Employment Law Toolkit for Illinois Employers

How to Protect Your Business From Liability and Comply With State and Federal Employment Laws

Fourth Edition

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CHAPTER I

INTRODUCTION

Starting or running a company is no easy task. Successfully operating a business requires its owners and managers to successfully navigate through a wide variety of different employment and personnel issues such as employee morale, immigration compliance, unions, protecting assets and complying with the literally hundreds of different employment and labor laws and regulations. In this regard, there exist many legal pitfalls that companies can fall into if they are not familiar with the applicable employment laws and do not take adequate preventative measures to protect themselves from liability.

This Toolkit serves as a resource for business professionals, entrepreneurs, executives, managers and human resource personnel who are involved in the day-to-day operations of a company or who otherwise are thinking about starting a company. This Toolkit highlights some of the major laws and regulations facing employers in Illinois and elsewhere, and offers practical suggestions on how to avoid costs and liability.

We are pleased to make this Toolkit available to you and hope that it will serve as a useful resource for you and your business. Of course, we welcome any comments or suggestions of topics to be included in the next edition. For more information or additional copies of this Toolkit, please contact E. Jason Tremblay (ejtremblay@arnstein.com).

Now for the legal disclaimers: While the information in this Toolkit is currently accurate, employment laws in Illinois and elsewhere are frequently changing. This Toolkit is for informational purposes only and is not intended to be a comprehensive summary of every legal requirement facing an employer. Rather, it is a general summary of some of the major issues and laws presently facing employers. This information should not be construed as legal advice or an opinion as to a particular situation or application. Further, this Toolkit does not create an attorney/client relationship between Arnstein & Lehr LLP and any readers or recipients. Therefore, if your company is faced with a pending legal issue or question, we strongly encourage you to contact Arnstein & Lehr LLP to ensure that your company is complying with existing employment laws and regulations.
CHAPTER II

EMPLOYER POSTING REQUIREMENTS

Illinois’ labor laws require employers to post state, federal and OSHA mandated posters where visible to employees that inform them of their employment and labor law rights. An employer’s failure to post such mandated posters can subject it to fines and penalties, as well as lawsuits. There have also been recent cases that have held that an employer’s failure to post a required labor law poster tolls the applicable statute of limitations for certain employment discrimination causes of action. Accordingly, an employer should routinely ensure that it is posting the required notices and that those notices are current and updated with the most recent version of the notice.

As a general matter, both federal and state mandated labor law notices must be displayed in a location conspicuous to all employees at each of the employer’s work facilities. There are no specific requirements that the notices be posted in, for example, the lavatories or smoking rooms, but generally, they should be placed in employee common areas, such as lunch or break rooms, where they can readily be seen by employees. Additionally, although not mandated by law, it would be prudent for companies to post these notices on their websites as well.

A) Illinois Posting Requirements

The following notices are mandated by Illinois law to be posted in the workplace:\(^1\):

- Notice to Workers About Unemployment Insurance Benefits
- Notice to Workers About Workers’ Compensation
- Equal Pay is the Law
- Illinois Dept. of Labor Notice to Employers and Employees (Minimum Wage)

\(^1\) The required Illinois posters can be obtained from the appropriate Illinois departments or agencies, including the Illinois Department of Labor, the Illinois Department of Employment Security and the Illinois Workers’ Compensation Commission.
• Pay Day Notice
• Illinois Dept. of Labor Notice to Employers and Employees (Victims Economic Security and Safety Act)
• Illinois Dept. of Public Health Emergency Care for Choking Notice (mandatory for dining facilities and recommended for places of employment where employees eat on premises)
• Illinois Employee Classification Act Notice (mandatory for construction contractors for whom one or more individuals perform services who are not classified as employees)
• Illinois No Smoking Notice
• Illinois Firearms Concealed Carry Notice (mandatory if employer wants to prohibit concealed weapons in workplace)

B) Federal Posting Requirements

The following notices are mandated by federal law to be posted in the workplace:

• Uniformed Services Employment and Reemployment Rights Act (USERRA)
• Equal Employment Opportunity is the Law (A version later than Nov. 2009 which includes the Genetic Information Nondiscrimination Act notice)
• It’s the Law OSHA Notice
• Family and Medical Leave Rights Act Notice (only required for employers of 50 or more employees)
• Notice to Workers with Disabilities (only required for employers who employ workers with disabilities)
• Fair Labor Standards Act (including minimum wage)
• Employee Polygraph Protection Act
• Notice of Employee Rights Under the NLRA (for federal contractors and subcontractors)

