give prior written notice to all employees who may be affected, informing them of the types of monitoring which may occur.” CONN. GEN. STAT. ANN. § 31-48d(b)(1).

### **Delaware:**

- A Delaware employer may not “monitor or otherwise intercept any telephone conversation or transmission, electronic mail or transmission, or Internet access or usage of or by a Delaware employee unless the employer either: 1) provides an electronic notice of such monitoring or intercepting policies or activities to the employee at least once during each day the employee accesses the employer-provided e-mail or Internet access services; or 2) has first given a one-time notice to the employee of such monitoring or intercepting activity or policies.” Id. at § 705(b). The notice must “be in writing, in an electronic record, or in another electronic form and acknowledged by the employee either in writing or electronically.” 19 Del. C. § 705(b)(2).

### **District of Columbia:**

- Employers in the District of Columbia are prohibited from using lie detector tests in connection with the employment of an individual, except for criminal or internal disciplinary investigations conducted by the police, fire or corrections departments. D.C. CODE ANN. §§ 32-901 to 32-903.

### **Florida:**

- According to the Florida Security of Communications Act, FLA. STAT. § 934, it is unlawful to use an electronic or mechanical device to intercept any “wire, oral, or electronic communication.” Further, the term “oral communication”

is broadly defined and focuses on whether the person uttering the communication has a reasonable expectation that the communication will not be subject to interception. FLA. STAT. § 934.02. A violation of this statute constitutes a third degree felony. Furthermore, FLA. STAT. § 934.10 entitles a person whose communication has been illegally intercepted to bring a civil claim for: (1) actual damages, or liquidated damages computed at a rate of \$100.00 per day for each day of violation, or \$1000.00, whichever is higher; (2) punitive damages; and (3) reasonable attorneys' fees and costs.

- One case in Florida has suggested that an “expectation of privacy” may exist with respect to conversations taking place in the workplace. *See, e.g., State v. Sells*, 582 So. 2d 1244 (Fla. DCA 4th Dist. 1991) (holding that whether a conversation which took place in the office of the employee’s superior was protected from interception was an issue of fact).

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### Illinois:

- Under the Illinois Eavesdropping Act, which governs interception of conversations in person, by phone, or electronically regardless of whether one or more of the parties intended the conversation to be private and applies to all employers, a person commits eavesdropping by knowingly and intentionally using an eavesdropping device to hear, record, retain, transcribe, or otherwise intercept a conversation or by divulging or using information that is known or reasonably should be known to have been obtained via eavesdropping. Under the act, two-party consent is generally required. 720 ILCS 5/14-1 *et seq.*
- With regard to polygraph testing, Illinois law prohibits polygraph testing in pre-and post-employment inquiries in the following areas unless the area is directly related to the employment: i) racial, political, or religious beliefs, opinions, or affiliations; ii) union-related beliefs, affiliations, or lawful activities; and iii) sexual activity or preferences. Moreover, polygraph examiners must be licensed by the state. 225 ILCS 430/14.1; 225 ILCS 430/4.

### Louisiana:

- The Louisiana Electronic Surveillance Act, which largely mirrors the Federal Wiretap Act, prohibits the willful interception of any oral or wire communication. LA. REV. STAT. § 15:1301 *et seq.* The Act defines interception as “the aural or other acquisition of the contents of any wire electronic or oral communication through the use of any electronic, mechanic or other device.” LA. REV. STAT. § 15:1302(11). However, under the Louisiana Act, if one party consents to the interception of a communication, the interception is lawful provided the communication is not intercepted for the purpose of committing any criminal or tortious act. LA. REV. STAT. § 15:1303(4).

### Maryland:

- Maryland employers are prohibited from requiring as a condition of employment or future employment that an individual submit to a lie detector test. Applications for employment are required to state this prohibition, and they must be signed by the applicants, except for federal, law

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enforcement, or correctional employees. Md. Lab. & Emp. Code Ann. § 3-702.

### **Nevada:**

- Nevada law makes it unlawful for employers to: (1) require, request, or suggest that an employee or prospective employee take a lie detector test; (2) use the results of a lie detector test; or (3) discharge, discipline or discriminate against any employee or prospective employee who refused or take a lie detector test, on the basis of a lie detector test, or in retaliation for exercising his rights under this statute. NEV. REV. STAT. ANN. § 613.480. The statute provides exemptions where an employer can use a polygraph examination if it is administered in connection with an investigation of activities that would result in economic loss to the employer and there is reasonable suspicion that the employee is involved in the activity. The employer must provide an employee in this situation with a written explanation of the incident being investigated. NEV. REV. STAT. ANN. § 613.510.
- An employer who violates the laws pertaining to lie detectors is liable to the employee or prospective employee “for any legal or equitable relief as may be appropriate, including employment of a prospective employee, reinstatement or promotion of an employee and the payment of lost wages and benefits.” NEV. REV. STAT. ANN. § 613.490. Moreover, the Labor Commissioner can impose an administrative penalty up to \$9000 for each violation of the statute. NEV. REV. STAT. ANN. § 613.500.

### **New Jersey:**

- New Jersey employers, with certain exceptions relating to the manufacture, distribution or dispensing of controlled dangerous substances, are prohibited from requesting or requiring employees or applicants to take or submit to lie detector tests as a condition of employment or continued employment. N.J. STAT. ANN. § 2C:40A-1.

### **New York:**

- New York prohibits eavesdropping, including wiretapping and the intentional overhearing or recording of a telephonic or telegraphic communication by a person without the

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consent of either, by means of any instrument, device or equipment. N.Y. PENAL LAW §§ 250.00(1), (3) and 250.05.

- New York also prohibits the use and administration of psychological stress evaluation examinations for employment purposes. N.Y. LAB. LAW §§ 733-739.
- Furthermore, New York law prohibits employers from keeping employees under surveillance in the course of exercising their rights to engage in union activities. N.Y. LAB. LAW § 703.

### **Pennsylvania:**

- Under Pennsylvania law, it is a felony to eavesdrop, including wiretapping and the intentional overhearing or recording of a telephonic or telegraphic communication by a person without the consent of either, by means of any instrument, device or equipment. 18 Pa. C.S. § 5703.
- It is also a violation of Pennsylvania law for an employer to require a lie detector test as a condition of hiring or continued employment. 18 Pa. C.S. § 7321.

### **F. Confidentiality and Communications Policies.**

Employers should be cautious when promulgating handbook policies that restrict the types of work-related conversations in which employees may engage. The National Labor Relations Act (“NLRA”), 29 U.S.C. § 151 *et seq.* (2005) applies to non-unionized employers as well as to unionized employers in the private sector. Section 7 of the NLRA protects employees’ rights to “self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection.” 29 U.S.C. § 157 (2005). An employer’s infringement of § 7 rights, such as a blanket prohibition on all solicitation on and off work time, is considered an unfair labor practice under § 8(a)(1). *Martin Luther Mem’l Home, Inc.*, 343 N.L.R.B. 646, 646 (2004).

Moreover, the fact that the employer’s language does not explicitly instruct employee not to discuss terms of employment is not dispositive; the appropriate test is whether an employee would reasonably construe the language to prohibit Section 7 activity, the rule was promulgated in response to union activity; or the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* This test was cited with approval by the Court of Appeals for the District of Columbia in two recent cases. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007).

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Three rules contained in the company handbook were at issue in *Guardsmark v. N.L.R.B.*: a chain-of-command rule, a solicitation rule, and a fraternization rule. 475 F.3d at 372

- **Chain-of-Command Rule**  
The rule provided that while on duty an employee must follow the chain of command and that employees are not to register complaints with any representative of the client. *Id.* at 374. The Board found that this last provision interfered with the “right of employees under Section 7 to enlist the support of an employer’s clients or customers regarding complaints about terms and conditions of employment.” *Id.* at 374-75. The court affirmed the Board’s holding because: (1) it was reasonable to find the “while on duty” language only applied to the prohibition against discussing complaints with non-supervisory employees but not to the ban on client communications (*id.* at 375); (2) the Board did not need to consider whether the rule ever actually prohibited an employee from voicing complaints to clients during non-working times because the Board had already decided that the rule restricted Section 7 activity (*id.*); and (3) the employer did not present evidence that the chain-of-command rule’s purpose was to ensure efficient resolution of dispute and that “this purpose represents a special circumstance necessary to employee discipline or company production.” (*Id.* at 377).
- **Solicitation Rule**  
The rule prohibited the solicitation and distribution of literature not pertaining to officially assigned duties “at all times while on duty or in uniform.” *Id.* The court affirmed the Board’s conclusion that the rule was unlawful because the rule bars solicitation and distribution at all times when the employees are on duty, whether or not they are in uniform, and at all times while employees are in uniform, whether or not they are on duty. *Id.* The fact that the rule prohibits off-duty solicitation is a violation of the Act.
- **Fraternization Rule**  
The rule provides that “While on duty you must NOT . . . fraternize on duty or off duty . . . with the client’s employees or with co-employees.” *Id.* at 378. The court disagreed with the Board’s approval of this rule, holding that it is unreasonable for the Board to conclude that employees would understand the term “fraternize” in the rule to prohibit “only personal entanglements rather than activity protected by the Act.” *Id.* at 379. The court held that *Guardsmark* could have achieved its legitimate goal of ensuring that security was not compromised by interpersonal relationships by eliminating the word “fraternize,” leaving only the dating and becoming overly friendly language in the rule, or by making an exception for protected activity, for example. *Id.* at 380.

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In *Cintas Corp. v. NLRB*, the union challenged the confidentiality provision in the handbook, which provided that “We recognize and protect the confidentiality of any information concerning the company, its business plan, its partners, new business efforts, customers, accounting and financial matters.” *Id.* at 464. The administrative law judge held that the employees could construe this provision as restricting their ability to discuss their wages and other terms of employment and, therefore, interfered with their Section 7 rights. The NLRB affirmed the ALJ’s decision and the Court of Appeals affirmed. The court held that the focus must be whether an employee would reasonably construe the language as to prohibit Section 7 activity, and therefore the fact that the language did not expressly provide this limitation, or the fact that no employee testified that he interpreted the provision to limit his rights, or the fact that the employer never applied the confidentiality rule in the feared manner, did not undermine the Board’s ruling that the rule was overly broad and unlawful. *Id.* at 467-468. Cintas further argued that the Board’s interpretation of the confidentiality provision was an unreasonable, literal reading of the words. The court rejected this argument, holding that because the company’s policy made no effort to distinguish Section 7 protected behavior from violations of the company policy, the Board’s determination was “reasonably defensible” and entitled to deference. *Id.* at 469. The D.C. Circuit concluded that a “more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company’s presumed interest in protecting the confidential information.” *Id.* at 470.

Summarized below are some other recent decisions addressing whether a variety of employer policies interfere with employees Section 7 rights.

- *Crowne Plaza Hotel*, 352 N.L.R.B. 382 (2008).

Several of the Hotel’s policies were challenged as violating Section 8(a)(1). The “no solicitation/no distribution” rule prohibited solicitation or distribution during work time, or at any time in working areas or in customer and public areas. The Board held that to the extent the rule prohibited off-duty employee solicitation and distribution at “any time” in “customer and public areas”, it was unlawfully overbroad. The Hotel’s interest in customer service did not entitle it to designate all public areas of its facility to be “guest service areas” in which off-duty employees could not exercise their Section 7 rights under any circumstances.

The Hotel’s “Press Release and News Media” policy prohibited employees from providing statements or information to the press regarding any incident that “generates significant public interest or press inquiries”. The Board found that the term “significant public interest” was broad enough to encompass a labor dispute, and the policy did not limit the prohibition to situations where the media was seeking the Hotel’s

“official comments”. As such, the policy was ambiguous, and could reasonably interpreted as barring Section 7 activity.

The Hotel’s “Employment Conduct Policy” prohibited employees from leaving their work area without authorization before completion of a shift, walking off the job, or inciting actions against fellow employees, supervisors or department heads. The Board found these rules unlawfully overbroad because an employee could reasonably interpret them as requiring management’s permission before engaging in protected concerted activity, or altogether prohibiting such activity. In addition, the prohibition on inciting actions against supervisors and department heads could reasonably be construed as prohibiting employees from exercising their right to initiate or induce group action.

The Board upheld two of the challenged policies, finding no violation. First, the “Employee Use of Hotel Facilities Policy” was justified because legitimate business reasons existed for a rule requiring employees to obtain permission before patronizing the Hotel’s food and beverage outlets. Second, the “Discussing Company Business” rule encouraged employees to use the fair treatment procedure to address their problems or concerns, but did not foreclose them from using other avenues or required them to go to management before using other avenues.

- *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249 (10th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

The Tenth Circuit granted enforcement of the Board’s order finding that a casino violated § 8(a)(1) of the NLRA by maintaining handbook policies prohibiting the communication of certain “confidential information” and the discussion of working conditions around customers.

The employee handbook defined “confidential information” to include salary information, salary grade, and types of pay increases and prohibited the sharing of this information outside an employee’s department without “a valid need to know” or the unapproved communication of this information to non-employees. *Id.* at 1259. The Tenth Circuit affirmed the Board’s ruling that these rules violated NLRA § 8(a)(1) because the confidentiality provision covered salary, salary grade, and pay increase information, and because employees “could reasonably interpret [the communication rule] to prevent discussion of salary information.” *Id.* at 1260.

Another provision in the employee handbook prohibited employees from discussing “company issues, other employees, and personal problems to our around our guests.” *Id.* at 1253. The Tenth Circuit observed that while the casino could lawfully prohibit employee discussions of working conditions on the gaming floor and adjacent corridors, the handbook provision was overly broad in that the Casino’s rule “follows each of its customers.” *Id.* at 1254. The Court also held that an oral rule prohibiting discussion of the employer’s tip-sharing policy was overly broad because it prohibited these discussions beyond the gaming floor and adjacent areas.

The Tenth Circuit analyzed these rules under Board case law regarding no-solicitation rules, rather than no-discussion rules. In the no-solicitation context, employers in retail and customer service industries may in certain circumstances prohibit discussions regarding working conditions when these discussions could be disruptive to customers. In contrast, where customer disruption is not at issue, employers may not discriminatorily prohibit discussions of working conditions while permitting discussions regarding other topics.

- *Fiesta Hotel Corp.*, 344 N.L.R.B. 1363 (2005).

The Board held that a prohibition on “any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons” contained in a team member guide did not violate § 8(a)(1). The Board held that the provision did not explicitly restrict § 7 activities, and a reasonable employee would not construe the provision to prohibit § 7 protected conduct.

- *KSL Claremont Resort, Inc.*, 344 N.L.R.B. 382 (2005).

The Board held that the employer violated § 8(a)(1) by maintaining a written rule prohibiting “negative conversations” about associates or managers. The Board held that the rule “would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities.”

- *Martin Luther Mem. Home, Inc.*, 343 N.L.R.B. 646 (2004).

The Board held that the employer did not violate § 8(a)(1) by maintaining work rules prohibiting “abusive or profane language,” harassment, or “physical or verbal threats.” These rules did not explicitly prohibit § 7 activity, were not promulgated in response to union activity, and were not

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applied or would not be reasonably construed as prohibiting § 7 activity. The Board did, however, affirm the administrative law judge's decision that the employer's "no solicitation," "not loitering" and "no unlawful strikes, work stoppages, slowdowns or other interference" rules were unlawfully overbroad and a reasonable employee could conclude these rules proscribed Section 7 activity.

### California

California specifically prohibits employers from requiring employees to refrain from wage discussions. CAL. LAB. CODE § 232 (2005). In *Grant-Burton v. Covenant Care, Inc.*, 99 Cal. App. 4th 1361 (2002), a California appellate court held that an employee could maintain an action for wrongful discharge in violation of public policy where she was terminated for discussing the employer's bonus system with co-workers.

### G. No-Solicitation and Bulletin Boards Rules.

Many employers promulgate a rule prohibiting all solicitation of other employees on work time and all distribution of literature in work areas at any time. Employers also have rules limiting the use of bulletin boards and the electronic mail system. Apart from maintaining a smoothly functioning work environment, these policies assist the employer in the event of a union organization drive. Such policies, however, must be carefully worded and consistently applied.

1. Rules prohibiting solicitation during *working time* (i.e., when either the employee soliciting or the employee being solicited is supposed to be working) are presumptively valid under the National Labor Relations Act ("NLRA" or "Act"). See *Our Way, Inc.*, 268 N.L.R.B. 394 (1983). However, a rule prohibiting solicitation during *working hours* or *company time* is presumptively invalid. *Id.* It is always advisable to clarify in unambiguous terms the specific limitations on employee solicitation rights.

- *Guardsmark, LLC v. N.L.R.B.*, 475 F.3d 369, 374 (D.C. Cir. 2007).

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The court found the solicitation rule violated the NLRA because it prohibited solicitation “at all times while on duty or in uniform” and that it could reasonably be interpreted to prevent solicitation by employees who are in uniform but are off-duty.

- *Adtranz ABB Daimler-Benz Transport, N.A. Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001). The court found that the employer did not violate the NLRA by prohibiting solicitation during working time. The NLRB held that the company policy to prohibit all solicitation without authorization was unlawful because it would chill protected union activity. The Court of Appeals vacated the NLRB's order, stating that a neutral policy that does not discriminate against union activity and only prohibits solicitation during “working time” was valid.
- *Mediaone of Greater Fla, Inc.*, 340 N.L.R.B. 277 (2003). The NLRB ruled that the an employer did not violate the NLRA by maintaining a provision in its employee handbook that stated in part, “[y]ou may not solicit another employee in work areas during work time.” Two of the three panel members found that the rule was lawful notwithstanding a table of contents entry that listed the page on which the actual rule was found and paraphrased the rule as follows: “[y]ou may not solicit employees on company property.”

Although the majority noted that the table of contents entry, standing alone, would be overbroad — as a rule restricting solicitation in nonworking areas during nonworking time is presumptively unlawful — the members found that the table of contents entry was “obviously a shorthand summary of the rule and the employees would not be confused by it.” They determined that a reasonable employee would rely on the actual rule and distinguish the material in the table of contents “to the extent that it conflicted with the fuller explanation of the policy.”

2. It is important to have a no-solicitation rule in place before a union organizing drive begins; once the union has sought to solicit, it may be impossible to lawfully promulgate such a rule.

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- *Ideal Macaroni Co.*, 301 N.L.R.B. 507 (1991), *enf. denied, rev'd on other grounds*, *NLRB v. Ideal Macaroni Co.*, 989 F.2d 880 (6th Cir. 1993). The court found that the employer violated the NLRA by announcing and posting a new no-distribution policy shortly after discovering union leaflets.
3. Discriminatory or lax enforcement of a no-solicitation rule may invalidate application of an otherwise lawful rule. It is often difficult, however, to police and enforce a no-solicitation rule. For instance, if the employer permits solicitation during working time for sports pools, wedding gifts, and the like, but prohibits union solicitation, its rule may be found invalid as applied.
    - *South Nassau Communities Hosp.*, 274 N.L.R.B. 1181 (1985). The court stated that coffee room union solicitation may not be prohibited when collections normally are taken for marriages, births, baby showers, *etc.*
  4. However, an employer does not violate the Act by permitting a small number of *beneficent* acts as narrow exceptions to a no-solicitation rule.
    - *Hammary Mfg. Corp.*, 265 N.L.R.B. 57 (1982). The court found that an exception to a general no-solicitation rule to allow solicitation on behalf of the United Way is not unlawful.
  5. Furthermore, employers in the retail and customer service industries may prohibit discussion of working conditions in certain areas, even if they do not prohibit discussions of other topics, where customer disruption is at issue. *See* discussion in *Double Eagle Hotel & Casino v. N.L.R.B.*, 414 F.3d 1249, *supra*.
  6. Issues arise when the non-solicitation rule pertains to e-mail systems. The NLRB has ruled that businesses can prohibit employees from using the office email system to communicate information about union activities. On December 21, 2008, the Board held that the Register-Guard, a daily newspaper in Oregon, had not violated any law by establishing a rule that stated that all of its communication systems, including telephones, message machines, computers, fax machines and photocopiers, “are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.” *Guard Publishing*, 351 NLRB 1110 (2007). The Court of Appeals for the D.C. Circuit refused to uphold the Board’s conclusion as to whether the employer discriminatorily enforced

its email policy but did not explicitly overrule the standard announced by the Board. The court found that the distinction between solicitations for groups and for individuals in the company policy prohibiting non-work-related solicitations was a “post-hoc invention” that did not actually exist in the company’s email policy. The court further noted that the company’s disciplinary warning did not invoke the organization-versus-individual line drawn by the Board. To the contrary, the company told the employee in question to “refrain from using the Company’s systems for union/personal business.” *Guard Publishing Co., v. N.L.R.B.*, 571 F.3d 53, 56 (D.C.Cir. 2009). Despite the court’s dissatisfaction with the Board’s reasoning, the court’s decision does not disturb the underlying premise that employers may prohibit union access to its email system so long as it does so in a nondiscriminatory manner.

**H. E-mail, Internet, Cell Phone, Camera Phone, and Other Telecommunication Rules.**

Employers should carefully consider e-mail, Internet, instant messaging, Blackberries and PDAs, blogging, cell phone, camera phone, and other telecommunication policies. The reasons to develop comprehensive policies regarding these means of communications are the same as those for more traditional forms of business communications, such as telephones or fax machines. Without such a policy, employees may use e-mail and the Internet during business hours for personal reasons such as sending messages to friends, shopping, checking sport scores or the stock market, or even viewing pornography. Employers also are at risk if employees use e-mail to communicate inappropriate information to others inside or outside the company, including discriminatory statements or otherwise illegal and inappropriate remarks.

A recent incident involving CISCO illustrates why every employer should consider implementing and enforcing a clear and comprehensive technology use and monitoring policy. Cisco has settled in two defamation suits relating to the patent troll tracker blog of one of its employees – Rick Frenkel – who accused attorneys suing Cisco of conspiring with a Texas court to alter a lawsuit filing date. *Ward v. Cisco Systems, Inc. et al.*, 08-cv-04022-JLH, (W.D. Ark. Jan. 11, 2010). Although Cisco emphasized that Frenkel's blog reflected his own opinions and that Cisco neither edited nor required Frenkel to write on those topics, it also admitted that “a few Cisco employees used poor judgment when they suggested topics to Rick for his anonymous blog or pointed third parties to the blog without disclosing that the content was created by a Cisco employee.” Consequently, Cisco implemented a blogging policy that prohibits employees from anonymously blogging about company affairs. The policy states that any Cisco employee who comments on any aspect of Cisco’s business “must clearly identify yourself as a

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Cisco employee in your postings or blog site(s) and include a disclaimer that the views are your own and not those of Cisco.” Employees are also prohibited from circulating posts written by co-workers without informing the recipient of the source's affiliation. *See* Ron Zapata, “*Cisco Prohibits Anonymous Blogging After 'Troll' Spat*,” EMPLOYMENT LAW 360 (Mar. 24, 2008).

1. In developing or reviewing their current e-mail and Internet use policies, employers should keep the following factors in mind:
  - Employers may want to prohibit private Internet access during company time and through a company connection.
  - Employees should be made aware that computer and electronic resources and connections are company-owned and for business use only.
  - Employers should filter out or ban unwanted Internet sites, such as pornography or other inappropriate materials.
  - Employees should be told that they must respect the intellectual property rights that pertain to information or materials that are accessed and informed that unauthorized downloading is prohibited.
  - Employees should be informed that their e-mail and other computer-related activities are subject to monitoring and that they should not expect privacy in such activities. Furthermore, deleted e-mails can often be retrieved, and e-mail messages easily can be forwarded to unintended recipients.
  - Employees should be told that use of the Internet for illegal activity, such as gambling, is expressly prohibited.
  - Employees should be told that use of the Internet in a manner that might create a hostile work environment on the basis of race, sex, age or other protected classifications is expressly prohibited.
  - Employees should be told that disciplinary or other corrective actions may be taken in the event that the policy is violated.