2 Most federal and state employment and labor law notices can be obtained from the responsible federal or state agency, downloaded from their respective websites or, alternatively, from larger commercial office supply retailers.
Federal law also requires that the federally-mandated notices be displayed for job applicants, as well as employees. Accordingly, an employer must usually have two sets of postings at locations where applicants and employees are located in different areas. And, where a company has a large number of employees who speak Spanish (or some other language), it is advisable to have two sets of posters – one in English and one in Spanish (or the other language).

Finally, please note that certain public entities, industries and/or companies may be required to have additional posters. For example, government contractors are obligated to have additional posters. Therefore, it is advisable to contact an employment attorney to ensure that you are posting the correct and most up-to-date employment and labor law posters.
CHAPTER III

RECORD RETENTION

A) Importance of Record Retention

Proper records management and information governance is an important function of every successful business. All companies, whether small or large, must recognize the importance of providing guidelines for the retention and destruction of company records. Not only does this reduce the volume of records maintained by a company, it also keeps in mind the requirements of the business and applicable law. Documents should be destroyed only in the regular course of business, and not on a selective basis. Always keep in mind the needs of the company before destroying anything. If an employer reasonably believes that it will need a document in the future, it should keep it.

Remember that, despite the existence of a record retention policy, document destruction must cease when a subpoena is issued or when litigation, a government investigation or an audit is pending, imminent or reasonably anticipated. In those cases, a litigation “hold” should be drafted and distributed to the relevant employees informing them not to destroy any relevant files despite the guidelines of the company’s record retention policy. Sanctions for destroying documents that are relevant to pending or anticipated litigation or government investigations and audits can range from significant monetary penalties and fines to adverse inferences against the company in litigation.

B) Suggested Retention Periods

In light of the foregoing, the following guidelines are suggestions on how long to retain various documents generated in the course of normal business:

Accounts Payable/Receivable, Ledgers and Schedules..........................15 Years
Annual Reports..............................................................................Permanent
Audit Reports.................................................................................Permanent

3 Keep in mind that these guidelines apply to both paper copies of the documents and electronic or computer versions of the documents.
Background Checks................................................................. 2 Years
Bank Reconciliation, Statements and Deposit Slips...................... 15 Years
Budgets..................................................................................... 10 Years
Capital Stock & Bond Records.................................................... Permanent
Casualty reports, property, injury or liability claims (resolved).......... 3 Years
Casualty reports, product, injury or liability claims (open)............. Permanent
Certificate of Incorporation....................................................... Permanent
Checks (Cancelled, Routine, inc. Payroll)\(^4\)................................. 7 Years
Checks (Cancelled, Important)..................................................... Permanent
Collective Bargaining Agreements.............................................. 3 Years after expiration
Consultant Agreements (Expired).................................................. 7 Years
Consultant Agreements (Active).................................................... Permanent
Contracts & Leases (Expired)........................................................ 7 Years
Contracts & Leases (In Effect) or Labor/Union Contracts.............. Permanent
Correspondence (General).......................................................... 6 Years
Correspondence (Legal/Tax/Important)........................................ Permanent
Credit Card Documentation....................................................... 120 days
Customer/Vendor Invoices.......................................................... 7 Years
EEO-1 Report (only for larger companies)..................................... 1 Year
Employee Benefit Plans, Seniority and Merit Systems.................. Permanent
Employee Personnel Records (Terminated)\(^5\)............................... 3 Years
Employment Applications (non-employee).................................... 3 Years
Employee Manual / Handbook................................................... Permanent
ERISA Plan Records................................................................. Permanent
Expense Reports........................................................................ 7 Years
Financial Statements.................................................................. Permanent
FMLA & Leave of Absence Records............................................... 3 Years
General & Private Ledgers............................................................ Permanent
I-9 Eligibility Form............. 3 Years from hire date or 1 year after termination (whichever is later)
Insurance-Company Accident Reports........................................... 6 Years
Insurance-Fire Inspection Records............................................... 6 Years
Insurance-Group Disability Records.............................................. 8 Years
Insurance-Worker’s Compensation Claims (after settlement)........ 6 Years
Insurance-Policies, Records (Expired)............................................ 4 Years
Insurance-Policies, Records (Current)......................................... Permanent
Internal Audit Reports.................................................................. 3 Years
Inventory Schedules and Physical Reports................................. 15 Years