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- Employees should be taught the basics of how to use e-mail. For instance, employers should tell employees not to write anything on e-mail that they would not want to commit to writing permanently. Employers should remind employees to reread what they write and be attentive to their tone.

Without a comprehensive and effective policy on e-mail and Internet use, employers may be subject to liability:

- *City of Ontario v. Quon v. Arch Wireless Operating Co.*, No. 08-1332, 2010 WL 2400087 (June 17, 2010): In Quon, the police department had an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers. In an effort to determine if the city was providing sufficient character limits to its employees under its wireless contract, the city conducted an audit of text messages. In reviewing the requested transcripts, the employer found sexually explicit text messages sent by Quon during work time. The Ninth Circuit held that, since there was no formal policy, the city's review of employee text messages without notice was excessively intrusive. The Supreme Court reversed this holding, assuming that Quon had a reasonable expectation of privacy, but finding that the search was reasonably related to the objective and not excessively intrusive.
- *Owens v. Morgan Stanley & Co.*, No. 96-9747, 1997 U.S. Dist. LEXIS 10351 (S.D.N.Y. July 16, 1997). The court dismissed a suit filed by two African-American employees who claimed that a racist e-mail message created a hostile work environment. The court noted that the company had acted quickly to discipline those employees involved in the incident, including stripping those employees who were involved of any managerial responsibilities.
- *Williamson v. Citibank N.A.*, 1999 U.S. Dist. LEXIS 23047 at \*25 (S.D.N.Y. Dec. 13, 1999). Even if one e-mail alone could be viewed as subjecting plaintiff to a hostile work environment, there is no basis for imputing liability for the e-mail to the employer because none of the senders of the e-mail were plaintiff's supervisors and the employer can only be liable for its employees' actions if it either provided no reasonable avenue for complaint or knew of its employees' racially and sexually hostile comments and did nothing.
- *Schwenn v. Anheuser-Busch, Inc.*, No. 95-CV-716, 1998 U.S. Dist. LEXIS 5027 (N.D.N.Y. Apr. 7, 1998). The court granted summary judgment to the company, rejecting the employee's claim that three weeks

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of sexually harassing e-mail was sufficient to establish a hostile environment.

- *Wesley College v. Pitts*, 974 F. Supp. 375 (D. Del. 1997), *aff'd without op.*, 172 F.3d 861 (3d Cir. 1998). A computer programmer's retrieval of an e-mail message from storage is not a violation of The Electronic Communications Privacy Act's ban on disclosing contents of an intercepted message since the message was retrieved from storage, and was not intercepted during its transit from sender to receiver.
- *Global Policy Partners, LLC, et al. v. Yessin*, 2009 U.S. District LEXIS 112472 (E.D.Va. Nov. 24, 2009). The court held that, even assuming that state law authorized managers to access e-mail information stored on a company's computer system, it is a factual question as to whether the company's purposes for accessing the e-mails falls within the scope of that authorization. If the purposes for which the employer or its agents accessed the e-mails are not in accordance with the "expected norms or intended use" of the computer network, then the employer may be found liable.
- *Timekeeping Sys. Inc.*, 323 N.L.R.B. 244 (1997). The NLRB found that an employer violated federal law when it fired an employee who sent an e-mail to other employees protesting a proposed change in company vacation policy.
- *Media General Operations, Inc. v. NLRB*, 225 F. App'x 144 (4th Cir.), *cert. denied*, 128 S. Ct. 492 (2007). The employer's policy on e-mail stated that the system was provided to assist employees in carrying out their jobs, but in practice a wide variety of messages unrelated to the company were transmitted. The company told the union president that the union could not use the company's e-mail system for communicating union messages and this issue was brought up in collective bargaining negotiations. The court held that the email system was used by employees "to convey news about the employees' personal lives, to arrange social events, and to inform employees about charities" and therefore restricting the union's access "while others were allowed unfettered access" was prohibited by the NLRA. *But see Supra Guard Publishing Co., v. N.L.R.B.*, 571 F.3d 53, 56 (D.C.Cir. 2009).
- *St. Joseph's Hosp.*, 337 N.L.R.B. 94 (2001). An employer was held to have violated the NLRA by prohibiting an employee from displaying a union-related computer screen saver message. The Board analogized screen savers to company bulletin boards and reasoned that the employer discriminated against the employee by prohibiting union-related screen savers but allowing screen savers that contained non-work related messages. The Board stated that if the employer had a policy prohibiting screen saver messages, it had to be universally enforced.

Another important point to consider is integrating any electronic mail policy with existing employment policies, such as policies on the prohibition of sexual harassment and discrimination and transmission of trade secrets or other confidential matters.

### **Monitoring Employees on the Internet.**

When employers provide Internet access to employees, they must decide if they are going to regulate and monitor that usage and access, as employees' excessive or inappropriate usage may serve to increase employer liability and decrease employee productivity. Employers that take the necessary precautions will have a better ability to monitor employee usage, as long as they comply with applicable laws.

- Employers may wish to include in their policy a provision regarding the scope and frequency of monitoring they may undertake. For instance, employers may wish to tell employees that they reserve the right to engage in occasional monitoring by reviewing the record of all sites visited from time to time. Alternatively, if an employer wishes to engage in more frequent monitoring, the reservation of this right should be disclosed as well.
- The Electronic Communications Privacy Act of 1986 ("ECPA") prohibits the interception of oral, wire and electronic communications while these communications are in transit. It also prohibits unauthorized "access" to stored communications. There are exceptions, however, that may allow employers to monitor their employees' electronic communications. *See Hall v. Earthlink Network, Inc.*, 418 F.3d 500, 504 n.1 (2d Cir. 2005) (requiring contemporaneous transmission, but distinguishing case where internet service provider received and stored, without forwarding, email messages from a case where someone acquired previously stored electronic communications).
- The "Consent of a Party" exception allows an employer to intercept communications when there is either an express consent from a signed writing or verbal acknowledgment, or where an employer demonstrates the existence of implied consent.
- The "Business Use" exception permits the employer to intercept communications by an employee "in the normal course of his employment while engaged in any activity which is a necessary

incident to the rendition of his service. . . .” 18 U.S.C. 2511(2)(a)(i).

- The “Provider” exception allows employers who maintain electronic communications systems for their employees' use to access communications that may be stored on that system.
- Additionally, different states have different privacy laws, and thus it is important to be familiar with state requirements and exceptions as well. Most states have more protective laws than the ECPA, so that employers have a reduced ability to monitor employees.

#### **Secret Tape-Recording of Conversations.**

- Federal law imposes a general prohibition against the secret recording of any wire or oral communication. 18 U.S.C. § 2511. However, there is a very broad exception to this prohibition which authorizes any party to that communication (not acting under the color of law) to secretly record or authorize the secret recording of the conversation for any purpose other than the commission of a criminal or tortious act. 18 U.S.C. § 2511(2)(d).
- *Dorris v. Absher*, 179 F.3d 420 (6th Cir. 1999). A county agency director who secretly tape-recorded four employees' office conversations and used the information in drafting termination notices is personally liable under the federal law against wiretapping. For an interception of communication to be illegal, the person making it must have had an expectation of privacy that was both subjectively and objectively reasonable. The “frank nature” of the recorded conversations made it clear that these employees had an expectation of privacy.
- Some states, such as California (CAL. PENAL CODE § 631-32), Connecticut (CONN. GEN. STAT. 52-570d), Florida (FLA. STAT. § 934.03(2)(d)), Illinois (720 Ill. Compiled Stat. Ann. 5/14-1, 5/14-2), Maryland (Md. Code Ann. Cts & Jud. Proc. 10-402), Michigan (MICH. COMP LAWS 750.539c), Massachusetts (MASS. ANN. LAWS. ch 272.99), Montana (MONT. CODE ANN. 45-8-213-2), New Hampshire (N.H. REV. STAT. ANN. 570-A:2-I), Pennsylvania (18 PA. CONS. STAT. 5703(1)), and Washington (WASH. REV. CODE 9.73.030) prohibit recording conversations without the consent of all parties to the communication.

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- In Nevada, a person can only tape a telephone conversation with the consent of all the parties to the communication (NEV. REV. STAT. ANN. § 200.620); but an individual can listen to, monitor, or record an in-person conversation with the consent of one party to that conversation (NEV. REV. STAT. ANN. § 200.650). *See Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179 (1998) (“[i]t seems apparent that the legislature believed that intrusion upon Nevadans’ privacy by nonconsensual recording of telephone conversations was a greater intrusion than the recording of conversations in person”).
- However, New York and many other states have no such prohibition.
- *See, e.g., Heller v. Champion Int’l Corp.*, 891 F.2d 432, 436 (2d Cir. 1989). Employee had no intent to defraud employer, but was only seeking to document evidence of suspected discrimination; the court determined that such activity was not only not sufficiently disloyal, but may also be statutorily protected participation in employment discrimination investigation or litigation; *and Perraglio v. State of New Mexico*, 106 FEP Cases 1555 (D.N.Mex. 2009) – In ruling on a motion in limine in a discrimination case, the District Court allowed the admission into evidence of a tape recording made by a recorder left on, sitting on the plaintiff’s desk in his cubicle during working hours in an area accessible to the public.
- It is advisable, therefore, for employers to establish a policy prohibiting employees from tape-recording workplace conversations without the express consent of all parties to the conversation.
- *Deiters v. Home Depot U.S.A.*, 842 F. Supp. 1023, 1030 (M.D. Tenn. 1993). Employer was granted summary judgment where the employee could not prove that the employer’s asserted legitimate reason for the employee’s discharge — namely, the employee’s secret taping of conversations with management in violation of “standards of conduct for employees” — was pretextual.

### Cell Phones.

Potential liability to the employer may attach based on employees’ use of cell phones while driving in the course of their employment.

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- An employer is vicariously liable for an employee's negligence if the employee's negligent act(s) occurred within the scope of his or her employment and was in furtherance of the employer's interest. For example, in *Johnson v. Rivera*, No. C1-98-1922, 1999 Minn. App. LEXIS 617 (Minn. Ct. App. June 1, 1999), the employer was found not liable for an employee's negligence, because the employee was not acting within the scope of her employment at the time of the accident. The employee was driving home from a work-related appointment after 5:00 p.m. and received a page from her daughter on a pager supplied by her employer. While reaching for her cell phone to return the call, the employee got into an accident. Because the employee did not take work or client calls after 5:00 p.m. and she was in her own car, the court determined that the accident did not occur in the employer's space or on the employer's time. Therefore, during the accident, she was not acting within the scope of her employment and the employer escaped liability. However, had the call been from the employer or a client, the result may have been different.
- Safety tips for employers to avoid liability from employees' use of a cell phone while driving:
  - Make sure that employees know the features available on their cell phone and how to use them, such as speed dialing and redialing;
  - Promote the use of hands-free devices, memory, one-button and voice-activated dialing (some states and localities, such as New York, have passed laws prohibiting the use of cell phones while driving without the use of a hands-free device);
  - Check that the cell phone is within easy reach of the driver;
  - Advise employees to inform anyone with whom they are speaking that they are driving while on the phone;
  - Advise employees to avoid using cell phones during hazardous weather and traffic conditions;
  - Ensure that employees do not look up phone numbers or take notes while they are driving. Advise employees to pull off the road if they need to do either;

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- Advise employees to make calls while they are not moving or prior to pulling into traffic; and
- Advise employees to avoid emotional or stressful discussions while driving.

### **Camera Phones.**

Camera phones have become increasingly popular and their popularity is, in turn, causing various concerns for companies, especially regarding privacy issues and trade secrets.

- To maintain employees' privacy, employers should ban camera phones in restrooms and locker rooms. However, because an employee's expectation of privacy in the workplace is minimal, employees do not possess a great deal of legal recourse against their employers if a co-worker photographs them with a phone outside of restrooms and locker rooms. Simon J. Nadel, *In A Flash, Cell Phones With Cameras Can Develop Into Major Employer Concern*, (BNA) No. 46, at 361-362 (Nov. 13, 2003).
- Camera phones also provide a new dangerous avenue for stealing corporate trade secrets within a matter of seconds. "While camera phones could be used by an exiting employee as a way to take some of the company's proprietary information to a new employer...the bigger problem is the worker who pilfers trade secrets as a way to 'get back' at the organization." *Id.* Unfortunately, employers may encounter difficulties trying to avoid these problems, because the damage caused by camera phones is done immediately upon the employee hitting the send button.
- Employers can either ban camera phones altogether or revise their current policies. For example, employers should post notices around the workplace banning camera phones in restrooms and changing areas. Employers do have the right to completely ban cell phones.

### **Telecommuting Policies.**

The number of telecommuters in the United States continues to rise, and with that increase comes the increase in number of managers who are trying to supervise employees who work remotely. Under the Fair Labor Standards Act ("FLSA"), there is no definition or guidance about who is and is not a telecommuter. What

the FLSA does require is that if a person is working, he or she must be paid properly, regardless of where the work is done.

Employers can avoid misunderstandings about a telecommuter's role and responsibility by including a policy for those telecommuting. The policy can articulate job responsibilities, expected work habits, goals, overtime expectations and the like, even though these employees are working out of the office. Further, a policy regarding telecommuting should address health and safety of telecommuters. For instance, it should include tips for telecommuters in creating and maintaining a safe home workplace.

### **I. Drug and Alcohol Policies.**

Most employers choose to have a policy prohibiting the selling, purchasing, use or possession of illegal drugs or alcohol while on the employer's premises. In addition, for certain employers, federal statutes and regulations mandate such a policy. For example:

- The Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-07, imposes obligations on: (i) companies with government procurement contracts to be performed in whole or in part in the United States (including purchase orders) valued at \$25,000 or more, and (ii) recipients of federal grants (including educational financial assistance). The Act requires employers to publish and provide drug-free workplace statements to each employee working under the federal contract or grant (in practical terms, this often means all employees), and to establish ongoing drug-free awareness programs. 55 Fed. Reg. 30465 (Jul. 26, 1990) (codified in various titles of the C.F.R.).
- The Department of Transportation ("DOT") has promulgated a series of regulations regarding drug and alcohol abuse in the transportation industry. For example, the DOT has regulations (codified in various titles of the C.F.R.) covering: (i) employees in the aviation, trucking and busing, railroad, and mass transit industries; (ii) merchant marine personnel; and (iii) employees of companies that operate pipeline facilities.
- In addition, the Omnibus Transportation Employee Testing Act of 1991 establishes drug and alcohol testing and rehabilitation programs for public transportation employers.

## Drug Testing in the Workplace.

Drug testing of employees has become extremely common in the workplace. For example, in 1988, employers tested about eight million employees for illegal drug use. Aaron C. Schepler, *Hart v. Sever Resorts, Inc.: Should the Arizona Constitution Protect Employees from Employer-Mandated Drug Testing*, 30 ARIZ. ST. L.J. 541 (1998). By 1992, that amount rose to about twenty-two million. *Id.* By 1998, almost half of all employers nationwide had some type of drug testing program in the workplace. *Id.* The benefits of instituting drug-free workplace policies include decreases in absenteeism, turnover, downtime, accidents and thefts. In addition, drug-free programs will enable employers to increase productivity and overall employee morale. *Making Your Workplace Drug Free - A Kit for Employers*, available at <http://www.workplace.samhsa.gov/>.

For example, in Florida:

[i]t is the intent of the legislature to promote drug-free workplaces in order that the employers in the state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays and tragedies associated with work-related accidents resulting from drug abuse by employees. FLA. STAT. § 440.101.

- Implementing a successful drug testing program requires a drug testing policy, which should be part of the company's drug-free workplace policy or in a separate document distributed to all employees. *Making Your Workplace Drug Free – A Kit for Employers*, available at <http://www.workplace.samhsa.gov/wpworkit/legal.html>. Included within the policy or document should be a detailed description of the procedures that will be utilized for drug testing. Examples of information that should be included in the policy are the location where employees will give their samples, what laboratory the employee's samples will be tested in, and how the results will be reported to the employee and/or the employer. *Id.*
- Drug testing is usually conducted through the analysis of urine samples. Urinalysis is the only method of drug testing approved by the U.S. Department of Health and Human Services. This procedure is simple and inexpensive. *Guidelines for a Drug-Free Workforce* (4th ed. 2003), available at <http://www.workplace.samhsa.gov/wpworkit/legal.html>.

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- Employers test applicants and employees in the following circumstances:
  - During a yearly physical;
  - Prior to transfers or promotions;
  - Prior to being placed in positions involving security, safety or money;
  - After an accident;
  - For past drug users;
  - After treatment;
  - Based on reasonable suspicion;
  - On a random basis.
- Random drug testing is the most likely type of drug testing to be struck down by the courts or prohibited by state statutes. *See Twigg v. Hercules Corp.*, 185 W. Va. 155 (1990) (finding that requiring an employee to submit to random drug testing is contrary to public policy because it is an invasion of an employee's right to privacy).

### **Potential Legal Liability For Drug Testing.**

- Public employers must satisfy federal and state constitutional standards when implementing drug testing for public employees. *See, e.g., Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (upholding under Fourth Amendment the warrantless drug and alcohol testing of railroad employees following number railway accidents); *Booker v. City of St. Louis*, 309 F.3d 464 (8th Cir. 2002) (no constitutional violation where male corrections officer accompanied into restroom by a female laboratory employee during random drug test).
- California applies its constitutional privacy protections to private employees as well as public employees. *See Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 1041-44 (1989) (scrutinizing private employer's drug testing policy under California Const.).

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- Drug testing could potentially lead to legal action under theories of common law invasion of privacy, negligence, breach of contract law and discrimination. Employers must be careful as to how they conduct drug tests and under what circumstances.
- Additionally, many states have laws regulating what is and is not permissible when drug testing employees. Employers should be aware whether there are any laws in the state where they conduct business that preclude or regulate drug testing of employees.

### California

- California's Drug-Free Workplace Act of 1990, applicable to all persons or organizations "awarded a contract or a grant for the procurement of any property or services from any state agency," also requires the development of a drug-free awareness program. CAL. GOV'T CODE ANN. § 8350 *et seq.*
- The state of California law regarding drug testing is, however, uncertain. For example, in *Loder v. City of Glendale*, 28 Cal. App. 4th 796 (2d Dist. 1994), the California appellate court held that public employers may only require drug testing of applicants for jobs directly affecting public safety and security. However, *Loder* was reversed by the California Supreme Court, which held that the public interest in the safe and efficient operation of the city government overrode the applicants' privacy interest. 14 Cal. 4th 846 (1997). The California Supreme Court upheld drug testing of college athletes in *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1 (1994). The court in *Hill* weighed the gravity of the interests of the NCAA in insuring its athletes are drug-free against the intrusiveness of the testing and found that because the athletes have a lower expectation of privacy than the general public, their privacy was not sufficiently invaded. Before *Hill*, one appellate court held that employers were allowed to conduct pre-employment testing under certain circumstances, *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034 (1989), *review denied by*, Cal. LEXIS 1284 (Cal. Mar. 15, 1990) while another appellate decision held that employers cannot conduct random drug testing of current employees, *Luck v. Southern Pacific Transportation Co.*, 218 Cal. App. 3d 1 (1990). Further, certain cities in California have passed ordinances prohibiting and/or regulating the administration of drug tests to employees or applicants for employment. Employers should include in their workplace rules

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drug and alcohol policies, including pre-employment screening, prohibition of use in the workplace, searches, disciplinary action and/or employee assistance programs.

### Connecticut

- In Connecticut, an employer may periodically require employees to undergo medical examinations to determine their suitability for continued employment, but it is prohibited from testing current employees for drug use unless the employer has a “reasonable suspicion” that an employee is under the influence of drugs or alcohol and such use affects or could affect the employee's job performance. Drug testing may be done without reasonable suspicion under only three circumstances: (i) when the test is authorized by federal law; (ii) when the employee is in a high-risk or safety-sensitive position; and (iii) when a urinalysis is conducted as part of an employer-sponsored employee assistance program in which the employee participates voluntarily. CONN. GEN. STAT. ANN. § 31.51t-bb.

### Florida

- Under Florida's Workers' Compensation Law, employers are permitted to require job applicants to submit to drug and alcohol tests provided that the employer first implements a drug-free workplace program that includes notice, education and testing in accordance with Florida's Drug Free Workplace Act, FLA. STAT. § 440.102.
- While implementation of such a program is voluntary both for public and private employers, those employers who avail themselves of the program receive certain benefits, including: (1) savings on workers' compensation insurance rates, as provided in FLA. STAT. § 627.0915; (2) savings on workers' compensation benefits costs, because injured workers who are tested pursuant to the program and who are found to be under the influence of alcohol or an illegal controlled substance forfeit their right to compensation benefits; (3) increased productivity and decreased absenteeism that would be expected to result from implementation of such a program.
- Compliance with Florida's Drug Free Workplace Act requires strict adherence to a host of procedural requirements; therefore, it

is extremely important that employers considering such a program familiarize themselves with the requirements.

### Illinois

Carnival owners must have a substance abuse policy, which includes random drug testing for its workers. 430 ILCS 85/2-20(c). Otherwise, Illinois does not specially regulate drug/alcohol testing for applicants or employees, but reasonable policies and procedures prohibiting drug use in the workplace and drug testing do not violate the Illinois Human Rights Act. In Illinois, an employer has the right to prohibit the illegal use of drugs and alcohol at work by all employees and require that employees not be under the influence of alcohol or illegal drugs while at work. Employers may require that employees conform with the federal Drug-Free Workplace Act of 1988 and the state Drug Free Workplace Act and hold any employee who uses illegal drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior as other employees. Under the Illinois Human Rights Act, the term “handicap” cannot be applied to include any employee or applicant currently engaging in the illegal use of drugs, when an employer acts on the basis of such use. Moreover, the Illinois Metropolitan Transit Authority Act, 70 ILCS 3605/47, and the Regional Transportation Authority Act, 70 ILCS 3615/2.24 authorize public mass transit systems to mandate drug testing for employees in conformity with federal law. Also, applicants for school bus driver positions who are not subject to drug testing under federal law must still submit the results of a medical exam that includes drug testing. See 625 ILCS 5/6-106.1(A).

### Louisiana

- Although Louisiana regulates the administration of drug and alcohol testing, it does not regulate the specific reasons why an employer may test its employees. Louisiana statutes governing drug and alcohol testing mandate that tests be conducted by certified laboratories only and meet National Institute on Drug Abuse (“NIDA”) guidelines. An employer who complies with the statutory requirements may test prospective employees and may test employees in a post-hiring situation either on the basis of cause or reasonable suspicion or randomly. Significantly, the statutory requirements are not applicable to an employer or an

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employer's agent using an on-site screening tests certified by the FDA to test employees or prospective employees when there are no mandatory or discretionary consequences for the tested individuals. LA. REV. STAT. ANN. §§ 23:1601, 49:1001 *et seq.*

### Maryland

- In Maryland, an employer who requires any person to be tested for job-related reasons for the use or abuse of any controlled dangerous substance or alcohol shall have the specimen tested at approved laboratories, inform the employee of the laboratory, and, if the results are positive, the employer must provide the employee with the test results, notice of the employer's drug and alcohol policy, notice of any discipline to be taken, and the opportunity to independently test the same specimen. Md. Health-General Code Ann. § 17-214(c)(1).

### New York

- In New York, employers need to be cautious with regard to drug and alcohol testing because certain individuals may be entitled to protection under the State Human Rights Law, which prohibits discrimination on the basis of a disability or a perceived disability when the disability (or perception) does not interfere with the individual's job performance. *But see Doe v. Roe, Inc.*, 143 Misc. 2d 156, 539 N.Y.S.2d 876 (Sup. Ct. N.Y. County 1989), *aff'd*, 160 A.D.2d 255, 553 N.Y.S.2d 364 (1st Dep't 1990) (finding that applicant who tested positive for marijuana use was not "disabled" or perceived as "disabled" by employer, within the meaning of the Human Rights Law).

**Drug use and the ADA** – While the ADA prohibits discrimination against successfully rehabilitated drug addicts, individuals currently using drugs are not entitled to protection under the ADA.

- Drug testing permissible under the ADA. The ADA allows employers to make certain that the workplace is free from illegal drug use and ensure compliance with other regulations and federal laws regarding the use of drugs. Under § 12114 of the ADA, an employee or applicant who currently uses illegal drugs is not considered a "qualified individual with a disability." 42 U.S.C. § 12114(a). Additionally, the ADA permits employers to adopt policies or procedures, such as drug testing, in order to determine whether an individual is illegally using drugs. 42 U.S.C. §

12114(b). A test to determine if an employee is illegally using drugs does not constitute a medical examination under the ADA. 42 U.S.C. § 12114(d)(1). Further, an employer may require employees to conform to the requirements of the Drug-Free Workplace Act of 1988. 42 U.S.C. § 12114(c)(3). In *Harrison v. Benchmark Elecs. Huntsville Inc.*, No. 08-16656, 2010 U.S. App. LEXIS 632 (11th Cir. January 11, 2010), the Eleventh Circuit held that the ADA's medical inquiry section (42 U.S.C. § 12112(d)) provides a cause of action for any violation of its restrictions, whether or not the plaintiff has a disability. Harrison sued his employer when he was not hired by BEHI for a permanent job after he tested positive for barbiturates, which he took for his epilepsy. After Harrison's test came back positive, a Medical Review Officer asked Harrison a series of questions over the phone to determine if the positive result was due to a legal prescription, determined that it was and subsequently cleared Harrison. Although BEHI was permitted to ask follow-up questions to ensure that Harrison's positive drug test result was due to a lawful prescription, a jury could still find that these questions violated the ADA because the hiring manager's presence in the room while Harrison was answering the Medical Review Officer's questions might have been an intentional attempt to elicit information about a disability in violation of the ADA's prohibition against pre-employment medical inquiries.

- Repeated drug abuse. In *Longen v. Waterous Co.*, 347 F.3d 685 (8th Cir. 2003), the Eighth Circuit held that an agreement which permitted the termination of an employee with a history of substance abuse in the event of future drug or alcohol abuse did not violate the ADA. Plaintiff had recurring substance abuse problems and underwent treatment for chemical dependency multiple times. Plaintiff entered into an agreement with defendant stating that if he successfully completed a treatment program, he could return to work without discipline. After plaintiff experienced a few relapses and defendant learned of plaintiff's cocaine use, plaintiff was suspended for five days, but was permitted to return to work under an additional last chance agreement. The agreement provided that "[f]uture use of any mood altering chemicals, including alcohol or violation of working rules generally related to chemical dependency will result in immediate termination of employment." *Id.* at 687. Thereafter, plaintiff was arrested for driving while intoxicated and terminated based on this agreement. Plaintiff argued that the last chance agreement violated the ADA because it

called for his termination for any use of mood altering chemicals, regardless of whether the use was at his workplace or non-workplace. Plaintiff also argued that the agreement subjected him to different conditions of employment than his co-workers. The court held that all return-to-work agreements place different conditions on the returning employee. Further, “[u]nder the ADA, there are no restrictions on what type of further constraints a party may place upon himself.” *Id.* at 689. Here, plaintiff placed additional restrictions on his own conduct when he signed the agreement, such as refraining from future use of mood altering chemicals. An employee who enters this type of agreement does so in exchange for the valid consideration of continued employment and therefore, it does not violate the ADA. *Id.*

- Reemployment. *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003). Reversing the Ninth Circuit’s holding that an employer’s unwritten policy not to rehire employees who left the company for violating personal conduct rules contravenes the ADA, the Supreme Court held that the Ninth Circuit improperly applied a disparate impact analysis to a disparate treatment claim. Plaintiff was forced to resign after taking a drug test, which came back positive for cocaine, because his behavior violated the employer’s workplace conduct rules. Over two years later, plaintiff applied to be rehired by his former employer. An employee from the company’s labor department rejected Plaintiff’s application in accordance with company policy, after she reviewed plaintiff’s application and saw that he had previously been terminated for workplace misconduct. The labor department employee testified that she did not know that plaintiff was a former drug addict when she made the employment decision. Plaintiff subsequently filed an EEOC charge claiming that he had been discriminated against in violation of the ADA. Because plaintiff failed to raise a timely disparate impact claim, he proceeded only under a disparate treatment theory. Applying the familiar *McDonnell Douglas* burden-shifting approach, the Court of Appeals found that although the employer’s neutral policy against rehiring employees previously terminated for violating workplace conduct rules appeared “lawful on its face,” it “held the policy to be unlawful ‘as applied to former drug addicts whose only work-related offense was testing positive because of their addiction.’” *Id.* at 51 (citations omitted). The Supreme Court reversed, determining that the Ninth Circuit had improperly conflated a disparate-impact analysis with its disparate treatment analysis. The Court instructed that the employer’s proffer of its

neutral no-rehire policy satisfied is requirement under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to rehire respondent. According to the Supreme Court, the only remaining question for the Court of Appeals to address was whether “there was sufficient evidence from which a jury could conclude that [the employer] did make its employment decision based on [plaintiff’s] status as disabled . . .” *Id.* at 53. The Court vacated the Ninth Circuit’s judgment “[t]o the extent that the Court of Appeals strayed from this task by considering not only discriminatory intent but also discriminatory impact . . .” *Id.* at \*55. Importantly, the Court noted that the employer’s “no-rehire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules.” *Id.* at 54-55. *See also Smith v. MABSTOA/NYCTA*, 02 Civ. 220, 2005 U.S. Dist. LEXIS 8888, at \*15 (S.D.N.Y. May 11, 2005) (holding that employer’s policy to not rehire an employee who retires because of a positive drug test is facially neutral and assumes nothing about the person’s status as a person with an actual or perceived disability).

On remand, the Ninth Circuit held that the plaintiff “presented sufficient evidence from which a reasonable jury could determine that [the employer] refused to re-hire him because of his past record of addiction and not because of a company rule barring re-hire of previously terminated employees.” *Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564, 570 (9th Cir. 2004). Notably, the court conceded that in its initial opinion, it had proceeded on the assumption that there was a policy in place that was uniformly applied, and the court never examined whether there was an issue of fact as to the existence of such a policy and its application. On remand, the court concluded that there was an issue of fact as to the existence of the policy. Indeed, the first time the employer mentioned its purported “unwritten policy” of refusing to re-hire individuals previously fired for misconduct, occurred after EEOC conciliation efforts had terminated and plaintiff brought the instant action against the company.

#### **J. Performance Evaluations.**

Many employers make reference to their performance appraisal system in their personnel handbooks. Claims of breach of contract because the employer did not follow the performance appraisal policy can give rise to liability.

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1. Employers have been held liable under the theory of negligent performance appraisal. For instance, an employer who had assumed a “contractual obligation to conduct performance reviews” through promulgation of a written policy breached that review duty by failing to inform an employee at a performance appraisal conducted two months before his discharge that it was considering terminating his employment. *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067, 1081 (W.D. Mich. 1982) (discussed further in Section II (A)(2), *supra*).
2. An employer may be able to minimize exposure under this theory by including a strong disclaimer in its policy manual. For example, a terminated employee failed to establish breach of contract as a result of the employer’s failure to abide by the evaluation procedures in its handbook where that handbook explicitly reserved the employer’s discretion to discipline its work force and contained a statement that it “does not constitute an express or implied contract.” *Castiglione v. Johns Hopkins Hosp.*, 60 Md. App. 325, 329 (1986).
3. An employer faces possible liability under fraud or related claims if it knowingly makes false assurances that an employee was performing satisfactorily in order to induce him or her to remain on the job.  
  
*Palmer v. Richard L. Schlott, Realtors, Inc.*, No. 88-4027, 1989 U.S. Dist. LEXIS 12402 (D.N.J. Oct. 16, 1989). The employer evaluated the performance of the employee, a secretary, as “exemplary,” the highest attainable rating, in the last performance appraisal conducted prior to her discharge. The court, applying New Jersey law, refused to dismiss her wrongful termination claim, permitting her to prove that the employer’s performance appraisal system constituted a contractually binding policy “whereby employees are informed of specific deficiencies and afforded an opportunity to improve” and that she was led to believe that her job would not be in jeopardy as long as she earned favorable evaluations.
4. Performance appraisals are subject to scrutiny under anti-discrimination laws. An employee treated differently in performance appraisals because of his or her race, sex, creed, age or other protected group status may prevail on a disparate treatment claim. In addition, the Supreme Court has held that subjective or discretionary employment practices may be challenged under a disparate impact theory in appropriate cases. It stated that “[i]f an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.”

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*Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 990-91 (1988). But see *Chapman v. A.I. Transport*, 229 F.3d 1012 (11th Cir 2000) where the court overturned a grant of summary judgment for an employee in a dispute involving subjective employment appraisals. The court was deferential to the employer's subjective business judgment in reasoning that a jury could decline to find discrimination and as such summary judgment should not have been granted to the employee. "It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation." *Id.* at 1034. While subjective criteria may be used, an employer can still be liable if it cannot articulate reasonably specific facts to explain the subjective factor. See *EEOC v. Target Corp.*, 460 F.3d 946, 957-58 (7th Cir. 2005) (reversing summary judgment because the employer did not provide clear statements that could be evaluated to support its subjective assessment that, based upon an interview, the applicant did not meet the employers requirements).

5. An employee may also have a defamation claim for allegedly false performance appraisals. *Jensen v. Hewlett-Packard Co.*, 14 Cal. App. 4th 958, 965 (4th Dist. 1993). However, an employer may insulate itself from this type of claim by discussing appraisals only with the evaluated employee and by utilizing a standard form for all evaluations. See also *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, [715 A.2d 873](#), [14 IER Cases 851](#) (DC CtApp 1998). An employee, solely by virtue of the fact that she is an employee, does not consent to any comments on her performance by her employer. This would effectively convert the qualified privilege afforded to such statements into an absolute one.

### K. Payment of Wages.

Many employers describe the employee groups (categories) they employ and the overtime policy in the handbook. Generally, the employee categories may be divided in two manners. First, employees may be categorized based on whether they are employed on a full-time, part-time or temporary basis. Second, the employees may be categorized based on whether they are classified as exempt or non-exempt employees under the Fair Labor Standards Act ("FLSA"). The FLSA imposes minimum wage, overtime and other related requirements on employers engaged in interstate commerce. If the employee is classified under the FLSA as a non-exempt employee, the FLSA generally requires that they be paid time and one-half their "regular rate" of pay for hours worked in excess of 40 in any workweek, commonly known as overtime compensation. 29 U.S.C. § 207(a). Employees that are classified under the FLSA as exempt — executive,

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administrative, professional employees, outside salespersons, and certain computer employees — do not have to be paid for overtime.

To maintain exempt status for certain categories of employees and avoid overtime requirements, an employer must comply with the FLSA regulations and requirements. Therefore, in practice, an employer should be familiar with the numerous FLSA regulations. In addition, employers should periodically review whether they have correctly classified their employees as exempt or non-exempt. Most employee handbooks, however, do not specifically explain the regulations surrounding the FLSA, and the details surrounding the FLSA regulations are beyond the scope of this outline.

Notably, in 2004, the United States Department of Labor (“DOL”) issued long-awaited final regulations redefining the executive, administrative, professional, outside sales, and computer professional exemptions under the FLSA. 29 C.F.R. § 541.0 *et seq.* (2006). The new regulations, which became effective on August 23, 2004, are designed to modernize and update the “white-collar” exemptions. Accordingly, in an effort to resolve conflicts or ambiguities in the current regulations that confused well-intentioned employers and permitted unscrupulous employers to avoid overtime obligations, the DOL consolidated in the new regulations relevant explanatory information that was previously contained in the Interpretive Guidelines, along with key principles gleaned from federal case law.

1. Significantly, in the new regulations, the DOL has added a new exception to the salary basis test, allowing deductions from pay of exempt employees for “unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules.” 29 C.F.R. § 541.602(b)(5).
  - The purpose of this new exception is to enable employers to suspend exempt employees (in full-day increments that need not be a full week in duration) for sexual harassment, workplace violence or other misconduct.
  - The new exception is therefore responsive to employers’ obligations under *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), that have “placed increased responsibility and risk of liability on employers for their exempt employees’ conduct.”
  - Previously, employers could only consider suspensions in full-week increments as discipline for employees who engaged in serious workplace misconduct. *See Auer v.*

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*Robbins*, 519 U.S. 452, 459-60 (1997); *Stanley v. City of Tracy*, 120 F.3d 179, 184 (9th Cir. 1997) (where disciplinary policy not actually applied and “warnings [plaintiff received] could have referred to suspensions in full-week increments . . . they did not ‘effectively communicate’ that impermissible suspensions would be made.”

2. The new “workplace conduct” exception only applies if the suspension is pursuant to a policy that is generally applicable to all employees. The policy must be in a writing that puts employees on notice that particular types of misconduct could result in an unpaid disciplinary suspension. However, the policy need not exhaustively list specific violations that could result in suspension, or definitively declare when a suspension will be imposed.
3. As in the past, the FLSA exemption is lost where an employer makes improper deductions from salary.
4. The new regulations preserve the “window of correction,” which has long provided that isolated or inadvertent deductions will not defeat the exemption, if the employee is reimbursed. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 463 (1997) (employer may act to correct a single *actual* disciplinary deduction in pay to an otherwise exempt employee and thereby preserve that employee’s exempt status by “reimburs[ing] the employee . . . and promis[ing] to comply in the future.” (internal quotations omitted)).
5. If, on the other hand, the employer has an “actual practice” of making improper deductions, the exemption *will* be lost under the new regulations.
6. Factors to consider to determine whether an “actual practice” exists include:
  - (i) The number of improper deductions made, particularly as compared to the number of employee infractions warranting discipline;
  - (ii) The time period over which the improper deductions were made;
  - (iii) The number and geographic location of affected employees;

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- (iv) The number and geographic location of managers responsible for the improper deductions; and
  - (v) Whether the employer has a clearly communicated policy allowing or disallowing such improper deductions.
- 7. The new regulations also create a new “safe harbor” to mitigate the risk that improper deductions from pay (whether for lack of work or any other reason) will destroy the FLSA exemption. 29 C.F.R. § 541.603(d).
- 8. Under this provision, the exemption is not lost, provided the employer:
  - (i) Has a clearly communicated policy (preferably one in writing, distributed to all employees) that prohibits improper pay deductions;
  - (ii) Reimburses employees for any improper deductions and makes a good faith commitment toward future compliance; and
  - (iii) Does not “willfully” violate the policy by continuing to make improper deductions after receiving employee complaints.

29 C.F.R. § 541.603(d).

- 9. The safe harbor thus operates in a manner analogous to the *Faragher/Ellerth* defense to sexual harassment claims – if an employer has a clear, widely distributed policy regarding pay deductions that is consistent with the FLSA, the unauthorized, improper conduct of a rogue supervisor or manager with respect to docking employee pay (even if such improper docking is more than an isolated or inadvertent occurrence) will not defeat the FLSA exemption, provided the employer makes the affected employee(s) whole after it learns of the improper docking, and takes other corrective steps to prevent a recurrence.

### **L. Employer Property (After-Acquired Evidence).**

An employer may be able to defend its employment decisions, even if found unlawful, or reduce its liability to an employee by presenting evidence of an employee’s misconduct discovered after the employee initiates litigation against the employer. For example, if an employee brings a discrimination lawsuit and the employer subsequently discovers that either during his/her employment or upon his/her termination, the employee stole company property, the employer

may be able to use this “after-acquired evidence” to limit the employer’s liability for the unlawful employment practice(s) if the court ascertains that the employer would have terminated the employee had it known of the “after-acquired evidence.”

- *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352 (1995). A terminated employee brought suit under the Age Discrimination in Employment Act (“ADEA”). The employer subsequently discovered that she had copied and removed confidential material without authorization and this misconduct would have resulted in her termination had the employer known of it at the time of the discharge. Here, the Supreme Court remanded the case and held that “[w]here an employer seeks to rely upon after-acquired evidence of wrongdoing” and can establish that it would have terminated the employee “on those grounds alone if the employer had known of it at the time of the discharge,” “neither reinstatement nor front pay is an appropriate remedy” and backpay should be calculated “from the date of the unlawful discharge to the date the new information was discovered.” *See also* EEOC Policy Guidance No. 915.002, 12/14/1995.

Based on the “after-acquired evidence” doctrine, an employer might consider adding in its handbook a policy notifying employees that they may be terminated for taking employer property, including, without limitation, documents, files, records, computer files or similar materials, or not returning all employer property. With such a policy, an employer may be able to defend or limit liability if an employee files a lawsuit against the employer and the employer subsequently learns that the employee stole its property.

### **M. Dress Codes and Grooming Standards.**

For years, employers have assumed that they have the right to control the dress and grooming habits of their employees. Increasingly, companies are grappling with how to draft policies restricting, for example, body art and facial jewelry, without alienating employees – particularly younger ones. Many companies now prohibit visible body art and/or facial jewelry, except for earrings. Standards often vary according to job category or geographic region. In addition to companies’ desire to convey a clean-cut image to customers, safety can be another consideration for certain employers with regard to body jewelry. However, companies must be careful to apply grooming standards consistently and to be honest with employees about the underlying rationale for these policies. *See* Linda Micco, *As Body Art Becomes Workplace Staple, Employers Grapple with Piercing Issues*, 55 BULLETIN TO MANAGEMENT, BNA, Inc. (Jan. 1, 2004).

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- *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 2940 (2005). Employer maintained a “no facial jewelry” provision in its dress code. Plaintiff, a member of the Church of Body Modification, alleged that this prohibition amounted to religious discrimination, and refused the employer’s recommended accommodations that she conceal her facial jewelry with band-aids or clear retainers. The Circuit Court held that Costco was under no duty to accommodate the employee because the accommodation that she insisted on – being wholly exempted from the policy would be tantamount to the employer sacrificing its legitimate interest in controlling public image. Therefore, granting such an exemption would be an undue hardship because it would “adversely affect the employer’s public image.” The court noted: “Costco has made a determination that facial piercings, aside from earrings, detract from the ‘neat, clean and professional image’ that it aims to cultivate. Such a business determination is within its discretion.”

Some jurisdictions have enacted statutes which place limits on the ability of employers to regulate the appearance of its employees.

- In 1994 California enacted a law which prohibits employers from refusing “to permit an employee to wear pants on account of the sex of the employee.” CAL. GOV’T. CODE § 12947.5. The law, however, still permits employers to either require that employees wear a uniform in a particular occupation or require an employee to “wear a costume while that employee is portraying a specific character or dramatic role.”
- The D.C. Human Rights Law prohibits discrimination on the basis of “personal appearance.” D.C. Code § 2-1402.11. “Personal appearance” is defined as “the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards.” D.C. Code § 2-1401.02. However, “personal appearance” does not refer to “the requirement of cleanliness, uniforms, or prescribed standards, . . . when uniformly applied to a class of employees for a reasonable business purpose, or when such [characteristics] present a danger to the health, welfare, or safety of any individual.” D.C. Code § 2-1401.02. Likewise, the New York City Human Rights Law prohibits discrimination on the

basis of an individual's gender identity, self-image, appearance, behavior, or expression.

- *Turcios v. United States Servs. Indus.*, 680 A.2d 1023 (D.C. 1996). The court held that the trial court did not err in allowing a jury to consider the “reasonable business purpose” exception to the “personal appearance” definition in the D.C. Human Rights Law, where the employer applied a rule requiring “neat hair style” to prohibit a male employee from wearing a ponytail.
- *Underwood v. Archer Mgmt. Servs.*, 857 F. Supp. 96 (D.D.C. 1994). The court denied the employer's motion to dismiss a transsexual employee's personal appearance discrimination claim under the D.C. Human Rights Law, but dismissed the employee's claims based on sex and sexual orientation. *But see Schroer v. Billington*, 577 F. Supp.2d 293 (D.D.C. 2008) (holding that government employer violated Title VII when it withdrew an employment offer after learning that the plaintiff was transsexual and would be transitioning from male to female because the employer's decision was influenced by gender stereotypes and because discrimination based on a person's transition from one sex to the other sex is “literally” because of sex)

Discrimination claims based on issues of image or dress are becoming increasingly common. In 2005, for example, two former female cocktail servers filed a \$70 million sexual discrimination suit against the Borgata Hotel Casino & Spa, charging that the weight and image restrictions imposed on the female servers created a sexual and gender-hostile environment that constituted sex discrimination. *See* “Borgata Hit With \$70 Million Discrimination Suit”, *USA Today*, available at [http://www.usatoday.com/travel/hotels/2006-01-31-borgata-lawsuit\\_x.htm](http://www.usatoday.com/travel/hotels/2006-01-31-borgata-lawsuit_x.htm). In many cases, however, as long as dress code policies are enforced on a non-discriminatory basis, an employer may establish different standards for men and women.

- *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006).

In 2000, Harrah's revised its “Personal Appearance Standards” guidelines for its beverage employees. One of the revisions required women to wear makeup. An employee refused to wear the makeup and she did not qualify for any open position at the casino with similar compensation and she therefore left Harrah's and brought suit against them for disparate treatment. The Ninth Circuit took this case en banc to “reaffirm our

circuit law concerning appearance and grooming standards, and to clarify our evolving law of sex stereotyping claims.” *Id.* at 1105. First, the court held that a sex-based difference in appearance standards, without any further showing of disparate effects, will not support a prima facie case of discrimination. *Id.* at 1109. An employee must be able to demonstrate that the policy creates an unreasonable burden on one gender. Jespersen was unable to make this showing – she did not submit any documentation or evidence related to the relative cost and time required to comply with the grooming requirements by men and women. Second, the court rejected the employee’s claim that Harrah’s policy was unlawful sex stereotyping because the policy required all bartenders to wear the same uniform and only differed as to the grooming requirements. The court held that the employee’s objection to the makeup requirement, without more, cannot give rise to a claim of sex stereotyping under Title VII because that “would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.” *Id.* at 1112.