\(^4\) In the event that cancelled checks are not received, there is no need to save them. Save scanned checks on CD or confirm that such checks are available from a third party (e.g., banks) for the seven (7) year period.
\(^5\) Could vary from state to state.
Job Advertisements and Posted Notices..................................................1 Year
Journals..................................................................................................Permanent
Lawsuits, pleadings & files (Expired)......................................................3 Years
Lawsuits, pleadings & files (Current)....................................................Permanent
Legal Hold Records..............................................................................15 Years After end of Triggering Event
Minutes of Board of Directors/Stockholders/By-Laws/Charter..............Permanent
Monthly Trial Balances.........................................................................7 Years
Mortgages, Notes, Bills of Sale and Purchase of Assets .......................Permanent
Mortgages and Notes (expired).........................................................10 Years (3 office/7 storage)
Notes Receivable Ledgers/Schedules...................................................7 Years
OSHA Forms.......................................................................................5 Years
Payroll Time Cards6............................................................................10 Years
Payroll Records & Summaries............................................................10 Years
Petty Cash Vouchers............................................................................3 Years
Polygraph Test Results.........................................................................3 Years
Property Appraisals.............................................................................Permanent
Property Records (incl. Deeds and Easements).......................................Permanent
Proxies and Ballots.............................................................................10 Years
Purchase Orders..................................................................................3 Years
Real Estate Title Documents............................................................Permanent
Receiving Sheets.................................................................................1 Year
Requisitions.........................................................................................3 Years
Retirement and Pension Records......................................................Permanent
Sales and Use Tax Records...............................................................Permanent
Sales Records.....................................................................................3 Years
Tax Returns & Worksheets...............................................................Permanent
Trademark/Patent/Copyright Registrations Records............................Permanent
Unemployment Insurance Records....................................................15 Years

C) Document Retention Policies

Federal court rules on document retention and e-discovery changed significantly in 2006. Many states have implemented similar, if not more stringent, rules. It now becomes even more important for businesses and executives to take steps to understand what paper documents and computer-

6 With the passage of the Lilly Ledbetter Fair Pay Act of 2009, the time limit a worker may bring a claim for unlawful pay discrimination was greatly expanded. The Act will now permit the period for a worker to file a charge of pay discrimination to be triggered each time the worker receives an allegedly discriminatory paycheck, even if the pay decision was made many years earlier. As a result, and if practicable, employers may consider maintaining payroll and other compensation documentation indefinitely.
stored records must be preserved and which can be discarded. Failure to properly preserve documents and electronic records has resulted in some very severe consequences, including personal liability.

Protecting yourself and your business starts with the establishment of a document retention policy. In fact, under the new federal rules, a document retention policy may serve as a “safe harbor” against liability for inadvertently destroyed documents.

1. Your policy should define what records must be retained and which can be destroyed.

2. You must determine how your documents are electronically stored, where they are stored (for example, are company documents stored on laptops, PDAs, employees’ personal computers?), and how they are routinely destroyed (for example, are emails automatically deleted and back-up tapes reused?)

3. Your policy should be in writing and must cover paper documents, e-mails and electronic data.

4. Your policy should address the record keeping requirements of other statutes, laws, and regulations that require the retention of certain documents for varying time periods. Such documents would include employment records, legal documents (such as contracts, leases and licensing agreements), tax returns, payroll and accounting records, and insurance information, to name a few.

5. There are other laws that also affect document retention. For example, the Sarbanes-Oxley Act imposes criminal penalties for the improper destruction of documents that might impede or obstruct an official investigation.

Document retention requirements vary by industry, state and type of company. One size does not fit all when it comes to document retention policies.