- *But see Woodward Governor Co. v. Human Rights Com.*, 139 Ill. App. 3d 853 (1985). An employee brought suit, alleging sex discrimination, on grounds that her employer unlawfully discriminated on the basis of sex by permitting men to wear slacks and boots while at work but forbidding women to do so under the employer’s dress code. An administrative law judge found the employer guilty, and the commission affirmed. Ultimately, the parties reached a settlement.
- *Kleinsorge v. Eyeland Corp.*, No. A.99-5025, 2000 WL 124559 (E.D. Pa. Jan. 31, 2000), *aff’d*, 251 F.3d 153 (3d Cir. 2001). An employer maintained a grooming code for men that differed from the grooming code for women. The employer required a male employee to refrain from wearing an earring at work, yet permitted female employees to wear earrings. Because the male employee did not allege that the employer’s grooming policy was unevenly applied and that other male employees were permitted to wear earrings, the policy did not violate Title VII. *See also Harper v. Blockbuster Entm’t Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (grooming policy prohibiting men, but not women, from wearing long hair does not violate Title VII).
  - *Coia v. USAir, Inc.*, No. A. 94-3307, 1995 WL 89014 (E.D. Pa. Mar. 2, 1995). In 1991, USAir instituted a new grooming policy whereby men could not wear a pony tail or earrings, while women were allowed to wear both pony tails and earrings subject to

certain earring size, style and color restrictions. After USAir issued this policy, a male baggage handler who wore a pony tail and earrings brought a complaint alleging that USAir's new grooming policy was discriminatory. The District Court held that dress codes are permissible under Title VII, as long as they are even-handedly enforced between men and women. Therefore, although USAir's grooming policy itself was not in violation of Title VII, the question of whether its policy was enforced in a discriminatory manner was a factual issue for the jury to decide.

- *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996). The New York Mercantile Exchange had a grooming policy requiring men but not women to keep their hair short. A male employee sued NYME, alleging that the policy discriminated against male employees of the basis of gender. The court held that requiring short hair on men and not women does not violate Title VII because hair length policies are not within the statutory goals of equal employment. Grooming codes are more closely related to how the employer chooses to run the business and not to the equality of employment. Furthermore, the court found that grooming policies have only a *de minimis* effect on equal employment. See also *Boyce v. Gen. Ry. Signal*, 99-CV-6225T, 2004 U.S. Dist. LEXIS 13709 (W.D.N.Y. June 10, 2004) (dismissing male employee's claim that he was harassed and denied promotion because of the length of his hair).
- *Kohli v. LOOC, Inc.*, 103 Md. App. 694 (1995), *rev'd in part and remanded by* . Since 1980, Domino's Pizza had a no-beard policy as a result of its concerns that hair can get into food and that customers are reluctant to purchase food products from employees who are not clean shaven, and its belief that its corporate image is best promoted through a uniform market image and consistent standards regarding the professional appearance of its employees. In 1987, Domino's refused to hire Kohli, a member of the Sikh religion, because he refused to remove his beard for religious reasons even though he was willing to wear a hair snood or net while at work. As a result, Kohli filed a complaint with the Maryland Commission on Human Rights alleging that Domino's discriminated against him because it refused to accommodate his religious belief. Here, the administrative law judge concluded that Domino's failed to show by a preponderance of the evidence that it would suffer undue hardship if it accommodated Kohli.

- *Pirie v. Conley Group, Inc.*, No. 4:02-CV-45078, 2004 U.S. Dist. LEXIS 499, at \*4 (S.D. Iowa Jan. 7, 2004). The Southern District of Iowa upheld an employee's termination for violating a company policy prohibiting an on duty employee from wearing earrings, bracelets or necklaces. The employee filed claims for sexual harassment and retaliation under Title VII and the Iowa Civil Rights Act. The employee, an airport security officer, claimed that she was sexually harassed by a co-worker who exposed himself and engaged in "inappropriate sexual banter." The employee reported the incident and the co-worker was terminated. Prior to the harassing behavior, the employee was warned on two separate occasions that her tongue stud violated the company's uniform policy. After the second warning, the employee was further warned that future violations would lead to her termination. The employee was later discharged after she was again found wearing a tongue stud. The court determined that the one instance of harassment was not sufficiently severe to establish a claim of hostile harassment. Additionally, the court rejected the employee's allegations of unlawful retaliation. Based on the employee's ongoing violations of the company's uniform policy, the court held that the employer had offered a legitimate and nondiscriminatory reason for terminating the employee.
- *Swartzentruber v. Gunito Corp.*, 99 F. Supp. 2d 976, 979 (N.D. Ind. 2000). An employee of Gunito Corporation, a manufacturer of truck wheels, brake drums, hubs and related parts for the heavy truck industry, sued the Company after he was instructed by the personnel manager to cover a tattoo on his forearm depicting a hooded figure standing in front of a burning cross. A group of black employees had complained that they found the tattoo "offensive and threatening." The personnel manager determined that the tattoo could potentially contribute to a hostile working environment and told Plaintiff, a self-identified member of the KKK, to keep the tattoo covered while at work and explained that failure to do so would result in disciplinary action including discharge. Plaintiff subsequently alleged that Gunito discriminated against him by failing to accommodate his religious beliefs in forcing him to cover his tattoo and by closely monitoring his cover-up of the tattoo. Plaintiff claimed that his tattoo depicted sacred symbols and complained that the Company's failure to require

other employees cover what he viewed as offensive tattoos constituted an adverse employment action. The court explained that Plaintiff did not present admissible evidence, or even contend without evidence that covering up his tattoo at work conflicted with his religious beliefs. Further, the court noted that Gunité did, in fact, accommodate Plaintiff by allowing him to work with a tattoo covered up that “many would view as a racist and violent symbol.” Accordingly, the court dismissed Plaintiff’s claim of hostile working environment.

- *Sam’s Club, Inc. v. Madison Equal Opportunities Comm’n*, 266 Wis. 2d 1060 (2003). Sam’s Club terminated an employee for wearing a ring through her eyebrow in violation of its dress code, prohibiting nose rings or other facial jewelry in the workplace. The employee filed a complaint against Sam’s alleging that it discriminated against her in violation of the city’s Equal Opportunities Ordinance prohibiting discrimination based on physical appearance. Sam’s defense was based on the dress code exception in the ordinance permitting employers to enforce dress code policies “for a reasonable business purpose.” The court held that a reasonable decision maker could not conclude that Sam’s Club’s prohibition against facial jewelry did not fall within the “reasonable business purpose” exception. The court noted that the image of its business an employer chooses to convey may vary according to the type of business and instructed that a requirement of proscribed attire is “for a reasonable purpose when it is intended to further a goal that benefits the business, so long as the goal is that of a reasonable business person.” The court determined that Sam’s Club policy prohibiting facial rings was for a reasonable business purpose.
- *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800 (Iowa 2003). Fareway Stores terminated an employee after he refused to remove an ear stud during working hours in violation of an unwritten company policy. The employee sued alleging sex discrimination under both Title VII and the Iowa Civil Rights Act (“ICRA”). The Iowa Supreme Court rejected plaintiff’s argument that the fact that he was terminated for wearing an earring stud while female employees were allowed to wear earrings and ear studs established a prima facie case of sex discrimination under federal and state law. The court explained that while Title VII and the ICRA were enacted to

“stop the perpetuation of sexist or chauvinistic attitudes in employment which significantly affect employment opportunities,” they “were not meant to prohibit employers from instituting personal grooming codes which have a de minimus affect on employment.” The court similarly rejected plaintiff’s alternative “sex-plus” discrimination theory. Under the sex-plus discrimination theory, “discrimination occurs when employees are classified on the basis of sex plus one other seemingly neutral characteristic.” The court instructed that sex-plus discrimination is generally applied to employment policies which discriminate on the basis of immutable characteristics; changeable characteristics that involve a fundamental right such as marriage or child bearing; or changeable characteristics that considerably impact the employment opportunities afforded one sex. Concluding that wearing an ear stud is neither an immutable characteristic nor a fundamental right, and that the plaintiff did not contend that the grooming code perpetuates sexist or chauvinistic attitudes in employment, the court dismissed plaintiff’s sex-plus argument. Thus, the court held that Fareway’s grooming policy prohibiting males but not females from wearing earrings or studs did not constitute unlawful sex discrimination under either Title VII or the ICRA.

- *Pound v. Lee Mem'l Hosp.*, No. 239149, 2003 Mich. App. LEXIS 3217, at \*3 (Mich. Ct. App. Dec. 11, 2003). A male hospital employee who was dismissed for wearing female attire could not sustain a claim of sex discrimination. The employee was expelled from the hospital for his inappropriate appearance. While on duty, the employee often wore makeup, nail polish and visible female undergarments. The court held that having a differential appearance code for women and men does not implicate an inherent sex characteristic. Further, “the civil rights act does not protect a person’s conduct if it does not implicate an inherent characteristic of a protected class.” Therefore, the employee could not make out a valid cause of action.

### **Religious Accommodation in the Workplace.**

An employer’s dress code should permit employees to wear head gear or beards that are required by a person’s religion and allow female employees to avoid wearing masculine clothing (*i.e.*, pants), unless it is required by reasons of safety or some other legitimate reason. If an employee asks to wear religiously

mandated dress and it does not interfere with employee safety, relations or productivity, employers should make a bona fide effort to accommodate reasonable employee requests, unless it creates an undue hardship.

**Employer's Attempts To Demonstrate Undue Hardship.**

- **Safety Concerns.** See *EEOC v. Heil-Quaker Corp.*, No. 1-88-0439, 1990 U.S. Dist. LEXIS 9948 (M.D. Tenn. Jan. 31, 1990) (finding undue hardship for an employer to accommodate a religious employee by permitting her to wear a skirt in a manufacturing plant, where plaintiff's own experts testified that movement around the plant in a skirt was more hazardous than in pants and that the inconsistent application of company policy would diminish employee morale, thereby further detracting from plant safety). See also *EEOC v. Kelly Servs.*, 598 F.3d 1022 (8<sup>th</sup> Cir. 2010) (holding that summary judgment for a temporary employment agency was proper on a claim that the company discriminated against a Muslim employee by failing to refer her for a position at a printing plant because of her refusal to remove her headscarf); and *Mohamed-Sheik v. Golden Foods/Golden Brands, LLC*, No. 3:03 CV-737, 2006 U.S. Dist. LEXIS 11248, at \*12-13 (W.D. Ky. Mar. 16, 2006) (citing cases where courts have held that an employer is not required to accommodate a religious concern when doing so would potentially create a safety risk to employees or a legal risk for the employer).
- **Liability for statutory violation.** In *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984), Chevron adopted a policy designed to comply with standards promulgated by California's Occupational Health and Safety Administration. The policy required all employees whose duties involved potential exposure to toxic gases to shave any facial hair that would prevent them from achieving a gas-tight face seal when wearing a respirator. Bhatia, whose duties involved a potential exposure to toxic gases, claimed that Chevron had failed to reasonably accommodate him by permitting him to maintain his beard. The Ninth Circuit upheld the district court's grant of summary judgment to the employer on the ground that it would suffer an undue hardship by risking liability for the violation of a state occupational safety and health statute. See also *United States v. Bd. of Educ.*, 911 F.2d 882, 885 (3d Cir. 1990) (finding it was an undue hardship for the school board to accommodate a Muslim employee's religious practice of covering her entire body except

her hands and face, thereby violating the Pennsylvania Garb Statute prohibiting public school teachers from wearing any “dress...or insignia indicating the fact that such teacher is a member or adherent of any religious order,” and exposing school board directors to possible criminal prosecution).

- **Adverse effect upon employee morale.** *See Heil-Quaker Corp.*, No. 1-88-0439, 1990 U.S. Dist. LEXIS 9948 (M.D. Tenn. Jan. 31, 1990) (determining it was an undue hardship for a manufacturer employer with policy requiring all employees to wear pants to accommodate a female employee’s religiously-motivated desire to wear skirt where plaintiff’s own expert testified that accommodating her would have an adverse effect on employee morale).

**N. Casual Days.**

It is becoming a common practice among many employers to institute a relaxed dress code. Some companies permit their employees to dress casually one day a week. However, an increasing number of companies are expanding their casual dress policies to full-time casual business wear. In the employee handbook, employers can assure a suitable atmosphere by issuing guidelines on appropriate clothing for casual days.

**O. Poster Requirements.**

Although not part of the employee handbook, federal and state laws mandate that employers post within each work facility posters to inform employees about certain federal and state laws. Generally, posters must be publicly displayed in a conspicuous place, such as in a place where other notices are usually posted or in a prominent place in the employee cafeteria.

The following is a list of the federal posters that an employer is required to display in the workplace. These posters can also be obtained as a consolidated poster that is called the Consolidated Equal Employment Opportunity Poster.

- **Equal Employment Opportunity.**  
This contains a summary of Title VII, ADEA, Americans with Disabilities Act, Equal Pay Act, Executive Order 11246, Rehabilitation Act of 1973, Vietnam Era Veterans’ Readjustment Act of 1974, and Title IX of the Education Amendments of 1972.
- **Occupational Safety and Health Act of 1970.**  
This describes the Act’s coverage.

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- **Fair Labor Standards Act.**  
This contains a discussion of the Federal Minimum Wage.
- **Employee Polygraph Protection Act.**  
This sets forth the Act's prohibitions, exemptions, examination rights, and enforcement.
- **Family and Medical Leave Act of 1993.**  
This contains a discussion of the Act.

State posting requirements vary depending on state and local statutes and regulations. For example, in Illinois, in addition to the federally required posters, employers must post posters covering payment of wages, child labor, minimum wage, the One Day's Rest in Seven Act, the Equal Pay Act of 2003, the Victims' Economic Security and Safety Act, the Right to Know Act (toxic substances disclosure), workers' compensation, unemployment insurance, emergency care for choking, Equal Employment Opportunity, and participation in the federal Employment Eligibility Verification Program/Basic Pilot Program.

Similarly, the following is a list of the poster requirements that employers with facilities in Florida are required to display.

- **Florida Civil Rights Act:** Employers are required to post and keep posted in conspicuous places upon their premises a notice provided by the Commission on Human Relations setting forth information that the Commission deems appropriate to effectuate the purposes of the Florida Civil Rights Act.
- **Florida Minimum Wage:** Employers must post notice of the minimum wage in Florida. The notice must also provide an explanation of the rights protected by the Florida State Constitution, including the right to file a complaint about an employer's alleged noncompliance with the minimum wage, the right to inform any person about an employer's alleged noncompliance, and the right to inform any person of his rights and to assist in asserting those rights.
- **Child Labor Law:** Employers who employ a minor must post, in an area where it can be read easily, a child labor law notice that is provided by the Florida Division of Labor and Employment Security and that provides information regarding Florida's child labor laws.

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- **Public Officers and Employees:** The state or any county, municipality, or special district or any subdivision or agency thereof, as well as any employment agency or labor organization, must post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Department of Labor and Employment Security setting forth information relating to the state's prohibition of age discrimination by public employers pursuant to FLA. STAT. § 112.044(5).
- **Workers' Compensation:** An employer who employs fewer than 4 employees, who is permitted by law to elect not to secure payment of compensation under Florida's Workers' Compensation chapter, and who elects not to do so, must post a clear written notice in a conspicuous location at each worksite directed to all employees and other persons performing services at the worksite of their lack of entitlement to Workers' Compensation benefits.
- **Drug Free Workplace:** Employers implementing a drug testing program must post a notice of the employer's drug testing policy in an appropriate and conspicuous location on the employer's premises, and copies of the policy must be made available for inspection by employees and job applicants of the employer during regular business hours.
- **Unemployment Compensation:** Employers must post, in places readily accessible to individuals, printed statements concerning unemployment benefit rights as set forth in FLA. STAT. § 443.

### P. Travel Policies.

Employers can take control of the cost of business travel by issuing guidelines in a manual or handbook. Such guidelines may include:

- Requiring employees to take the lowest airfare available (and perhaps requiring an overnight stay on Saturdays if it significantly reduces the airfare);
- Requiring employees to stay in moderate accommodations;
- Putting spending limits on meals;
- Limiting the size of rental cars or encouraging employees to use alternate methods of transportation.

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Employers can improve compliance with such travel guidelines by mandating that senior management follows the same rules.

### **V. DESCRIBE YOUR POLICIES DESIGNED TO ASSIST EMPLOYEES.**

Most employers grant employees different kinds of leaves of absence. Some of the most common types are disability, family and medical, personal, educational, military, jury and bereavement leave. A personnel handbook is a forum for the employer to communicate to its employees these policies that it has established to assist them (e.g., disability leave) and to summarize the benefits (e.g., medical) it provides. In drafting these manual sections, care must be taken to comply with the organization's plan documents and summary plan descriptions (where appropriate) and all applicable laws. Employers should be aware that there are legal requirements at the federal, state and local level that must be considered in developing leave of absence policies. Some of the common legal considerations in drafting these provisions are discussed below.

#### **A. Federal Family and Medical Leaves of Absence.**

The federal Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, generally requires private employers of 50 or more employees, and public agencies to provide eligible employees with a certain amount of time away from work for a number of reasons discussed below. During this FMLA leave, employers are typically required to maintain the employees' pre-existing group health insurance coverage and restore the employees to their same or an equivalent position at the end of the FMLA leave.

The United States Department of Labor ("DOL") issued revised final regulations that went into effect on January 16, 2009. The details of these regulations are too extensive to include in this outline. However, we have outlined below some of the key statutory and regulatory provisions.

##### **a. Employee Eligibility.**

Under the FMLA, employees must have been employed by the employer:

- for at least 12 months, which need not be consecutive;
- for at least 1250 hours of service during the 12-month period immediately preceding the commencement of FMLA leave; and,
- at a worksite where 50 or more employees are employed within 75 miles of that worksite.

If the employer does not maintain accounting records of the actual hours that an employee worked, *e.g.*, in the case of an employee who is exempt under the Fair Labor Standards Act, the employer has the burden of showing that the employee has not worked the requisite 1250 hours of service. If the employer cannot meet this burden, the Department of Labor presumes that the employee has met this eligibility requirement. 29 C.F.R. § 825.110.

A recent case illustrates the importance of clearly stating employee eligibility requirements. In *Peters v. Gilead Sci., Inc.*, 533 F.3d 594 (7th Cir. 2008), an employee handbook promised 12 weeks of leave and recited the 12-month, 1,250-hour prerequisites for FMLA eligibility, but failed to mention the requirement that 50 or more employees must be employed within 75 miles of the worksite (often referred to as the “50/75” rule). In addition, the employer informed the employee that he was eligible for leave. Prior to reinstatement, the employee was terminated based on his status as a “key employee” under the FMLA.

The court held that the employee, though statutorily ineligible for FMLA leave under the 50/75 rule, could assert a valid promissory estoppel cause of action under Indiana state law. The employee’s statutory ineligibility was irrelevant to contract-based theories of liability. The court held that the leave provisions in the employee handbook may be enforceable as a contract under Indiana law, and, at the least, are promises giving rise to recovery under promissory estoppel.

**b. Events That May Entitle an Employee to FMLA Leave.**

Employees may take FMLA leave for any one or combination of the following reasons:

- the birth of a son or daughter (including prenatal care), and to care for the newborn child;
- the placement with the employee of a son or daughter for adoption or foster care, and to care for such child;
- to care for the employee’s spouse, son, daughter or parent (but not in-law) with a serious health condition; and/or
- the employee’s own serious health condition that renders the employee unable to perform the essential functions of the employee’s job;

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- a “qualifying exigency” (discussed *infra*); or,
- to care for a “covered service member” with a serious injury or illness if the employee is the son, daughter, parent, or next of kind of the service member.

A “serious health condition” is defined by the FMLA as an illness, injury, impairment or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider. A “serious health condition” also includes:

- a period of incapacity of more than three consecutive calendar days that also involves: (i) treatment two or more times; or (ii) treatment on at least one occasion which results in a regimen of continuing treatment;
- any period of incapacity due to pregnancy, or for prenatal care;
- a chronic condition requiring treatments, *e.g.*, asthma, diabetes, epilepsy;
- a permanent or long-term condition requiring supervision, *e.g.*, Alzheimer’s, a severe stroke, or the terminal stages of a disease; or
- multiple treatments of a non-chronic condition, *e.g.*, cancer chemotherapy, radiation, *etc.*, severe arthritis (physical therapy), or kidney disease (dialysis).

29 C.F.R. §§ 825.112 –.115.

### **c. How Much FMLA Leave May Be Taken.**

An eligible employee may take up to 12 workweeks of unpaid leave during the “12- month period” for any one, or combination, of the above-described situations, except in the case of leave to care for a covered service member. An eligible employee may take up to 26 workweeks of leave during a single 12-month period to care for a covered service member, measured forward from the date the employee first takes leave for that reason. 29 C.F.R. § 825.200.

Although the Department of Labor allows for a number of definitions for the “12-month period,” many employers feel it is most protective of their rights to define this period as the 12-month period immediately preceding the commencement of any FMLA leave (commonly known as the “rolling” backwards 12-month period). An employer’s administrative procedures might, however, be considered in defining the “12-month period.” *Id.*

**d. Substitution of Paid Leave.**

The FMLA generally allows an employer to require an employee to first substitute for unpaid FMLA leave certain accrued paid leave, such as vacation, personal or family leave, or medical/sick leave. If the employee is on disability or workers' compensation and FMLA leave, neither the employee nor employer may require the substitution of paid leave. However, the employer and employee may agree, where state law permits, to supplement disability or workers' compensation benefits with accrued paid leave. 29 C.F.R. § 825.207.

**e. Intermittent Leave.**

FMLA leave for childbirth or placement must conclude 12 months after the birth or placement unless the employer otherwise authorizes. An employer is not required to allow the employee to take this leave intermittently or on a reduced work schedule. 29 C.F.R. §§ 825.120, .121

However, an employer must allow the employee to take intermittent leave or work on a reduced schedule if there is a medical need for the leave (as distinguished from voluntary treatments and procedures) that can be best accommodated through an intermittent or reduced leave schedule. However, in such cases, employees must attempt to schedule their leave so as not to disrupt the employer's operations. The employer may also assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced schedule. 29 C.F.R. §§ 825.202–.204.

**f. Husband and Wife Employed by Employer.**

If a husband and wife are both employed by the employer, they can together take only a combined total of 12 weeks of FMLA leave within the "12 month period" for any birth, placement or to care for a seriously ill parent, which they can split between them in any proportions. In addition, any such leave taken by each employee can be charged against that employee's available 12 weeks of FMLA leave for his/her own serious health condition or to care for a child or spouse with a serious health condition. 29 C.F.R. §§ 825.120(a)(3), .121(a)(3).

**g. How FMLA Leave Is Requested and Scheduled.**

If the leave is foreseeable, an employee must provide the employer with at least 30 days advance notice before the FMLA leave is begun. If 30 days

notice is not practicable, the employee must give the employer notice as soon as practicable under the facts and circumstances of the particular case. 29 C.F.R. § 825.302.

If the leave is not foreseeable, an employee should give notice to the employer as soon as practicable under the circumstances of the particular case. It is expected that the employee will notify the employer within no more than one or two working days of learning of the need for leave, unless there are extraordinary circumstances which make this notification not feasible. 29 C.F.R. § 825.303.

Written notification from the employee is not required under the FMLA regulations. However, employees are required to provide the employer with at least verbal notification of their need to take leave. In addition, employees are not required to expressly assert their rights under the FMLA and they do not have to mention the FMLA. Employees must only state that leave is needed and the employer is then expected to obtain any additional information that may be required. It is, however, expected that the employee will provide this additional information when it can readily be accomplished, taking into consideration any exigent circumstances. 29 C.F.R. §§ 825.302, 825.303.

An employer may also require that the need for the leave be supported by a certification issued by the health care provider of the employee or the employee's ill family member. 29 C.F.R. § 825.305.

Although employers should generally notify the employee that his/her leave has been designated FMLA leave before it starts and provide employees certain specific advance notices, under certain circumstances leave may be designated retroactively, upon mutual agreement by employer and employee. 29 C.F.R. § 825.301.