**D) Obligations Imposed by Federal Rules**

A key concept under the Federal rules is that once litigation is “reasonably contemplated,” an obligation to preserve “relevant documents” automatically arises. Litigation may be “reasonably contemplated” well before your company is served with a complaint from opposing counsel. Some courts have held that
litigation can be reasonably contemplated when an employee first complains about harassment or when a company first learns about a problem with one of its products. Similarly, if you are a plaintiff in a lawsuit, the duty to preserve will likely be well before the lawsuit was filed since you control the timing of the litigation and can anticipate the litigation before it commences. Because an obligation to preserve evidence can arise so early in a dispute, it is usually a good idea to involve your attorney at the first sign of trouble.

Once the duty to preserve “evidence” and “relevant documents” arises, you and your attorneys must take affirmative steps to ensure that no relevant information or records are destroyed. This is commonly referred to as instituting a “litigation hold.” This duty includes suspending routine document destruction procedures. The “key players” within your organization who may have relevant information (managers, IT personnel, and even coworkers) must be identified and told about the litigation hold. You must gather their information, image their computers if necessary, and instruct them in writing to preserve evidence. Your company will also have to determine what records are reasonably accessible and which are not.

Noncompliance with any of the foregoing requirements could result in you or your business being hit with severe penalties, including sanctions, fines or a judgment in litigation.

E) Maintaining Personnel Files

Since virtually all employment disputes relate in some way to what documents are kept in an employee’s personnel file, it is crucial that employers properly maintain employee personnel files. Of course, few employers enjoy dealing with paperwork, but taking the time to properly create and maintain personnel files will pay off in the long run. Properly maintained personnel files allow the company to have all important documents relating to each employee in one central location that is easily accessible when it is time to make a personnel decision or to comply with government audits, which are increasingly becoming more prevalent. Moreover, if you have to terminate a problem employee, maintaining the appropriate documentation in the personnel file will protect you from any frivolous claims brought by a terminated employee. This section serves to identify what should and should not be kept in a personnel file, as well as how to properly maintain a personnel file in today’s litigious environment.
A personnel file should be opened for each employee on their date of hire. Under Illinois and federal law, all job-related documents should go into the file, including (1) a job description for the position, (2) any job application and/or resume, (3) any written offers of employment, (4) the employee’s IRS Form W-4, (5) any receipts or signed acknowledgements (FMLA policy, sexual harassment policy, computer use policy, etc.) of company documents, policies, or training, (6) all performance evaluations, (7) any forms relating to employee benefits (or waiver of employee benefits), (8) forms providing next of kin and emergency contact information, (9) awards or citations for good performance, (10) warnings and/or other disciplinary action notices taken due to the employee’s poor performance, (11) notes and memos on the employee’s attendance or tardiness, (12) any contract or written agreement between the company and the employee, if applicable (employment agreement, non-disclosure agreement, etc.), (13) any complaints from customers and/or coworkers of the employee, and (14) all documents related to the worker’s termination or departure from the company (such as exit interview information or documentation related to the employee’s termination). In Illinois, for example, an employer can be barred from affirmatively using a document justifying an employee’s termination in subsequent litigation if the employee requests the personnel file and the relevant document is absent. Thus, it is imperative that employers properly maintain their personnel files and ensure that they contain the appropriate information and documentation. In short, all documents that relate to the employee’s qualifications for employment, demotion, transfer, additional compensation, discharge or other disciplinary actions should be included and maintained in an employee’s personnel file.

A company’s personnel files should not be a receptacle for every single document, note, or thought about an employee. For example, some documents should be segregated from a personnel file so that they may be easily obtained in the event of an audit or subpoena. In this regard, all Employee Eligibility Verification Form I-9s should be segregated from an employee file. The Form I-9 is a form from the United States Citizenship and Immigration Services (formally the INS) that must be completed by the employee and employer verifying that the company has checked to ensure that the employee is legally authorized to work in the United States. Since the government is entitled to inspect these forms with very little notice, a company should segregate all

(Documents to Keep in a Personnel File)

(Documents That Should Not Be Kept in a Personnel File)
employee Form I-9s into a separate file so that, if audited, it will make it much easier for the company to promptly provide the government with those forms.

Second, medical records of an employee should also not be placed into a personnel file. In many states, workers have certain rights to privacy to their medical information. Therefore, keep all medical records, including records related to workers’ compensation claims or an underlying injury, in a separate file apart from the personnel file.