**h. Interim Health Benefits.**

Employers must maintain coverage under its group health plan for the duration of an employee's FMLA leave at the level and under the conditions such coverage would have been provided if the employee had continued in employment continuously for such duration. 29 C.F.R. § 825.209.

For the portion of FMLA leave which is unpaid, however, the employee is responsible for payment of his/her portion of health insurance premiums during such leave, as if he/she were still on the payroll, and the same payment rules apply to FMLA-interim health insurance as if the employee

were on any other leave without pay. Employers must provide employees who are on FMLA leave with advance notice of the costs and a schedule for such interim health insurance premium payments. 29 C.F.R. § 825.210.

If an employee's interim health insurance premium payment is more than 30 days late, upon 15 days written notice the employer's obligation to continue health care coverage ceases. However, the employer may continue to pay the employee's share of any health premium(s) missed by the employee during the FMLA leave period. Assuming the employee returns to work, the employer may then recover through subsequent payroll deductions the employee's share of the missed premium payments. 29 C.F.R. §§ 825.212, 825.213.

In addition, if the employee's health coverage is discontinued during the leave because the employee has not made the required interim payments while on FMLA leave, upon the employee's return from FMLA leave, health benefits must be restored to the employee as if the leave had not been taken and the premium payment(s) had not been missed. The employer, however, will then recoup the missed payments by payroll deductions. 29 C.F.R. §§ 825.212, 825.213, 825.215.

**i. Employee Reinstatement from Leave.**

Employees are entitled to return from qualifying FMLA leave to the same or an equivalent position with equivalent benefits, pay and other terms and conditions of employment, and without loss of job seniority or any other status or benefits accrued prior to FMLA leave, if all FMLA requirements are met, provided that the employee would still be employed if FMLA leave had not been taken. Employees are not entitled to accrue seniority and benefits during the unpaid FMLA leave if they are not provided during an employer's other forms of unpaid leave. 29 C.F.R. §§ 825.214, 825.215.

**j. Limitations on Reinstatement from Leave.**

Certain "key employees" may be denied reinstatement if it is necessary to prevent substantial and grievous economic injury to the employer's operations. A key employee is a salaried eligible employee who is among the highest paid 10% of all employees at any covered worksite. The employer should advise the employee at the time of a request for, or commencement of, FMLA leave, or as soon thereafter as is practicable, that he/she qualifies as a key employee and that reinstatement may be

denied if the employer decides that substantial and grievous economic injury to its operations would occur if the employee elects not to return to employment. 29 C.F.R. §§ 825.216 to 825.219.

**k. Notice Requirements for Employers.**

Covered employers are required to post a summary of FMLA rights and responsibilities prominently in all worksites, where it can be readily seen by employees and applicants for employment. The revised regulations have clarified that electronic posting is sufficient, provided it meets all other requirements. 29 C.F.R. § 825.300(a)(1). A model poster that has been approved by the U.S. Department of Labor is available from the Wage and Hour Division.

If an employer has any written guidance to employees regarding benefits or leave rights (*e.g.*, employee handbooks or manuals), the employer must include in these materials information that describes employees' rights and responsibilities under the FMLA and employer procedures for FMLA leaves. 29 C.F.R. § 825.300(a)(3). If an employer does not have these written materials, the employer must provide the required information when the employee requests leave under the FMLA. 29 C.F.R. § 825.300(c). In addition, when an employee requests leave, the employer must notify the employee of the employee's eligibility to take leave within five business days absent extenuating circumstances. 29 C.F.R. § 825.300(b). When the employer has enough information to determine whether the leave is taken for an FMLA-qualifying reason, the employer must notify the employee whether the leave will be designated and counted as FMLA leave. 29 C.F.R. § 825.300(d).

- *Bachelder v. America West Airlines*, 259 F.3d 1112 (9th Cir. 2001). The court held that the airline violated the FMLA because it did not notify its employees which of several allowed methods would be used to determine the "12-month period" during which employees are entitled to FMLA leave. The airline was using a "rolling" 12-month method to calculate time but failed to inform its employees of this method other than a statement in the handbook that mirrors the statute with the phrase "within any twelve month period." The court concluded that the statement in the handbook was not sufficient to place employees on notice.

**I. Significant Recent Developments.**

The 2010 National Defense Authorization Act details further changes in the scope and requirements of the two new types of leave provided for by the National Defense Authorization Act for 2008 (“NDAA”) that contained provisions amending the FMLA. The first is Service-member Family Leave that provides up to 26 weeks per year of protected unpaid leave to any eligible employee who is the spouse, child, parent, *or next-of-kin* (*i.e.* closest blood relative) of a covered service-member to care for his/her relative (the service-member) injured during active duty. Such a leave would apply, if the service-member had been an active member of the Armed Forces (including those called to active duty in the Reserves or National Guard) within the five-year period preceding the date on which the veteran undergoes medical treatment, therapy or recuperation for a serious injury or illness. Such leave would apply, as well, to the family member who provides care to a veteran whose injury or illness existed before the service-member’s active deployment and was aggravated by active duty service.

The new Amendments also extend “qualifying exigency leave” protections to families of active duty service-members who are on active duty and are deployed overseas. Previously, eligible employees could only take up to 12 weeks of leave (in a 12-month period) as a result of any “qualifying exigency”, because the employee’s spouse, son, daughter or parent is on or called to active duty in the armed forces in support of a “contingency operation.”

The regulations describe eight “qualifying exigencies” for which an eligible employee can take FMLA leave arising out of the fact that the employee’s spouse, son, daughter or parent is a “covered military member” on active duty or is on call for such duty in the United States National Guard or Reserves in support of a “contingency operation”. They include the need to take time off due to:

- (1) the short notice deployment of a family member (limited to seven or less calendar days prior to the date of deployment);
- (2) the need to attend military events and related activities;
- (3) the need to make arrangements for childcare and school activities;
- (4) need to make financial and legal arrangements;
- (5) a need for counseling;

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(6) a family member being released for service for rest and recuperation (limited to 5 days of leave for each instance up to a maximum of 12 weeks in a 12-month period);

(7) a need to attend post-deployment activities; and

(8) additional activities (if agreed upon by the employer and the employee).

29 C.F.R. § 825.126.

The addition of leave to care for a covered service member is particularly significant because it more than doubles the available leave time to those employees who care for injured service-members. Moreover, the NDAA and FMLA regulations broadly define “covered service-member” to include “a member of the Armed Forces, including a member of the National Guard or Reserves, or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty for which he or she is undergoing medical treatment, recuperation, or therapy; or otherwise in outpatient status; or otherwise on the temporary disability retired list.” 29 C.F.R. § 825.127. The amendments also expand the definition of “covered employee” to include one’s next-of-kin, meaning nearest blood relative of that individual. 29 C.F.R. § 825.127(b)(3).

Notably, these new military-related leaves do not alter current FMLA eligibility requirements. The usual rules and regulations governing substitution of paid leave, intermittent leave, and reduced schedule leave, etc., still apply to the new types of leave enacted. Accordingly, employers should promptly notify employees of the new leave provisions in writing, amend their handbooks and leave request forms as appropriate, and post the new policies in conspicuous worksite locations.

### **B. State Family and Medical Leaves of Absence.**

In addition to the federal FMLA, many states have adopted state FMLA laws which interact with the federal FMLA and, in some cases, provide greater family and medical leave rights than the federal Act. Below is a brief description of a number of FMLA laws enacted by different states.

#### **California**

The amendments to the California Family Rights Act (“CFRA”) closely parallel the provisions of the FMLA. The CFRA requires covered employers to provide

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eligible employees up to 12 weeks of unpaid leave in connection with the birth or adoption of a child or for a “serious health condition” of the employee or the employee’s spouse, child or parent. CAL. GOV’T CODE § 12945.2. The statute guarantees that the employee may return to the same or a comparable position upon expiration of the leave.

Where differences in the FMLA and CFRA exist, employers are required to comply with the law providing greater family and medical leave rights. One difference includes the time allowed for pregnancy leave, discussed below.

California also has Paid Family Leave insurance, Senate Bill No. 1661, which is a component of the State Disability Insurance Law and allows employees to receive up to six weeks of benefits over a 12-month period if they are not working to care for a seriously ill child, spouse, parent, or registered domestic partner, or to bond with a new child (including an adopted child or child placed through foster care). Employees contribute to the program through mandatory deductions from their paychecks. Paid Family Leave does not change the requirements under either the FMLA or the CFRA, but it allows up to six weeks of paid benefits for an employee who suffers a wage loss when they take time off to care for others under these laws.

### **Connecticut**

Connecticut’s Family and Medical Leave Law requires certain private employers to grant workers employed for one year or more up to 16 weeks of unpaid leave of absence within any two-year period for the birth or adoption of a child, the serious illness of a child, spouse or parent, or the worker’s own serious illness. CONN. GEN. STAT. § 31-51k *et seq.*

Under this Act, employees are entitled to use the most advantageous combination of leave under the federal FMLA and the Connecticut Family and Medical Leave laws. For example, the employee could take up to 16 weeks of family or medical leave in the year 2009 (under the Connecticut law) and then an additional 12 weeks of family or medical leave in the year 2010 (under the federal law).

### **District of Columbia**

The District of Columbia Family and Medical Leave Act requires covered employers to provide eligible employees with the opportunity to take an unpaid family care leave of up to 16 weeks during a 24-month period in connection with the birth or adoption of a child, placement of a child for foster care or other permanent care, the serious health condition of: (i) a relative by blood, marriage or legal custody; (ii) a child living with the employee, for whom the employee has assumed parental responsibility; or (iii) a person in a committed relationship with

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the employee and sharing a mutual residence; or the employee's own serious health condition. D.C. CODE ANN. § 32-501 *et seq.*, formerly cited as §§ 36-1301 to 36-1317.. The statute guarantees that the employee may return to the same or a comparable position upon expiration of the leave.

The Act also requires employers to continue to allow employees taking a family care leave to participate in health, pension, retirement, and supplemental unemployment benefits plans to the same extent that they were provided to employees on other unpaid leaves of absence.

Under this Act, employees are entitled to use the most advantageous combination of leave under the federal and District of Columbia Family and Medical Leave statutes. For example, the employee could take up to 16 weeks of family or medical leave in the year 2006 (under the District of Columbia's statute) and then an additional 12 weeks of family or medical leave in the year 2007 (under the federal statute).

In November 2008, the District of Columbia Safe and Sick Leave Act took effect. D.C. CODE ANN. §§ 32-131.01 *et seq.* The Act requires employers to provide up to 7 paid sick days to each employee annually due to the employee or family member's medical condition, domestic violence or sexual abuse. In addition, the Act requires an employee's unused paid leave accrued during a 12-month period to carry over annually. Regulations have not yet been issued interpreting the Act, and there is some confusion surrounding provisions of the Act that address how employers that provide unlimited sick leave should coordinate the carry-over provisions.

### Florida

Florida's Family and Medical Leave Law applies to state employees who are in a "career service." Such employees are entitled to leave in connection with the birth or adoption of a child, as well as for the care of a family member with a serious illness, including a child, parent or spouse. FLA. STAT. § 110.221 defines career service employees as individuals working for the state or any committee, agency or department of the state, who are not in "exempt positions." "Exempt positions" include, *inter alia*, elected/appointed officials, employees of the State University System, temporary employees, employees in the Governor's office, and most policy-making or managerial employees.

It is also important that employers familiarize themselves with existing county ordinances. For example, in December 1991, Dade County approved a family leave ordinance that requires businesses in Dade County, as well as those businesses that do business with Dade County, who employ 50 or more persons, to provide up to 90 days of unpaid family leave during any 24-month period for

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the birth or adoption of a child, the care of a family member with a serious illness, or for the employee's own serious illness. Such employers must maintain group health insurance coverage for the employee during the leave.

### Illinois

Illinois currently has no state family and medical leave requirements, except those required under the Illinois Victims' Economic Security and Safety Act ("VESSA"), employers, which include the State, a state agency, local government, a school district, and any private employer that employs at least 50 employees. VESSA provides eligible employees with up to twelve weeks of unpaid leave, and the employee must provide 48 hours of notice when practicable. VESSA also states that a covered employer may not discharge or discriminate against an employee who is a victim of domestic violence or who has a family or household member who is a victim of domestic violence, for taking up to total of 12 workweeks of leave from working during any 12 month period to address the effects of the domestic violence. *See* 820 ILCS 180/1-999 and 56 Ill. Adm. Code 280.

In addition, under the School Visitation Rights Act, all public and private employers must grant an employee leave of up to a total of 8 hours during any school year, and no more than 4 hours of which may be taken on any given day, to attend school conferences or classroom activities related to the employee's child if the conference or classroom activities cannot be scheduled during non-work hours; however, no leave may be taken by an employee unless the employee has exhausted all accrued vacation leave, personal leave, compensatory leave and any other leave that may be granted to the employee except sick leave and disability leave. Before arranging attendance at the conference or activity, the employee shall provide a written request for leave at least 7 days in advance. (In emergency situations, no more than 24 hours notice shall be required.) The employee must also consult with the employer to schedule the leave so as not to unduly disrupt the employer's operations. *See* 820 ILCS 147/10, 147/15, and 147/20.

### Louisiana

Louisiana has not enacted a family and medical leave act, but provides for leave under certain circumstances. Under Louisiana law, employers who employ more than 25 employees within the state of Louisiana are required to permit female employees to take leave "for a reasonable period of time" not to exceed four months in connection with pregnancy. LA. REV. STAT. ANN. §§ 23:341, 23:342. A "reasonable period of time" is defined as the period during which the female employee is disabled as a result of pregnancy, childbirth or related medical

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conditions. LA. REV. STAT. ANN. § 23:342(2)(b). There are no minimum employment requirements for pregnancy-related leave, but such leave only applies to female employees. Paid leave in connection with pregnancy is not required. Louisiana law also provides for leave for employees undergoing bone marrow donations. LA. REV. STAT. ANN. § 40:1299.124. An employee must work an average of 20 hours per week to be eligible for leave to donate bone marrow and the combined length of leaves may not exceed 40 work hours, unless agreed to by the employer. Unlike pregnancy leave, leave for bone marrow donors must be paid.

### **New Jersey**

The New Jersey Family Leave Act requires covered employers to provide certain employees with the opportunity to take temporary leaves of absence for up to 12 weeks in any 24-month period to care for newborn or adopted children or seriously ill family members (including in-laws). The statute also guarantees that employees can return to their jobs, or to equivalent positions, upon the expiration of the leave.

In addition, if both spouses work for the same employer, under the New Jersey Family Leave Act, the employer cannot reduce the leave requirement to a combined total of 12 weeks of leave for both spouses (in contrast to the federal FMLA). The New Jersey Family Leave Act also specifies that employers must post notices describing employees' rights and obligations under the Act and must "use other appropriate means to keep its employees so informed." N.J. STAT. ANN. §§ 34:11B-1 *et seq.*

The statute, as enacted, also requires employers to provide employees on family leave with the same health insurance coverage that would have been provided if they had continued working and to continue other benefits to the extent that they were provided to employees on other temporary leaves of absence. These provisions, however, were held to be preempted by the Employee Retirement Income Security Act. The state has, therefore, been enjoined from enforcing these provisions in the private sector. *New Jersey Business & Indus. Ass'n v. State*, 592 A.2d 660 (N.J. Super. Ct. Law Div. 1991).

In addition, in May 2008, the Governor of New Jersey signed into law a paid family leave insurance program, which will provide up to six weeks of paid leave for employees who need time off to care for a seriously ill family member or a newborn or newly adopted child. The paid leave will be funded through a payroll tax on employee earnings that began on January 1, 2009, but the paid leave benefits, which will be two-thirds of pay to a current maximum of \$524 per week,

will not be available until July 1, 2009. The New Jersey Department of Labor and Workforce Development has issued a notice of rights regarding the law, which employers are required to post at each New Jersey workplace, in a place or places that are accessible to all employees. In addition, the notice must be provided to: (1) new employees at the time of hire; (2) whenever an employee informs the employer that he/she is taking time off for a reason covered by the new law; and (3) upon any first request from an employee. N.J. ANN STAT. § 43:21-25 *et seq.*

**C. Pregnancy Disability and Child Care Leaves of Absence.**

In addition to family and medical leave of absence laws, Title VII, as amended by the Pregnancy Discrimination Act of 1978 (“PDA”), Pub. L. No. 95-555, 92 Stat. 2076, specifies that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k). The statute does not require that employers provide pregnancy disability or child care leaves, but only that such leaves be granted to the same extent and under the same conditions as other disability and non-disability leaves.

1. A leave of absence for pregnancy-related disability must be provided on terms at least as favorable as those applied to other non-pregnancy disabilities.
  - *Maddox v. Grandview Care Ctr., Inc.*, 780 F.2d 987 (11th Cir. 1986). A nursing home’s leave of absence policy that limited maternity leave to three months, while no limit was placed on the duration of a leave of absence for other illnesses, violated Title VII.
2. The PDA does not require that employers treat pregnant employees more favorably.
  - *Tysinger v. Police Dep’t*, 463 F.3d 569 (6th Cir. 2006). A police officer sued her employer for sex discrimination for failing to accommodate her request for light duty while she was pregnant. The court affirmed the district court’s finding that the employee failed to make out a prima facie case of pregnancy discrimination. The evidence indicated that no other employee requested a similar light duty accommodation and therefore no other employee was given that accommodation for his/her short-term disabilities. Thus, because the Pregnancy Discrimination Act requires the same

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treatment, rather than preferential treatment for pregnant employees as other employees, the employer's actions were lawful.

- *Davidson v. Franciscan Health Sys.*, 82 F. Supp. 2d 768 (S.D. Ohio 2000). A hospital did not violate the PDA when it terminated a nurse who exceeded her medical leave limit because of pregnancy-related complications. The PDA simply requires employers to treat pregnant women “the same for all employment-related purposes” as employees who are not pregnant but have the same ability or inability to perform their work.
  - *Spaziano v. Lucky Stores, Inc.*, 69 Cal. App. 4th 106 (Cal. App. 2d Dist. 1999). An employer's disability leave policy offered employees temporarily disabled by non-occupational injuries, including pregnancy, a leave of up to six months. But the policy gave employees who were injured on the job leave time of up to one year. The court held the employer did not discriminate in violation of the Fair Employment and Housing Act (“FEHA”) by terminating a pregnant employee who did not return to work after a six-month pregnancy leave. Even though it incidentally affected pregnant employees, the two-tiered rule was neutral because the difference in leave policy was not based on sex or pregnancy.
  - *Urbano v. Cont'l Airlines*, 138 F.3d 204 (5th Cir. 1998). Continental Airlines did not violate the PDA by enforcing a policy that permitted job transfers to light-duty assignments only for employees injured on the job. The PDA requires pregnant employees to be treated the same as other employees injured off the job, and does not entitle them to be “treated the same under Continental's light-duty policy as employees with occupational injuries.” The Airline's policy did not violate the PDA because pregnant women were not treated any differently than any other workers injured off the job.
3. Policies requiring the employee to provide prompt notice of pregnancy, or requiring employees to stop work at a particular point in their pregnancy, generally are unlawful.
- *In re Pan Am. World Airways, Inc.*, 905 F.2d 1457, 1459 (11th Cir. 1990). The airline required flight attendants to notify it immediately upon learning of their pregnancy. The attendant was then prevented from working and placed on leave without pay for the duration of the pregnancy. The employer argued that

“grounding pregnant flight attendants was essential to assure passenger safety” since “because of the loss of stamina and agility that they experience as a result of their condition, pregnant flight attendants are unable to render necessary assistance to passengers during flight emergencies.” The employee, a flight attendant, did not notify the airline until 21 to 24 weeks into her pregnancy, at which time she was terminated. The court found that this policy violated Title VII and, moreover, concluded that the employee was not required, in order to prevail, to show that she would have complied with a lawful policy allowing for later notice.

4. Under Title VII, employers that want to provide their employees with child care leave following the completion of an employee’s disability must do so without regard to the employee’s gender.
  - *Schafer v. Bd. of Pub. Educ.*, 903 F.2d 243, 250 (3d Cir. 1990). The court stated that “childrearing by a mother or childrearing by a father should be on the basis of full parity.” The EEOC takes the position that Title VII “prohibits employers from establishing policies that treat male and female employees differently when such employees request time off to care for a newborn child.” According to the EEOC, “[i]f an employer chooses to grant paid or unpaid leave to employees to allow for care and nurturing of a newborn child, the same leave must be provided to male and female employees.” The EEOC advises that “the clearest safe harbor” for employers . . . is to separate the issue of pregnancy disability leave from the issue of parental leave. In this way, the employer may ensure that pregnancy disability leave is treated like all other forms of medical disability leave, while also establishing a single standard for parental leave that is applicable to males and females.” Policy Guidance on Parental Leave, EEOC Compliance Manual (CCH) ¶ 4806 (Aug. 27, 1990).
5. Many states have enacted statutes, either under a family and medical leave or a separate type of law, that provide additional protections to employees seeking leave for pregnancy or child care purposes.

For example, the Supreme Court has held that Title VII, as amended by the PDA, did not preempt a California statute requiring employers to provide leave of up to 4 months and reinstatement to employees disabled by pregnancy. The Court emphasized that the statute would allow benefits “to cover only the period of *actual physical disability*.” *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 290 (1987).

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The Florida Family Leave Act provides that state “career service” employees are entitled to take up to 6 months of unpaid leave for the birth or adoption of a child.

In Illinois, state government employees may request child care leave for the adoption of a child or for parental reasons, such as care for a seriously ill child, an emotionally disturbed child, or similar serious family dilemmas. Upon return, the employee is entitled to the same or a similar position to the one held before taking the leave. Ill. Admin. Code § 80-420.645. Employees may receive up to 90 days of unpaid leave and by request, an additional 90 days. Ill. Admin. Code § 80-420.645. (However, the additional 90 days will be deducted from continuous service.) This leave may be utilized, if requested and with prior approval by the employing department and the Department of Personnel, for additional leave after a disability leave for maternity purposes.

New York’s adoption leave statute requires that, when an employer or government agency permits an employee to take a leave of absence following the birth of his or her child, an adoptive parent of a young child is entitled to the same leave on the same terms following commencement of the parent-child relationship. N.Y. LAB. LAW § 201-c.

The Maryland Human Relations Law specifically addresses the issue of pregnancy disability and provides that pregnancy disability shall be treated as a temporary disability for all job-related purposes, and all policies and benefits which govern leaves shall treat pregnancy leaves in the same fashion as other disability leaves. MD. CODE ANN. art. 49B, § 17.

The District of Columbia Human Rights Act provides that “[w]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and this requirement shall include, but not be limited to, a requirement that an employer must treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees.” D.C. CODE ANN. § 2-1401.05.

The California Fair Employment and Housing Act (“FEHA”) also creates a separate pregnancy disability leave right under which women are eligible for up to 4 months pregnancy disability leave in addition to the 12 weeks of CFCLA leave. CAL. GOV’T CODE § 12945. In other words, this leave is separate from and in addition to any leave for which the employee may be eligible under CFCLA.

Louisiana's employment discrimination statute provides that "it shall be an unlawful employment practice unless based upon a bona fide occupational qualification: (1) For any employer, because of pregnancy childbirth, or related medical condition of any female employee, to refuse to promote her, or to refuse to select her for a training program leading to promotion . . . or to discharge her from employment or from a training program leading to promotion, or to discriminate against her in compensation or in terms, conditions, privileges of employment." LA. STAT. ANN. § 23:342. The statute also prohibits employers from refusing to provide female employees affected by pregnancy, child birth or related medical conditions with the same benefits or privileges of employment granted by that employer to other employees suffering from non-pregnancy related temporary disabilities. LA. STAT. ANN. § 23:342(2)(a). In addition, under Louisiana law, employers who employ more than 25 employees within the state of Louisiana are required to permit female employees to take leave "for a reasonable period of time" in connection with pregnancy, childbirth or related medical conditions. LA. REV. STAT. ANN. §§ 23:341, 23:342.

Nevada law provides that if an employer "grants leave with pay, leave without pay, or leave without loss of seniority for sickness or disability because of a medical condition, it is an unlawful practice to fail or refuse to extend the same benefits to any female employee who is pregnant." NEV. REV. STAT. ANN. § 613.335. While the statute does not require an employer to give any specific benefits, it does ensure that if leave is part of the employee's benefits, she is entitled to use the leave "before and after childbirth, miscarriage or other natural resolution of her pregnancy." *Id.*

**D. Short-Term Disability Leaves of Absence and Salary Continuance Policies.**

Several states have mandated that employees receive short-term disability benefits if they are ill or injured and unable to work. In addition, an employer may voluntarily provide employees with short-term disability benefits even if it is not required by law. Consequently, the handbook provides a communication tool for the employer to notify an employee that short-term disability benefits are available.

Some states mandate short-term disability benefits. *See* California (Cal. Unemp. Ins. Code § 2601); New York (N.Y. Work. Comp. Law § 201); and Rhode Island (R.I. Gen. Laws § 28-39-1).

Although Florida has not mandated short-term disability benefits, Dade County has enacted a short-term disability ordinance. Metropolitan Dade County Code § 2-56.27.1 provides a salary continuation plan for in-line-of-duty injuries suffered by employees. This program is called the “Metropolitan Dade County Service Connected Disability Program.” Under the program, an employee injured in the line of duty is entitled to full salary for 4 months from the date of disability, which is renewable for an additional 4 months.

Either in addition to short-term disability benefits or instead of short-term disability benefits (where not state mandated), many employers provide salary continuation plans as part of their overall employee sick leave benefits. Salary continuance programs are similar to short-term disability benefits in that they: (i) provide employees with at least partial income continuance; (ii) usually commence after a short waiting period (*e.g.*, one week); and (iii) last for a longer period of time than sick days (*e.g.*, up to 6 months).

**E. Military Leaves of Absence.**

The development of military leave policies must take into account the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“VEVRA”), as amended, 38 U.S.C. § 101 *et seq.*, and the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), 38 U.S.C. § 4301. In addition, a number of states have enacted laws pertaining to employee military leaves of absence.

1. VEVRA of 1974, as amended, guarantees the employment rights of veterans and members of the Reserves and National Guard. VEVRA requires that veterans seeking reemployment be returned to a position of like seniority, status and pay, and limits an employer’s ability to discharge such employees. The law also prohibits discrimination against veterans, reservists and members of the National Guard. For example, under this Act, it is unlawful to discharge or deny any promotion to reservists because of their military obligations.
2. USERRA also guarantees the employment rights of service persons in most voluntary and involuntary service categories, including the members of the United States Army, Navy, Air Force, Marines, Coast Guard, National Guard, Reserves, or Public Health Service. Reemployment rights also must be extended to employees with service-related disabilities who can be reasonably accommodated. In addition, employers must provide eligible service persons with: (i) COBRA-like health benefit continuation for up to 24 months during their military service; and (ii) pension benefit plan protection, allowing service in the uniformed service to be considered

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service with the employer for both vesting and benefit accrual purposes, provided that the veteran is reemployed within the prescribed time period allowed by USERRA.

3. A number of states have military leave laws that guarantee employment rights of military personnel and, in some cases, provide for additional benefits for such employees. For example, in Illinois, employees and applicants who have received an offer of employment and have enlisted in or been drafted for military service or militia training or who are called to active duty must be considered as being on a leave of absence. Those who provide evidence of satisfactory completion of service or who are honorably discharged must be restored to the same or similar position as previously held unless reinstatement is impossible due to the employer's changed circumstances. In addition, employees must reapply within 90 days of discharge or within one year after hospitalization continuing from military discharge. Any full-time employee of the State of Illinois, a unit of local government, or a school district, other than an independent contractor, who is a member of any reserve component of the United States Armed Forces or of any reserve component of the Illinois State Militia, shall be granted leave from his or her public employment for any period actively spent in military service, including: basic training; special or advanced training, whether or not within the State, and whether or not voluntary; and annual training. During these leaves, the employee's seniority and other benefits shall continue to accrue. 5 ILCS 325/1. Moreover, any eligible employee whose child or spouse is called military service may give adequate notice to the employer and then take up to 15 days (for employers with 15-50 employees) or 30 days (for employers with over 50 employees) of unpaid leave. 330 ILCS 60/1 et seq.; 20 ILCS 1805/30.15; 820 ILCS 151/1 et seq.
4. In addition, many state statutes require that public service employers pay public service employees for a certain length of time. Under Florida's Military Affairs and Related Matters statute, "any person who seeks or holds an employment position must not be denied employment or retention in employment, or any promotion or advantage of employment, because of any obligation as a member of a reserve component of the Armed Forces." FLA. STAT. ANN. § 250.481. In New York, the state's Military Law guarantees public employees their salary or other compensation for up to 30 working days. N.Y. MIL. LAW §§ 242(1)-(5). In Pennsylvania, the state's Military Leave Law provides a leave of absence for employees that are in active military service during a time of war, armed conflict, or state of emergency declared by the Governor or the President. These employees are entitled to reemployment status as he or

she would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. 51 PA. CONS. STAT. ANN. §§ 7301-7309. In California, any employee of any corporation, company, or firm, or other person, who is a member of the reserve corps of the armed forces of the United States or of the National Guard or the Naval Militia shall be entitled to a temporary leave of absence without pay while engaged in military duty ordered for purposes of military training, drills, encampment, naval cruises, special exercises or like activity as such member, providing that the period of ordered duty does not exceed 17 calendar days annually including time involved in going to and returning from such duty. CAL. MIL & VET. CODE § 394.5.

Moreover, any officer or employee of the state, any county of the state, or any municipality or political subdivision of the state who is a member of the Florida National Guard is entitled to leave of absence from his or her employment duties, without loss of pay, time, or efficiency rating, on all days during which he or she is engaged in active state duty. Such leave of absence without loss of pay, however, may not exceed 30 days at one time. FLA. STAT. ANN. § 250.48. The Florida statute also provides that all employers — private and public — are prohibited from discharging, reprimanding, or in any other way penalizing any member of the Florida National Guard because of his or her absence due to active duty. FLA. STAT. ANN. § 250.482. In Nevada, if the employment of a member of the Nevada National Guard is found to have been terminated as a result of the member being ordered to active service or duty pursuant to 412.122 or 412.124, the member is entitled to be immediately reinstated to his position without loss of seniority or benefits, and to receive all wages and benefits lost as a result of the termination. NEV. REV. STAT. ANN. § 412.1395.

**F. Employee Assistance Programs.**

Many employers have established Employee Assistance Programs (“EAPs”) to assist employees with drug, alcohol, psychological or related problems. Some employers describe their EAPs in their personnel manuals. These descriptions, especially with respect to statements made regarding the confidentiality of an employee’s treatment, must be drafted carefully. Furthermore, all EAP-related information and/or communications should be handled with the utmost discretion.

1. Public disclosure of private facts concerning an employee, even if true, may subject the employer to tort claims for invasion of privacy.

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- *Bratt v. Int'l Bus. Mach. Corp.*, 785 F.2d 352 (1st Cir. 1986). The employee sued the employer for breach of privacy based, in part, on the employer's written privacy policy. The employee alleged that a company-retained physician discussed the employee's medical problems with his supervisor and management without the employee's consent. Finding that the confidentiality policy enhanced the employee's expectations of privacy, the court reversed summary judgment for the employer and remanded for a factual determination of whether the employer's business interests outweighed the employee's privacy right.
2. Employers may be compelled to act in a manner consistent with their EAP policies.
    - *Kroboth v. Sexton*, 160 A.D.2d 126, 130, 560 N.Y.S.2d 6, 9 (1st Dep't 1990). The court overturned the New York City Department of Sanitation's discharge of a probationary employee, following his participation in an alcohol abuse program, for violation of its attendance policy. In so doing, it observed that "[t]o give employees information about the Department's crisis and substance abuse programs, encourage them to participate, all the while assuring confidentiality and job security, and then, in short order, terminate an employee such as petitioner, who avails himself of the program, is Orwellian."
  3. Employers can reduce the risk of liability (and litigation) by avoiding absolute promises of confidentiality in EAP literature and by obtaining written employee consent prior to the disclosure of information from the EAP to the employing organization.
    - *Ferguson v. Meehan*, 141 A.D.2d 604, 605, 560 N.Y.S.2d 6 (2d Dep't 1988). The release of a letter from an EAP counselor, indicating that the employee was experiencing "personal/stress related problems," did not result in a breach of a confidential relationship between the employee and the counselor where petitioner had consented to the release.
  4. At least one court has held that there may be some occasions when confidentiality in EAP programs should be disregarded, like when information garnered from the EAP indicates that someone may be in danger.

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- *Doe v. Garcia*, 961 P.2d 1181 (Idaho 1998). A health care employee sought help from the hospital's EAP for "being quite preoccupied with sex." During one counseling session, he told his EAP counselor that he was terminated from his last job for molesting a patient. Neither the EAP counselor nor her supervisor advised any other employees of the hospital about this employee's prior sexual conduct. An underage patient sued the hospital when this employee began to sexually molest him and the court found outstanding issues of material fact that precluded summary judgment for the hospital. The court held that the EAP counselor had a duty to disclose this information to others at the hospital, as it revealed that others may be in danger.
5. On the other hand, the Ninth Circuit has recognized the communications between an employee and EAP staff as privileged, even if the EAP staff members were not licensed psychiatrists, psychologists, or social workers.
- *Oleszko v. State Compensation Insurance Fund*, 243 F.3d 1154 (9th Cir. 2001). The employee in a Title VII discrimination suit sought to compel discovery of communications between other employees and the employer's EAP to try to show a pattern of discrimination. The Ninth Circuit, relying on the psychotherapist-patient privilege, held that the EAP communications were also privileged. The court held that many of the same reasons for why the Supreme Court recognized communications with licensed social workers as privileged, are applicable in the context of the EAPs, including that the availability of mental health treatment in the workplace will reduce the stigma of getting treatment and might encourage more people to get treatment and EAPs serve as a "primary link between the troubled employee and psychotherapeutic treatment", even if the EAP personnel are not licensed themselves.

### **G. Other Time Off: Wage Payment Laws.**

The handbook is a good place to describe an employer's time-off policies, such as vacation, holidays, personal time, and sick leave. In describing these policies, however, an employer should ascertain whether there are any state laws regulating this area, such as legislation requiring an employer to compensate employees who are terminating their employment for any accrued but unused vacation time, holidays or sick leave.

For example, a number of states have enacted wage payment statutes requiring that employers who provide vacation benefits pay employees who are terminating their employment accrued unused vacation time. Therefore, an employer should describe carefully how employees accrue vacation time. For example, instead of stating that an employee accrues 10 vacation days annually, an employer might state that the employee accrues vacation time on a monthly basis, at a rate of 10/12 vacation days per month. Such a policy allows the employer to pay an employee leaving employment before his or her anniversary date for vacation time on a pro-rated basis based on the number of months that the employee has worked.

Examples of states that have enacted such laws include:

- California requires that an employee's final wages and accrued vacation time be paid immediately at the time of the employee's termination or layoff. CAL. LAB. CODE §§ 201 and 227.3;
- Maryland defines wages to include fringe benefits, although Maryland does not specifically define what constitutes a fringe benefit. MD. LAB. & EMPL. CODE ANN. §§ 3- 501, 3-505;
- New York: (i) wages, including unused vacation time, must be paid to the terminating employee within 30 days after such payments are due (N.Y. LAB. LAW § 198-c); and (ii) employers are required to notify employees of its policies concerning "sick leave, vacation, personal leave, holidays and hours." N.Y. LAB. LAW § 195(5);
- Louisiana requires that the employer pay wages on or before the next regular payday or not later than 15 days following the date of discharge, whichever occurs first. The same time limit applies to resignations. LA. REV. STAT. ANN. § 23:631.

In addition, even if a particular state has not enacted a statute regulating these payments, an employer should ascertain whether the courts, through case law, have required that employers make such payments. For example, in the District of Columbia, the Court of Appeals held that "in the absence of an agreement to the contrary the fact that an employee was discharged for cause cannot operate to deprive him of earned vacation pay rights." *Jones v. Dist. Parking Mgmt. Co.*, 268 A.2d 860, 862 (D.C. 1970) (footnote omitted).

**VI. SET GUIDELINES FOR THE TERMINATION OF EMPLOYMENT.**

It is important for employers to maintain policies concerning the termination of employment. Such a policy encourages uniform treatment and sets guidelines for the entire organization to follow. The policy should cover both voluntary (*e.g.*, resignations) and involuntary (*e.g.*, discharges) terminations and the applicable procedures (*e.g.*, whether an exit interview is required and what benefits are available).

A policy addressing involuntary terminations should clearly state that all employees are *at-will*. It should set broad, albeit not exhaustive, guidelines for immediate terminations (*e.g.*, fighting, theft, violation of the employer's conflict of interest/outside employment and/or confidentiality policies). It also should describe the employer's progressive discipline system of warnings (*e.g.*, verbal, written, final) that are designed to address poor performance situations; it is important, however, for the employer to clearly reserve the right not to adhere to its progressive discipline system in all cases and, where appropriate, to immediately demote, suspend or discharge an employee rather than use the warning system.

Not unlike any other facet of the employment relationship, there are certain aspects of the termination process that are regulated by various federal, state and local statutes.

**A. Required Notifications.**

1. Employers covered by the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. §§ 1161-68, must distribute to employees and beneficiaries a notice detailing their COBRA rights upon their experience of a "qualifying event," such as the employee's "termination (other than by reason of such employee's gross misconduct), or reduction of hours." 29 U.S.C. § 1163(2).
2. Employers may be required to provide up to 60 days advance notice of certain plant closings or layoffs, or pay wages in lieu thereof, under the federal Worker Adjustment and Retraining Notification Act ("WARN Act"). 29 U.S.C. § 2101 *et seq.* The WARN Act applies to employers who employ 100 or more employees or whose employees work an aggregate of 4,000 hours per week. Under the WARN Act, covered employers are generally required to notify local government officials and affected workers (through their union representative, if any) at least 60 days before: (i) a closing of a single site of employment that affects 50 or more employees; (ii) a layoff that exceeds 6 months involving 50 to 500 employees who comprise at least 33 percent of the active employees at a single employment site; or (iii) a layoff that exceeds 6 months involving 500 or more employees at a single employment site.

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An employer may be permitted to provide less than 60 days notice if the plant closing or mass layoff is due to unforeseen business circumstances or if the provision of notice will prevent the employer from obtaining necessary capital or business.

3. Some states have their own notification requirements. For example, the Illinois WARN Act requires employers with 75 or more full-time employees (or 75 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime) to give workers and state and local government officials 60 days advance notice of a plant closing, relocation, employment loss, or mass layoff. *See* 820 ILCS 65/1 *et seq* and 30 ILCS 760/15. An employer that fails to provide notice as required by law is liable to each affected employee for back pay and benefits for the period of the violation, up to a maximum of 60 days. The employer may also be subject to a civil penalty of up to \$500 for each day of the notice violation. The law does not apply to federal, state, or local governments. New York State requires employers to “notify any employee terminated from employment, in writing, of the exact date of such termination as well as the exact date of cancellation of employee benefits connected with such termination.” Such notice must be provided within 5 working days of termination. N.Y. Lab. Law § 195(6).

### **B. Severance Pay Policies.**

Employers often provide severance pay to terminated employees and describe their severance policy in their personnel manual. Some employers consider their provision of severance pay as merely a *practice* of management. Severance pay plans, however, constitute an *employee welfare benefit plan* under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1002(l). Hence, in order to be provided with the level of protection that an ERISA plan affords when opposing claims for the denial of severance pay, employers must use care in drafting their severance plan and complying with ERISA’s requirements.

1. A severance pay plan need not be funded, or even written, to constitute an ERISA plan. *See, e.g., Gilbert v. Burlington Indus.*, 765 F.2d 320 (2d Cir. 1985), *aff’d sub nom. Roberts v. Burlington Indus.*, 477 U.S. 901 (1986). Even where the reporting and disclosure requirements of ERISA for employee welfare plans are not met, a severance plan could be found. Hence, employers must properly administer their severance pay plans since ERISA imposes certain penalties for non-conformance with its various requirements (including the issuance of a summary plan description (“SPD”) for the severance plan).

2. When an employer qualifies its severance plan under ERISA, it receives additional protection in defending against a challenge to the denial of severance pay by a terminated employee. If the employer's severance plan documents contain the appropriate language, the employer's denial is reviewed under an arbitrary and capricious standard — which usually is easier for an employer to satisfy than a *de novo* review of the decision or a review under the principles of state contract law. *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Furthermore, ERISA coverage preempts state law severance pay challenges. *See, e.g., Gilbert*, 765 F.2d 320.

An employer also needs to be careful that a severance policy is not so restrictive as to constitute an overly broad and invalid covenant not to compete.

**C. Grievance or Complaint Procedures and Alternative Dispute Resolution (“ADR”).**

In light of the growing number of litigations surrounding the termination of employment, some employers have implemented non-union grievance or appeal procedures for terminated employees to complain about — or even challenge — their discharges. Some employers utilize alternative dispute resolution procedures in an effort to provide an appeal mechanism and avoid costly litigation in court. Any such appeal or alternative dispute resolution options should be explained clearly in the employer's handbook.

1. The Legal Basis for ADR as an Alternative to Litigation in the Non-Union Employment Context.
  - The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16, provides for enforcement in federal court of agreements to arbitrate.<sup>2</sup> The primary substantive provision of the FAA states that a written agreement to arbitrate shall be as “valid” and “enforceable” as any other contract. 9 U.S.C. § 2. The FAA also provides for:
  - the stay of a lawsuit brought in federal court whenever an issue to be litigated in such a lawsuit is subject to arbitration in an arbitration agreement. 9 U.S.C. § 3; and

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<sup>2</sup> Note, however the FAA does not create an independent basis for federal subject matter jurisdiction — a federal question must be at issue, or the diversity/amount in controversy requirements must be satisfied. *See Smith v. Rush Retail Ctrs., Inc.*, 360 F.3d 504 (5th Cir. 2004); *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997); *Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp.*, 27 F.3d 911 (3d Cir. 1994).

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- an order compelling arbitration when one party has not complied with the agreement to arbitrate. 9 U.S.C. § 4.
  - Although the terms of the FAA provide for an exception to its general provisions, stating that the FAA shall not apply to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,” 9 U.S.C. § 1, the Supreme Court has interpreted this section to apply narrowly to transportation workers. *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001). Therefore, the FAA applies to employment contracts for most classes of employees.
2. Analogous state statutes similarly provide for enforcement of arbitration agreements, stay of litigation pending arbitration of issues contemplated in that litigation, and power to compel arbitration when a party has failed to abide by the terms of an arbitration agreement. For example:
- (i) New York C.P.L.R. § 7501: “A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.”
  - (ii) Cal. Civ. Proc. Code § 1281: “A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.”
  - (iii) Fla. Stat. § 682.02: “Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy; provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder.”

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- (iv) La. Rev. Stat. Ann. § 9:4201: “A provision in any written contract to settle by arbitration in a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”
- (v) Nev. Rev. Stat. Ann § 38.219: “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.”

3. Section 118 of the Civil Rights Act of 1991 encourages the use of ADR, stating that:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under [Title VII, the ADA, and other federal laws].

42 U.S.C. § 1981 note. *See, e.g., Benefits Commc'ns Corp. v. Klieforth*, 642 A.2d 1299 (D.C. 1994) (arbitration is an alternative expressly encouraged by the 1991 Civil Rights Act).

4. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), held that a claim under the Age Discrimination in Employment Act (“ADEA”) can be subjected to compulsory arbitration pursuant to the enforcement powers granted federal courts under the FAA.

Gilmer, a financial services manager, was required by his employer to register as a securities representative with the New York Stock Exchange (“NYSE”). Gilmer’s registration application with the NYSE contained an agreement to arbitrate disputes as required by NYSE rules, which provided for compulsory arbitration of disputes arising out of employment. After Gilmer was terminated at age 62, he filed an age discrimination charge with the Equal Employment Opportunity

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Commission (“EEOC”) and later filed suit in federal district court. The employer, invoking the provisions of the FAA, moved to compel arbitration in accordance with Gilmer’s arbitration agreement signed with the NYSE.

The Supreme Court held that an ADEA claim may be the subject of compulsory arbitration. The FAA embodies federal policy favoring arbitration and nothing in the ADEA precludes arbitration.

- There is no inconsistency between the goals of the ADEA and the FAA, since arbitration of statutory claims does not limit statutory protections, but simply allows claimants the right to select the forum in which to resolve disputes.
- Speculation about the bias of arbitrators is not enough to preclude arbitration where both the FAA and the applicable arbitration procedures guard against such bias.
- Supposed unequal bargaining power between employer and employee cannot forestall arbitration absent some showing of coercion or fraud.
- The EEOC’s role in enforcement of discrimination statutes is not undermined by allowing compulsory arbitration, because a claimant may still file an administrative charge, and the EEOC retains independent authority to investigate allegations of discrimination.
- The *Gilmer* court, however, expressly left open the question of the scope of the “employment contract” exception to the FAA because the Supreme Court found that Gilmer’s arbitration agreement was not an “employment contract” because it was signed with the NYSE, not the employer itself. *See Gilmer*, 500 U.S. at 25 n.2. This issue was later resolved in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), in which the Supreme Court held that the FAA applies to employment contracts for most classes of employees.

5. Post-*Gilmer*, a variety of employment-related claims have been held to be subject to mandatory arbitration as an exclusive forum, in both federal and state courts:

In *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), Defendants contracted with a third party security company and reassigned Plaintiffs (three night watchmen and porters). The Plaintiffs were all over the age of 50, and all members of the Service Employees International Union (SEIU). The Plaintiffs alleged that they were reassigned because of their age in violation of the Collective Bargaining Agreement (CBA). Plaintiffs refused repeated demands to arbitrate their contractual and Age Discrimination in Employment Act (ADEA) claims. Plaintiffs filed a lawsuit in court. The Second Circuit affirmed the district court decision, holding that a union-negotiated agreement to arbitrate statutory claims can never be enforceable. However, the Supreme Court reversed the Second Circuit in a 5-4 decision, holding that collective bargaining agreements that clearly and unmistakably require union members to arbitrate statutory age-discrimination claims are enforceable.

**Federal employment-related claims:**

a. Claims under Title VII

- *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).  
The Supreme Court held that the FAA is applicable to employment contracts. In this case, the employer instituted a dispute resolution program including binding arbitration of statutory disputes. As a condition of employment, employees had to sign the agreement; but the agreement contained a disclaimer that it did not form an employment contract. The Ninth Circuit held that despite the disclaimer, the agreement was an employment contract, and thus, the FAA was inapplicable because section 1 of the FAA stated that it did not apply to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The Supreme Court reversed, concluding that the “contracts of employment” except should be applied narrowly to transportation workers. Therefore, that FAA applies to most classes of employees.

On remand from the Supreme Court, the Ninth Circuit held that Circuit City’s arbitration agreement was unconscionable and thus invalid. *See Circuit City Stores, Inc v. Adams*, 279 F.3d 889 (9th. Cir. 2002). The court reasoned that because the arbitration agreement bound

employees to arbitrate their disputes, while not binding the employer to do the same, it placed the employees at an unfair disadvantage and thus was illegal. An arbitration agreement cannot be substantively one-sided so as to not allow employees the remedies they would have had absent the agreement.

- *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003). Following its decision in *Circuit City, Inc. v. Adams*, the Ninth Circuit held that Circuit City's arbitration agreement was both procedurally and substantively unconscionable. "[T]he stark inequality of bargaining power" between [the employee] and [the employer] made the arbitration agreement procedurally unconscionable. Furthermore, the agreement was substantively oppressive because the terms of the agreement were overly "one-sided" and "grossly" favored the employer. In other words, the terms "operate[d] to benefit the employer inordinately at the employee's expense."
- *EEOC v. Woodmen of World Life Ins. Soc'y*, No. 06-1522, 2007 U.S. App. LEXIS 5528 (8th Cir. Mar. 9, 2007). The employer sought to compel its employee to arbitrate her Title VII claims, rather than bringing her claims as an intervenor in an EEOC action. The Eighth Circuit held that the employee must arbitrate her claims. The court addressed whether the provision of the arbitration agreement that provided for the parties to share the costs of the arbitration made the agreement unconscionable. The court held that even considering the employee's current financial difficulties, the employee failed to demonstrate that the costs of arbitration would preclude her from vindicating her statutory rights. The court further noted that the arbitration agreement included a severability clause, such that the fee-splitting clause could be severed and the remainder of the arbitration agreement enforced if the costs were prohibitive.
- *Scaffidi v. Fiserv Inc.*, No. 06-3123, 2007 U.S. App. LEXIS 4974 (7th Cir. Feb. 28, 2007). The Seventh Circuit affirmed that an employee was required to arbitrate her Title VII gender discrimination and retaliation claims when she signed an arbitration agreement when she was hired.

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The court held that the contract was binding because the employer's promise to hire her was an offer and the employee's service constituted acceptance and consideration. Moreover, the fact that there was no opt-out provision did not invalidate the arbitration agreement.

- *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999). Employee was required to arbitrate her pregnancy discrimination claim because the arbitration procedure in the employee handbook was an enforceable contract. The handbook provision clearly indicated a mutual promise to arbitrate, binding on both parties and constituted sufficient consideration. Additionally, there was an opt-out form that the employee did not use.
- *Desiderio v. Nat'l Ass'n of Sec. Dealers Inc.*, 191 F.3d 198 (2d Cir. 1999). The Second Circuit upheld a mandatory pre-dispute arbitration agreement in the securities industry and rejected the employee's claim that it violated her constitutional and statutory rights under Title VII.
- *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997). An arbitration procedure in an employee handbook required a hospital worker to arbitrate her Title VII claims even though the handbook did not qualify as a contract under Missouri state law. Employees were required to sign, detach and return the page containing the arbitration provision, and the page was kept on file.
- *Nghiem v. NEC Elec.*, 25 F.3d 1437 (9th Cir. 1994). Title VII claims were subject to arbitration.
- *Crisan v. A.G. Edwards & Sons*, Civ. No. 94-20025, 1994 U.S. Dist. LEXIS 8648 (N.D. Cal. May 25, 1994). Sexual harassment claim was subject to arbitration pursuant to securities industry arbitration agreement.
- *Bender v. A.G. Edwards & Sons*, 971 F.2d 698 (11th Cir. 1992). Sexual harassment claim was subject to compulsory arbitration.
- *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992). Applying *Gilmer* to Title VII claims

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because ADEA and Title VII share similar aims and substantive provisions.

- *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76 (D. Mass. 1993). Court held that unmarried sales agent alleging pregnancy-based termination must arbitrate sex discrimination claim pursuant to agent contract she signed, which provided for arbitration of employment disputes.
- *Hull v. NCR Corp.*, 826 F. Supp. 303 (E.D. Mo. 1993). Title VII, ADEA and state-law discrimination claims were ordered to arbitration.
- *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993). Title VII and § 1981 claims of race discrimination brought by non-equity partner of law firm were subject to arbitration.

Certain federal courts, however, have refused to enforce arbitration of employment claims:

- *Sherry v. Sisters of Charity Med. Cntr.*, No. 98-CV-6151, 1999 WL 287738 (E.D.N.Y. May 4, 1999). Hospital handbook with arbitration provision is not enforceable where the language did not indicate that arbitration of disputes was mandatory. Citing phrases like “may” and “should” in the arbitration clause, the court held it was not clear that an employee had to submit all disputes to arbitration as a condition of employment.
- *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997). The Ninth Circuit would not enforce an arbitration clause because the employee did not explicitly agree to waive the right to a judicial forum.
- *Trumbull v. Century Mktg. Corp.*, 12 F. Supp. 2d 683 (N.D. Ohio 1998). Employee signed acknowledgment of receipt of employee handbook containing a mandatory arbitration clause. The court found that the waiver of her right to pursue a jury trial for Title VII claims was invalid because the handbook did not explain the significance of the provision, and the arbitration procedure would limit the remedies otherwise available to the employee in court. A

valid waiver of the right to a jury trial must be “knowing and clear.”

- *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126 (7th Cir. 1997). The Court refused to enforce an arbitration clause that attempted to bind the employee to arbitration but not the employer, finding that continued employment is not sufficient consideration for the employee’s waiver of the right to pursue certain rights in a court proceeding.
- *Goins v. Ryan’s Family Steakhouses, Inc.*, 181 F. App’x. 435 (5th Cir. 2006). All employees were required to sign an agreement to arbitrate, which provided that employees waive their right to judicial determination of any employment-related claim arising under federal or state law in exchange for an unbiased arbitration forum from Employment Dispute Services, Inc.; the employer was a third-party beneficiary to this agreement. The court refused to compel arbitration, holding that the employer was not required to arbitrate by the terms of this contract and a benefit to a third party is insufficient to create mutuality.
- *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582 (D.S.C. 1998), *aff’d*, 173 F.3d 933 (4th Cir. 1999). The court refused to enforce an arbitration agreement in Title VII sexual harassment action as contrary to public policy. The arbitration provision substantially limited the employee’s damages otherwise available under Title VII, increased the burden of proof for the complaining employees, limited the potential arbitrators to those chosen by the employer, required her to accede to one-way witness disclosure, empowered her employer with complete control over the official record, and curtailed judicial review.

b. Claims under the Americans with Disabilities Act (“ADA”):

- *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). The Supreme Court held that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as back pay, reinstatement, and damages, in an ADA enforcement action. An employee

was fired after he suffered a seizure. Prior to employment, the employee signed an agreement requiring employment disputes to be settled through binding arbitration. The EEOC subsequently filed an enforcement suit that sought damages, as well as injunctive relief to “eradicate the effects of past and present unlawful conduct.” *Id.* The Fourth Circuit concluded that the arbitration agreement between the employee and the employer did not foreclose the EEOC enforcement action because the EEOC was not a party to the arbitration contract. The court, however, limited the EEOC to injunctive relief only, holding that the policy considerations behind the FAA favored private arbitration agreements to vindicate private interests. The Supreme Court reversed, stating that the FAA did not materially change the enforcement powers given to the EEOC under the ADA.

- *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996). The Fourth Circuit held that claims under the ADA are subject to compulsory arbitration agreed to between the parties.
- *Connors v. Amisub (North Ridge Hosp.), Inc.*, No. 96-6188, 1996 WL 406677 (S.D. Fla. Feb. 2, 1996). Nurse’s ADA claim based on employer’s alleged failure to make reasonable accommodation was held arbitrable pursuant to an arbitration agreement signed by the nurse.
- *But see Moore v. UPS*, No. 06-CV-12223-DT, 2007 U.S. Dist. LEXIS 3536 (E.D. Mich. Jan. 18, 2007) (discussing cases where there was no clear and unmistakable waiver to arbitrate ADA or FMLA cases and therefore arbitration was not compelled).

- c. Claims under the Employee Retirement Income Security Act of 1974 (“ERISA”):

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- *Fabian Fin. Servs. v. Kurt H. Volk, Inc.*, 768 F. Supp. 728, 733 (C.D. Cal. 1991). Court held that *Gilmer* rationale applied to compel arbitration of breach of fiduciary claim under ERISA.
  - *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 122 (2d Cir. 1991). Court held that ERISA action for breach of fiduciary duty must be stayed pending arbitration. This was, however, a pre-*Gilmer* case.
  - *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993). ERISA action for breach of fiduciary obligation was subject to arbitration.
- d. Claims for racial discrimination under Section 1981 of the Civil Rights Act of 1866:
- *Scott v. Merrill Lynch, Pierce, Fenner & Smith*, No 89-3749, 1992 U.S. Dist. LEXIS 13749, at \*21 (S.D.N.Y. Sept. 10, 1992). Court held that nothing in § 1981 precludes application of the presumption favoring arbitration.

### State employment-related claims.

- a. Statutory “human rights” or “fair employment practice” claims:

#### California:

- *Sacks v. Richardson Greenshield Sec., Inc.*, 781 F. Supp. 1475 (E.D. Cal. 1991). Sex discrimination claim under state Fair Employment and Housing Act (“FEHA”) was subject to arbitration under *Gilmer*.

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- *Cheng-Canindin v. Renaissance Hotel Assoc.*, 57 Cal. Rptr. 2d 867 (Cal. App. 1st Dist. 1996). Sex and race discrimination claims under state law are not subject to arbitration where the peer review process mandated by the employee handbook was “inconsistent with the process of arbitration” because the procedure lacked “a third-party decision maker, a final and binding decision, and a mechanism to assure a minimum level of impartiality.”
- *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83 (2000). FEHA claims are arbitrable if the arbitration permits an employee to vindicate his or her statutory rights. For vindication to occur, the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration. As to the agreement in this case, the court held that it was invalid, since it possessed a damages limitation that was contrary to public policy, and it was unconscionably unilateral. The court further held that it was not possible to sever the unconscionable portions of the agreement, and therefore the agreement was unenforceable in its entirety.

### Florida:

- *Nazon v. Shearson Lehman Bros.*, 832 F. Supp. 1540 (S.D. Fla. 1993). Claim brought under Florida Human Rights Act was subject to arbitration.

### Hawaii:

- *Brown v. KFC Nat’l Mgmt. Co.*, 921 P.2d 146 (Haw. 1996). Hawaii Supreme Court held KFC employee was bound by mandatory arbitration provision included in his signed application of employment.

### Louisiana:

- *Walker v. Air Liquide Am. Corp.*, 113 F. Supp. 2d 983, 985 (M.D. La. 2000). The court held that signing a form acknowledging receipt of an employment manual does not constitute consent to be bound by the ADR policy contained therein. The employer contended that the

employee's signing the acknowledgment form in addition to his continued employment after acknowledging receipt of the handbook signified his consent to be bound by the ADR policy. The court explained that under Louisiana law, "when special formalities are required for a contract the same formalities are required for an acceptance which is intended to form that contract." Because the Federal Arbitration Act requires that arbitration agreements be in writing in order to be enforceable, under Louisiana law, the acceptance of an arbitration agreement must also be made in writing. In addition, apart from the FAA, Louisiana Arbitration Law requires a written agreement. LA. REV. STAT. ANN. § 9:4201. The court held that an acknowledgment form that does not itself contain any arbitration provision is insufficient to create a written arbitration agreement.

**Michigan:**

- *Rembert v. Ryan's Family Steak Houses, Inc.* 235 Mich. App. 118 (Mich. App. 1999). The Michigan Court of Appeals held that pre-dispute agreements to arbitrate statutory employment discrimination claims are valid so long as the arbitral process is fair and the employee does not waive any rights or remedies under the statute.
- *Heurtebise v. Reliable Bus. Computers, Inc.*, 550 N.W.2d 243 (Mich. 1996). Michigan Supreme Court held that the mandatory arbitration provision contained within the employee handbook was not enforceable because the handbook clearly stated employer's intent not to be bound by the handbook's provisions. Arbitration, according to the court, can only be mandated by a valid contractual agreement.

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### **New Jersey:**

- *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997). A female employee's state-law sexual harassment claims had to be arbitrated since the employee signed an agreement to submit employment-related disputes to arbitration, and the agreement was not procured through fraud or coercion.

### **New York:**

- *Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, 601 N.Y.S.2d 686 (1993). Race and sex discrimination claims under state human rights law were subject to arbitration clause set forth in securities industry registration agreement.

### **Pennsylvania:**

- *Kaliden v. Shearson Lehman Hutton, Inc.*, 789 F. Supp. 179 (W.D. Pa. 1991). Handicap discrimination claim under Pennsylvania Human Relations Act was subject to compulsory arbitration.

### **b. State common-law claims:**

#### **California:**

- *Lagatree v. Luce, Forward, Hamilton & Scripps*, 74 Cal. App. 4th 1105 (Cal. App. 2d Dist. 1999). The court dismissed the employee's claim of wrongful discharge in violation of public policy where the employee was fired for refusing to sign mandatory arbitration clauses. Compulsory pre-dispute arbitration agreements are not unenforceable merely because they are a required condition of employment. In the more recent federal court proceeding, *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003), the Ninth Circuit held that Title VII does not bar compulsory arbitration agreements. In so holding, the court overruled its previous decision in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). The court held that *Duffield* erred in concluding the Civil Rights Act of 1991 precludes mandatory arbitration of Title VII claims.

*Delaney v. Cont'l Airlines Corp.*, No. 92 Civ. 762-GRT, 1993 U.S. Dist. LEXIS 9868 (C.D. Cal. Jul. 22, 1993). Court held that state common law claims are subject to arbitration under the employer's arbitration policy contained in its employee handbook.

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- *Hall v. Nomura Sec. Int'l*, 219 Cal. App. 3d 43 (Cal. App. 1st Dist. 1990). Claims of discrimination are subject to arbitration.
- *But see Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (Cal. App. 1st Dist. 1997). Court held that an employment contract that required the employee to arbitrate disputes arising out of termination but allowed the employer to seek judicial enforcement of the contract was unconscionable because the contract increased the number of rights and remedies available to employer while simultaneously decreasing the rights of the employee. The court also rejected the employer's claim that violations of contract provisions involving patent infringement and improper use of confidential information posed an immediate threat to business operations requiring immediate access to the courts for emergency relief.

### Florida:

- *Bachus & Stratton, Inc. v. Mann*, 639 So. 2d 35 (Fla. Dist. Ct. App. 4th Dist. 1994). District Court of Appeals held that sex discrimination and related tort claims brought by former employee against former employer and parent company were arbitrable.
- *Chase Manhattan Inv. Serv., Inc. v. Miranda*, 658 So. 2d 181 (Fla. Dist. Ct. App. 3d Dist. 1995). In this case, which Allan Weitzman handled, the District Court of Appeals held that conversion and invasion of privacy claims arose out of executive's employment and, accordingly, were subject to arbitration.

### New York:

- *Singer v. Jefferies & Co.*, 78 N.Y. 2d 76, 571 N.Y.S.2d 680 (N.Y. 1991). Defamation claim was subject to arbitration.

### Tennessee:

- *Aspero v. Shearson/American Express, Inc.*, 768 F.2d 106 (6th Cir. 1985). Defamation, emotional distress, and invasion of privacy claims were subject to arbitration because they arose out of employment relationship.

6. Some courts have read *Gilmer* as requiring the enforcement of only those arbitration agreements that do not undermine the relevant statutory scheme.

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- *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).  
The court approved an order requiring a former employee to submit Title VII race and retaliation claims to arbitration, only after determining that the arbitration agreement, which was silent as to which party was responsible for the arbitration fees, did not require the employee to pay the fees. The court further held that if the agreement had been interpreted as requiring the employee to pay all or part of the fees, the agreement would have been invalid; “an employee can never be required, as a condition of employment, to pay an arbitrator’s compensation in order to secure their statutory claims under Title VII.”
  - *Baughner v. Dekko Heating Techs.*, 202 F. Supp. 2d 847, 850 (N.D. Ind. 2002). The court held that the plaintiff should have the opportunity to conduct limited discovery on the issue of arbitration costs and to present evidence to the court that she could not pay the costs. As the court explained, “[i]f she is successful in establishing that the cost-splitting provision denies her a forum to vindicate her statutory rights, then the arbitration agreement is unenforceable.” Significantly, the court noted that the employer had the option of avoiding additional discovery “and possible nullification of the arbitration agreement by offering to pay the costs and fees associated with arbitration.”
7. California state courts, however, have invalidated an arbitration agreement contained in an employee manual on the grounds that the agreement was unconscionable.

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- *Kinney v. United HealthCare Servs., Inc.*, 70 Cal. App. 4th 1322 (Cal. App. 1999). The court found that the arbitration agreement was so unconscionable that it was unenforceable. Under the arbitration agreement, only the employee (and not the employer) was obligated to submit claims to arbitration. Substantively, the arbitration agreement limited the discovery process, required a finding of at-will employment, and capped an employee's recovery of punitive and compensatory damages. The court concluded that the bargaining power was so unequal and the arbitration provision so one-sided that it was procedurally and substantively unconscionable. Hence, it was unenforceable.

### **D. Post-Employment References.**

Some employers describe in their handbook or manual the information it will provide on employees or former employees in response to a reference check request. Because negative job references may lead to claims of defamation or retaliation by the former employee, many employers will provide only information on dates of employment and the employee's most recent job title. Generally, employers should refrain from providing any other information and should promulgate restrictive policies on responding to external requests for information in order to avoid legal problems. The employer should also specifically designate the personnel (e.g., an officer in the human resources department) authorized to respond to such requests.

#### **1. State Laws**

- Under the Illinois Employment Records Disclosure Act, when employers provide truthful written or verbal information that they in good faith believe is true about a current or former employee, they are immune from civil liability for the disclosure, as well as any liability arising therefrom. However, employers are not required to provide references. *See* 745 ILCS 46/1 *et seq.*

#### **2. State Law Defamation Claims.**

- *Delloma v. Consolidation Coal Co.*, 996 F.2d 168 (7<sup>th</sup> Cir. 1993): After the employee was terminated and unsuccessfully sought new employment, he sued his ex-employer, alleging intentional interference with a prospective contractual relationship on grounds that he was not hired at a new job because when his prospective employer asked why he had been discharged, an employee of his ex-employer responded that "there were some

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record-keeping irregularities that may have been involved." Plaintiff claimed that on the basis of this statement, his prospective employer lost his favorable impression of him. In addition, another employee at the prospective employer did his own reference check in the local coal mining community and heard rumors that the former employee was a "womanizer" and "boozehound." The court affirmed the district court's grant of summary judgment to appellees, holding that they did not tortiously interfere with the former employee's contractual relationship with a prospective employer as they provided truthful statements concerning him in response to a direct inquiry by the prospective employer.

- *Lee v. Cullan*, No. A-98-399, 1999 WL 1338336 (Neb. App. Nov. 23, 1999). Employee alleged that former employer communicated to prospective employers that she stole items, left death threats, and falsified her resume. The employer denied making negative statements regarding the employee to prospective employers, and affidavits from potential employers supported that. Thus, there was no issue of material fact and the grant of summary judgment for the employer was affirmed.
- *Linafelt v. Beverly Enterprises-Florida, Inc.*, 745 So. 2d 386 (Fla. Dist. Ct. App. 1st Dist. 1999). Employer terminated employee for fairly "benign" violation and gave negative information about the employee in background check interviews. The employee sued for defamation and intentional interference with a business relationship. The state appeals court ruled that the employer had not defamed the employee because the statements were true. The statements, however, may have illegally interfered with a business relationship because, despite the "benign" nature of the employee's violation, the employer continued to brand him.
- *Sigal Constr. Corp. v. Stanbury*, 586 A.2d 1204 (D.C. 1991). The court upheld a \$250,000 judgment on a cause of action challenging a negative job reference. An employer official who had never supervised, evaluated or worked with the employee nevertheless told a prospective employer that the employee was "detail oriented to the point of losing sight of the big picture" and that "[o]bviously he no longer worked for us and that might say enough." *Id.* at 1206. Since the statements were made in the context of a reference check, according to the court, the employer

official either knew or should have known that his comments would be regarded as factual evaluations of the employee's performance. The qualified *common-interest* privilege was inapplicable since the statements were made "with gross indifference or recklessness amounting to wanton and willful disregard" of the employee's rights sufficient to constitute common law malice. *Id.* at 1215.

- *Buffolino v. Long Island Sav. Bank*, 126 A.D.2d 508, 510, 510 N.Y.S.2d 628, 631 (2d Dep't 1987). The court dismissed the employee's claim that a letter of reference sent to a potential employer was defamatory where "[t]he letter merely provides the dates of . . . employment and states that it is the [employer's] policy to provide no other information to potential employers." It was further observed that readers of the letter were advised that the "failure to comment on an individual's character does not reflect on the individual."
  - Employers in Virginia should be especially careful when providing information on an ex-employee. Under a Virginia statute, the employer is prohibited from "willfully and maliciously prevent[ing] or attempt[ing] to prevent by word or writing, directly or indirectly, such discharged employee or such employee who has voluntarily left from obtaining employment with any other person." The penalty for the defamation is a misdemeanor and a fine. This section does not prevent any employer from disclosing truthful statements about an employee or his or her abilities. VA. CODE ANN. § 40.1-27.
3. In response to the difficulties employers face in deciding what information to give out when responding to a request for a job reference, numerous states have enacted job reference immunity statutes. The range of information that may be disclosed varies from state to state, but the typical statute provides immunity when information about an employee's "job performance" is disclosed. Most statutes also specify that an employer is not entitled to immunity if it reveals information in violation of the civil rights of the affected employee. Additionally, some state laws only offer immunity when the disclosed information is true, and most other states require at least that the information be disclosed in "good faith."

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Most of these statutes are silent with respect to whether the employer who receives information about an employee is entitled to immunity. None of the state job reference statutes provide protection to prospective employers from “failure to hire” claims based on a bad job reference.

A number of states also have statutes that specifically apply to individuals in financial institutions. For example, in Florida, a “person” may provide employment information to a financial institution about an employee’s known or suspected involvement in a violation of any law or regulation that has been reported to the authorities.

State job reference immunity statutes have been enacted in, among others, the following jurisdictions: Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Michigan, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Wisconsin, Wyoming.

4. Some states recognize a qualified privilege for the type of information that would be included in a reference letter. The privilege is a defense in certain tort claims where the publisher of the information and the recipient of the information have a common interest and the communication is of the kind reasonably calculated to protect or further this interest. If the privilege applies, the plaintiff would only get damages if her or she could show actual malice on the part of the employer. *See, e.g., Mawaldi v. St. Elizabeth Health Ctr.*, 381 F. Supp. 2d 675 (N.D. Ohio 2005).
5. While an employer may elect not to write a “no comment” letter or merely verify an employee’s basic employment dates and titles, once the employer elects to speak out in an employee’s favor, the employer may be found negligent if it fails to disclose knowledge of misconduct.
  - *Davis v. Bd. of County Comm’rs*, 987 P.2d 1172 (N.M. Ct. App. 1999). An employer owes prospective employers and foreseeable third persons a duty of reasonable care not to misrepresent material facts in the course of making an employment recommendation about a present or former employee when a substantial risk of physical harm to third persons by the employee is foreseeable. County law enforcement officers gave an employment reference of a former detention sergeant and omitted

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information regarding the county's investigation and disciplinary action against him for alleged abuse of power and sexual abuse of women. The county was liable for breach under the New Mexico Tort Claims Act of 1978.

- *Randi W. v. Muroc Joint Unified Sch. Dist.*, 14 Cal. 4th 1066 (1997) (*en banc*). Officials at different school districts gave gratuitous recommendations “containing unreserved and unconditional praise” of a former employee, despite their knowledge of complaints regarding sexual misconduct at his prior employment. That employee was later hired by another district and was accused of sexually assaulting a 13-year old student. The court, relying on the Restatement Second of Torts sections 310 and 311, held that the recommenders, once they were volunteering information, had a duty to “complete the picture by disclosing material facts regarding charges and complaints of [the teacher’s] sexual improprieties.” But in the absence of resulting physical injury or some special relationship between the parties, the writer of the recommendation should have no duty of care extending to third persons for misrepresentations made concerning former employees.
- *But see Cohen v. Wales*, 133 A.D.2d 94, 518 N.Y.S.2d 633, 634 (2d Dep’t), *appeal denied*, 70 N.Y.2d 612, 523 N.Y.S.2d 496 (1987). With only limited discussion, the court found that “[t]he mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring.” *See also Koran I. v. N.Y. City Bd. of Educ.*, 256 A.D.2d 189, 683 N.Y.S.2d 228 (1st Dep’t 1998) (citing *Cohen*, the court held that a student cannot hold the Board vicariously liable for the alleged negligence of the student’s teachers and school principal in recommending the volunteer who molested the student); *McQuirk v. Donnelley*, 189 F.3d 793 (9th Cir. 1999) (release signed by employee authorizing the disclosure of information by his former employer did not insulate the employer from liability).

6. A few states require employers to provide a statement of service and reasons for discharge upon the request of a former employee. *See, e.g.*, NEV. REV. STAT. ANN. § 613.210; MO. REV. STAT. § 290.140; TEX. REV. CIV. STAT. ANN. art. 5196.

### **VII. HARMONIZE YOUR MANUAL WITH ETHICS CODE AND COMPLIANCE PLAN UNDER THE FEDERAL CORPORATE SENTENCING GUIDELINES.**

Under the Federal Corporate Sentencing Guidelines, a corporate employer can be convicted of a crime based upon the unlawful actions of its employees. The Guidelines require specific, often severe, mandatory penalties for corporations whose employees violate federal criminal law.

The Guidelines were designed to encourage efforts by corporations to deter and detect criminal conduct of their employees. Employers can limit their exposure under the Guidelines by implementing effective compliance programs. The rules for employee conduct and the procedures for reporting misconduct and imposing discipline that are listed in a manual or handbook should be harmonized with any compliance plan.

The Guidelines set forth a seven-part test to assess compliance programs that will qualify companies for reduced penalties under the Guidelines:

1. Written substantive policies setting forth standards of conduct;
2. Appointment as compliance officer(s) one or more high-level corporate officials to insure compliance with the policies;
3. Precautions against granting significant compliance authority to anyone whom the corporation believes has a propensity to engage in illegal activities;
4. Steps to communicate effectively the compliance standards and procedures to all employees;
5. Responsible efforts, including auditing systems and protection of “whistleblowing” employees who report misconduct by others, to achieve compliance with the written substantive policies;
6. Consistent enforcement of the policies, including appropriate disciplinary actions for violations; and
7. Provisions designed to cause an appropriate response if any offense is detected, and to prevent further similar offenses.

The Guidelines also specify that any written substantive policies must:

1. Specifically prohibit illegal conduct;
2. Set forth compliance standards and procedures that are reasonably capable of reducing the prospect of criminal conduct;

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3. Be tailored to the size and nature of a corporation's business, and address illegal conduct most relevant to such business (*e.g.*, antitrust, insider trading, fraud) by first identifying specific, relevant substantive areas and second, by establishing policies applicable in such areas (*e.g.*, securities firm employees must be prohibited from trading on insider information and prohibited from owning stock in clients' companies in order to minimize risk of insider trading);
4. Set forth general standards of honesty and integrity in all dealings with others, and instruct employees not to make misrepresentations to anyone;
5. Include conflict-of-interest and anti-discrimination policies;
6. Provide that corporate standards exceed legal requirements, and that employees must act in accordance with the highest standards of business ethics; and
7. Set forth a reporting system and require employees to report suspected criminal conduct to someone with authority within the organization and assure employees that those who report will not suffer retaliation.

Consideration must be given to the interplay between a compliance plan and any employee manual or handbook:

1. Substantive provisions and disciplinary procedures must be harmonized;
2. Roles of compliance and Human Resource personnel must be coordinated; and
3. Employees must be advised and managers trained regarding various requirements.

Consideration also should be given to segregating criminal and civil compliance reporting systems.

A statement should be included that the compliance plan imposes a higher standard than prevailing law in order to minimize the possibility that any employee admission would bind the employer.

### **VIII. INCORPORATE STATE AND LOCAL LEGAL REQUIREMENTS INTO YOUR MANUAL.**

Many state and local governments have enacted statutes affecting the workplace. An employer — especially one with facilities in more than one location — should take care to ensure that all

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such state and local requirements are met and that, where appropriate, they are reflected in the employee handbook. Some examples of these requirements are described below.

### **A. State Laws Requiring Publication of Specified Personnel Policies.**

New York State law requires employers to notify employees in writing of, or publicly post, their policies on sick leave, vacation, personal leave, holidays and hours. N.Y. LAB. LAW § 195(5). These policies can be conveniently provided to employees in a personnel manual.

California state law requires employers to distribute to employees an information sheet regarding sexual harassment, which complies with certain specified requirements. CAL. GOV'T CODE § 12950. The information contained in the designated sheet can be provided to employees in a personnel manual that is distributed to all employees. California state law also requires employers to publicly post a discrimination poster issued by the California Fair Employment and Housing Commission, which includes information regarding sexual harassment. *See* CCH Employment Practices Guide ¶ 20854.

Florida requires employers to post and keep posted in conspicuous places upon the employer's premises a notice concerning all of the protections set forth by Florida's Civil Rights Act of 1992, including its anti-discrimination provisions. Florida also requires that employees be notified by poster of information regarding unemployment benefits, workers compensation benefits, and any toxic or hazardous substances that may be present in the workplace. All of the foregoing information can be provided to employees in a personnel manual that is distributed to all employees, in addition to the required posters.

Louisiana requires employers to post a copy of labor laws as designated by the Secretary of Labor. Designated laws to be posted include: Fair Employment and Age Discrimination laws, Minor Labor Law (if minors are employed, legal provisions pertaining to minors must be posted), Notice of Compliance to Employees (notice informing employees of their right to workers' compensation if injured), Notice to Workers concerning Unemployment Insurance, Out of State Motor Vehicles (employers must post a notice informing employees that each of their motor vehicles operated in Louisiana must be registered within 30 days of employment in Louisiana), Sickle Cell Trait (notification of prohibition on discrimination against individuals with sickle cell traits must be posted) and Smoking (information regarding the office policy regulating smoking in the workplace).

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### B. Workplace Smoking Policies.

Smoking policies also should be included in employee handbooks. Employers are permitted to adopt a smoke-free policy that completely prohibits workplace smoking at all times. At a minimum, employers must comply with applicable local regulations.

- i. The Smoke Free Illinois Act prohibits smoking in all public places and places of employment (unless specifically exempted) or within 15 feet of any entrances, windows that open, and ventilation intakes of such places. *See* 410 ILCS 82/1 et seq.
- ii. Under Florida's "Clean Indoor Air Act," "a person may not smoke in an enclosed indoor workplace," unless one of the statutory exemptions applies. FLA. STAT. § 386.204. For example, the statute permits smoking in: a private residence "whenever it is not being used commercially to provide child care, adult care, or health care, or any combination thereof;" a retail tobacco shop; a designated smoking guest room at a public lodging establishment, a stand-alone bar, a smoking-cessation program involving medical or scientific research or a customs smoking room. FLA. STAT. § 386.204(5). The proprietor or other person in charge of an enclosed indoor workplace must develop and implement a policy regarding the smoking prohibitions set forth in the statute. "The policy may include but is not limited to, procedures to be taken when the proprietor or other person in charge witnesses or is made aware of a violation of [the Act] . . . and must include a policy which prohibits an employee from smoking in the enclosed indoor workplace. In order to increase public awareness, the person in charge of an enclosed indoor workplace may, at his or her discretion, post "NO SMOKING" signs as deemed appropriate." FLA. STAT. § 386.206.

Also of interest with respect to smoking is the decision in *City of N. Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995). In *Kurtz*, the Supreme Court of Florida held that a public employer's policy of refusing to consider smokers for any jobs, and of questioning applicants regarding whether they smoked tobacco, did not violate the applicants' reasonable expectation of privacy under the Florida constitution.

In Louisiana, smoking is prohibited in public places and any enclosed areas in a workplace. LA. REV. STAT. ANN. § 40:1300.256. Moreover, no smoking notices must be posted. LA. REV. STAT. ANN. § 40:1300.261.

On March 26, 2003, New York State adopted a new anti-smoking law that profoundly limits smoking in enclosed areas throughout the state, including all places of employment. The new law, which took effect on June 24, 2003, prohibits smoking in: bars; restaurants; public and private colleges universities and other educational and vocational institutions; hospitals and residential health

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care facilities (with the exception of separate smoking rooms for patients); commercial establishments used for any trade, profession, vocation or charitable activity; transportation facilities, centers and facilities serving children, and even bingo facilities.

At all facilities where smoking is regulated, “No Smoking” signs must be prominently posted. Violations of the statute are punishable as a civil penalty. To the extent provisions in the law are stricter than those in newly enacted laws passed in New York City and its surrounding counties, the State law provisions will supersede the local provisions. The law is silent with regard to the adoption or distribution of a workplace no-smoking policy.

The New York City Smoke-Free Air Act of 2002, which took effect March 30, 2003 and prohibits smoking in essentially the same areas as the state law, requires employers to update their written smoking policies to include: (i) a prohibition on smoking; (ii) protection from retaliation; and (iii) a procedure for the adequate redress of any retaliatory action taken against an employee.

- i. New Jersey law prohibits smoking in indoor public places or in the workplace. N.J. STAT. § 26:3D-58.
- ii. In March, 1995, Maryland implemented a comprehensive statewide statute which bans smoking in virtually all office buildings and other indoor worksites. MD. CODE REGS. 09.12.23; MD. LAB. & EMPL. CODE ANN. § 2-106.
- iii. California law prohibits smoking in enclosed spaces at place of employment and requires employers to post appropriate signs. Designated smoking areas are allowed subject to specifications enumerated in the Labor Code. CAL. LAB. CODE § 6404.5.
- iv. The District of Columbia requires employers to maintain a written smoking policy, including the designation of separate smoking area. D.C. Code § 7-1703.02.
- v. Nevada’s Clean Indoor Air Act prohibits smoking in indoor places of employment. Several types of establishments are excluded from this provision, including casinos and bars. NEV. REV. STAT. ANN. § 202.2483.
- vi. State laws also may protect the rights of smokers.

For example, in New Jersey, employers are prohibited from refusing to hire, discharging, or taking other adverse action against any employee with respect to compensation, terms, conditions or privileges of employment because the employee or applicant for employment “does or

does not smoke or use other tobacco products, unless the employer has a rational basis for doing so which is reasonably related to the employment.” The New Jersey statute, however, does not affect any applicable regulations concerning smoking or the use of tobacco in the workplace, and does not prohibit employers from establishing and enforcing policies banning or restricting smoking in the workplace. N.J. STAT. ANN. §§ 34:6B-1 to 34:6B-4.

Although New York City’s Smoking Law prohibits smoking in virtually all areas of the workplace, it also requires that the employer’s written “No Smoking” policy contain a “no-retaliation” provision prohibiting retaliation against employees who exercise their rights under the policy.

Virginia also protects smokers and non-smokers from employment discrimination by public employers. The statutes prohibit Commonwealth and local governmental employers from requiring employees or applicants to “smoke or use tobacco products on the job, or to abstain from smoking or using tobacco products outside the course of his [or her] employment.” VA. CODE ANN. § 2.2-2902; § 15.2-1504.

The District of Columbia prohibits all types of employment discrimination against applicants and employees on the basis of tobacco use. Employers still may implement workplace smoking restrictions as well as establish tobacco-use restrictions or prohibitions that constitute bona fide occupational qualifications. D.C. CODE § 7- 1703.02.

Louisiana prohibits all types of employment discrimination against an employee because the individual is a smoker or nonsmoker. In addition, it prohibits an employer from requiring, as a condition of employment, that an individual abstain from the use of tobacco outside of the workplace. Employers still may adopt policies regulating employees’ workplace use of tobacco. LA. REV. STAT. ANN. § 23:966.

### **C. Jury Duty Policies.**

Employers that maintain jury duty policies must ensure that those policies comply with state or local law.

1. In Illinois, all employers must give employees time off for jury duty when given reasonable notice and may not deny such leave merely because the employer is assigned to the night shift. According to Illinois law, “[a]n employer may not deny an employee time off for jury duty. No employer shall discharge, threaten to discharge, intimidate or coerce any employee by reason of the employee’s jury service, or the attendance

or scheduled attendance in connection with such service.” See 705 ILCS § 305/4.1(a). Employers are not required to compensate employers for time spent in jury duty. 705 ILCS 305/4.1 and 705 ILCS 310/10.1. Moreover, employers may not terminate, threaten or punish employees for subpoenaed witness service at criminal proceedings, but they are likewise, not required to compensate employees for time lost due to such service. 725 ILCS 5/115-118 and 820 ILCS 180/30.

2. Under Florida law, no person summoned to serve on any grand or petit jury in the State of Florida, or accepted to serve on any grand or petit jury, shall be dismissed from employment for any cause because of the nature or length of service upon such jury. Furthermore, threats of dismissal from employment for any cause, by an employer or his agent, to any person summoned for jury service in Florida, because of the nature or length of service upon such jury, may be deemed contempt of the court from which the summons was issued. A civil action by the individual who has been dismissed may be brought, and such individual shall be entitled to collect not only compensatory damages, but, in addition thereto, punitive damages and reasonable attorneys’ fees for violation of the jury service statute. FLA. STAT. § 40.271.
3. New York State protects the employment rights of employees who notify their employers that they are summoned to jury duty. Employers who discharge or penalize such employees on account of absence from employment for jury service are subject to punishment for criminal contempt of court. While employees need not be paid their full wages for the period of their jury service, employers with more than ten employees must pay an employee the first \$15.00 of his or her daily wages for each of the first three days of such employee’s jury service in a New York State court. N.Y. JUD. LAW § 519.
4. Under Connecticut law, an employer may not “deprive an employee of his employment, or threaten or otherwise coerce him with respect thereto,” because of receipt of or response to a summons, or service as a juror. Employers who violate this section are guilty of criminal contempt. CONN. GEN. STAT. ANN. § 51-247a.
5. Under California law, “an employer may not discharge or any manner discriminate against an employee for taking time off to serve as required by law on an inquest jury or trial jury, [or to appear in court as a witness] if such employee, prior to taking such time off, gives reasonable notice to the employer that he is required to serve.” CAL. LAB. CODE § 230.

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6. Under Louisiana law, “[n]o employer shall discharge or otherwise subject to any adverse employment action, without cause, any employee called to serve or presently serving any jury duty and no employer shall make, adopt, or enforce any rule, regulation or policy providing for the discharge of any employee who has been called to serve, or who is presently serving on any grand jury at any criminal or civil trial, provided the employee notifies his or her employer of such summons within a reasonable period of time after receipt of a summons and prior to his or her appearance for jury duty.” LA. REV. STAT. ANN. § 23:965(A). In addition, the Louisiana statute provides that public employers must pay employees for their time spent in jury service up to one day. LA. REV. STAT. ANN. § 23:965(B).
7. Under Maryland law, an employer may not deprive an employee of his employment solely because of job time lost by the employee as a result of any of the following civic duties: the employee’s response to a subpoena requiring the employee to appear as a witness in any civil or criminal proceeding, including discovery proceedings, Md. Courts and Judicial Proceedings Code Ann. § 9-205; or the employee’s response to a summons or attendance in court for service or prospective service as a petit or grand juror. MD. CTS. & JUD. PROC. CODE ANN. § 8-501.
8. Under New Jersey law, any “person employed full-time by any agency, independent authority, instrumentality or entity of the State or of any political subdivision of the State” who is required to be present for jury service in any New Jersey court, or in the United States District Court for New Jersey, shall be excused from his or her employment at all times the person is required to be present for jury service. This full-time employee shall also be entitled to receive from his or her employer his or her usual compensation for each day he or she is present for jury service, or at least his or her actual compensation less the amount of the per diem fee. N.J. STAT. ANN. § 2B:20-16.

In addition, under New Jersey law, all employers may not “penalize any employee with respect to employment, or threaten or otherwise coerce an employee with respect to that employment, because the employee is required to attend court for jury service.” If the employer violates this provision, the employee may bring a civil action for economic damages and reasonable attorney fees. In addition, the employee may obtain an order requiring his or her reinstatement. N.J. STAT. ANN. § 2B:20-17.

9. Under the District of Columbia law, “an employer shall not deprive an employee of employment, threaten, or otherwise coerce an employee

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with respect to employment because the employee receives a summons, responds to a summons, serves as a juror, or attends Court for prospective jury service.” D.C. CODE § 11-1913.

10. Under Virginia law, an employer may not: (i) terminate an employee’s employment; (ii) take any adverse personnel action against the employee; and/or (iii) require the employee to use sick leave or vacation time when the employee is summoned to serve on jury duty or summoned or subpoenaed to appear in court, except if the employee is a defendant in a criminal case. VA. CODE ANN. § 18.2-465.1.
11. In Nevada, employers are prohibited from terminating, threatening to terminate, or otherwise attempting to dissuade an employee from serving as a juror pursuant to a summons to appear for jury duty. A person who is discharged can commence a civil action against his/her employer for lost wages and benefits, reinstatement, damages equal to the loss of wages and benefits, attorney’s fees, and punitive damages up to \$50,000. NEV. REV. STAT. ANN. § 6.190.

### **D. Legal Activity During Nonworking Hours.**

1. Illinois prohibits employers from refusing to hire, terminating employment, or otherwise disadvantaging any person because s/he uses lawful products, such as alcohol and/or tobacco, off premises and on non-working time. *See* 820 ILCS 55/1-20.
2. New York Labor Law § 201-d prohibits discrimination against employees or applicants for employment for engaging in certain legal activities during non-working hours. *See supra*, section IV (C). The law, which went into effect in 1993, covers all employers and employment agencies, and it bars discrimination because of an individual’s: (1) political activities; (2) lawful use of consumable products; (3) legal recreational activities; or (4) union membership or exercise of other union-related rights. The law does not protect acts that create a conflict of interest related to the employer’s trade secrets or other proprietary interests, knowingly violate collective bargaining provisions concerning proper job conduct, or violate a professional’s contractual obligation to devote his or her entire compensated working hours to a single employer where the compensation is at least \$50,000 for 1992 or the inflation-adjusted equivalent in later years.
  - *State v. Wal-Mart Stores Inc.*, 207 A.D.2d 150, 621 N.Y.S. 2d 158 (3d Dep’t. 1995). Interpreting the New York law protecting off-duty activities, the court held that Wal-Mart’s “fraternization”

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policy, prohibiting dating between “a married employee and another employee, other than his or her own spouse,” did not violate the law. According to the court “‘dating’ is entirely distinct from and, in fact, bears little resemblance to [protected] ‘recreational activity.’”

3. In New Jersey, an employer may not interfere with the voting rights of any employee or attempt to influence employees regarding any political views. N.J. STAT. ANN. §§ 19:34-27 to 19:34-31.
4. In Florida, it is unlawful for any person having one or more persons in his service as employees to discharge or threaten to discharge any employee in his service for voting or not voting in any election, state, county, or municipal, for any candidate or measure submitted to a vote of the people. Any person who violates this provision of Florida Elections statute is guilty of a misdemeanor of the first degree. FLA. STAT. § 104.081.

### **E. Breastfeeding Accommodation.**

The Patient Protection and Affordable Care Act (P.L. 111-148) was signed into law by President Obama March 23 (55 DLR A-9, 3/24/10). Section 4207 of the new health care act, called “Reasonable Break Time For Nursing Mothers,” amends Section 7 of the FLSA. The provision requires that break time be provided for one year after the child's birth “each time such employee has need to express the milk.” In addition, an employer shall provide a private, shielded place other than a restroom in which the nursing mother may express the breast milk. The amendment only applies to businesses with 50 or more employees. An employer may be excused if compliance would impose an undue hardship by causing the employer significant difficulty or expense. The measure does not preempt state laws with more generous provisions for nursing mothers, according to its provisions.

Laws relating to breastfeeding in the workplace exist in nearly half of the states. In Illinois, the Nursing Mothers in the Workplace Act requires all employers to provide reasonable unpaid break time each day to an employee who needs to express breast milk for her child, so long as doing so does not unduly disrupt business. The break time must, if possible, run concurrently with any break time already provided to the employee. Employers must also make reasonable efforts to reserve a private space or area not too far from the employee's work area, where employees may, with reasonable comfort and privacy, express breast milk. (A toilet stall is not an acceptable space.) *See* 820 ILCS § 260/1 *et seq.* California

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(Cal. Labor Code § 1030 et seq.) New York (N.Y. Labor Law § 206-c) and many other states have similar laws.

### **F. Mandatory Leave for Organ and/or Bone Marrow Donation**

In recent years, organ and bone marrow donation has become increasingly popular among state legislators. These donations require employees to miss work. Until recently, this required donors to use accrued vacation leave in order to donate. Requiring donors to expend vacation served as a disincentive to donate. Thus, to promote the altruistic and socially beneficial activity of organ and bone marrow donation, many state legislatures reacted by enacting statutes that require employers to allow employees a certain amount of time for such donations.

**Illinois:** Under Illinois's Organ Donor Leave Act, employees receive paid leave to donate blood, organs, or bone marrow. Under the statute, public employees employed for at least six months receive paid leave up to 30 days in any 12 month period to donate bone marrow; up to 30 days in any 12 month period to donate an organ, and up to 2 hours for the purpose of donating blood platelets (though the 2 hour leave may be taken no more than 24 times in any 12 month period.) *See* 5 ILCS §§ 327/1 *et seq.* In addition, private employers with 51 or more employees and public employers must give eligible employee up to one hour every 56 days to donate blood. 5 ILCS § 327/1 and 820 ILCS § 149/1 *et seq.*

**Louisiana:** Private employers must grant paid leaves of absence to employees donating one marrow, but the combined length of leave may not exceed 40 work hours, unless the employer agrees. *See* La. Rev. Stat. Ann. § 40:1299.124.

**New York:** New York law grants state employees up to 7 days of paid leave to donate bone marrow and up to 30 days for organ donation. A separate provision extends the law to govern private employers, but it does not apply to independent contractors. Both private and public employers are also prohibited from retaliating against employees who request such leave. *See* N.Y. Lab. Law §§ 202a-b.

### **G. Injury Prevention Program.**

In California, employers are required to establish, implement and maintain an illness and injury prevention program. CAL. LAB. CODE § 6401.7. In addition, employers are required to include this program in its written policies.

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