Third, since the contents of a personnel file may turn into evidence in a lawsuit brought by a disgruntled former employee, it is important not to maintain lawsuit evidence, attorney work product or attorney-client communications in a personnel file. Entries that do not directly relate to an employee’s job performance and qualifications, should not be kept in personnel files since they are not related to the employee’s job performance and, if produced, could inadvertently waive a privilege or disclose information that is otherwise not discoverable. A good rule of thumb in this regard is not to put anything in the personnel file that you would not want a jury to see.

(Procedures to Help Maintain a Personnel File Over Time)

Reviewing personnel files periodically is useful to ensure that important documents are up to date. Therefore, at least once a year, companies should check their personnel files to confirm that they include: (1) a signed original copy of every contract or agreement between the company and the employee, (2) copies of the employee’s current job description and all job descriptions since the employee’s date of hire, (3) copies of all performance evaluations, (4) documentation of all salary adjustments or payroll changes since the employee’s hire, (5) documentation relating to any awards or disciplinary issues relating to the employee, and (6) signed acknowledgement forms for the most current version of any employee handbook or policies.

One final issue of key importance in maintaining a personnel file is how long to maintain it. Under new federal e-discovery rules, draconian penalties can result if a company permits the destruction or deletion of relevant documents -- such as those documents contained in a personnel file -- after a company has notice of a potential claim. To avoid such a possibility, it is generally advisable to keep a personnel file for a minimum of three (3) years following the relevant employee’s termination and/or separation from the company. If the company reasonably anticipates litigation, either by receipt of a formal charge or by a
verbal threat by an employee, all potentially relevant documentation relating to their employment should be preserved, even if the company maintains a document destruction policy. When in doubt, the safest practice is for the company to preserve the relevant documentation, including those documents contained in an employee’s personnel file. As well, keep in mind that many states, such as Illinois, allow employees (both current and terminated) to access their personnel file. For this reason also, it is important for companies to properly maintain and preserve their employee files.
CHAPTER IV

EMPLOYEE HANDBOOK

One of the initial issues facing a company is whether to publish an employee handbook. The purpose of an employee handbook is to provide a company’s employees with the policies and inform them of the rules that govern them throughout the stages of their employment. Through an employee handbook, employers notify employees about the legal rights and obligations they both have in the employment relationship. While an employee must comply with the policies contained in an employee handbook, a handbook should not be drafted in a way so as to create an employment contract with the employee. In other words, the employee handbook, while specifically describing the rights and duties of the employee, should be drafted in a way so as to maintain the “at will” relationship between the employer and the employee.

A) Advantages of an Employee Handbook

There are a number of advantages to having an employee handbook. Initially, a handbook advises the employee and the employer in writing of their respective duties and obligations. The handbook therefore clarifies expectations and helps promote the fair and consistent administration of policies. Additionally, a carefully written handbook can improve morale, prevent costly disagreements and, most importantly, keep the employer out of court, as long as it consistently follows the provisions of the handbook. An employee handbook also promotes consistency in management and is an efficient recruitment tool for new employees. A “make it up as you go along” policy of addressing human resource and personnel issues is a one-way ticket to getting sued and incurring costly and unnecessary attorneys’ fees.

B) Disadvantages of an Employee Handbook

While employee handbooks are generally recommended, they also have some disadvantages. The primary disadvantage stems from the fact that employee handbooks can create certain obligations on the company if they are not drafted correctly. For example, discipline policies that mandate an elaborate series of
warnings and write-ups may sound good in theory, but they may otherwise restrict an employer from dealing appropriately with a problem employee. Plus, a company that sets out a policy and then fails to follow it (or applies it inconsistently) is inviting an employee to challenge the company’s employment decisions. It can even be evidence of pretext in an employment discrimination claim. Additionally, if not regularly reviewed, handbook provisions can become outdated and unenforceable. More importantly, however, is that if handbooks are not drafted properly, they can become an enforceable contract between the employee and the company. These disadvantages can easily be eliminated if the handbook is carefully drafted and reviewed by an employment attorney.

C) **Necessary Contents and Policies of a Handbook**

An employer that maintains an employee handbook must ensure that the handbook contains certain standard provisions and that those provisions are carefully worded in “plain English” so that all employees can understand the policies. The following provisions are some of the more important policies that should be contained in an employee handbook.

**_(At-Will Employment Statement)_**

To alleviate the problem of converting an employee handbook into a binding employment contract between a company and its employees, a carefully drafted “at-will” statement must be contained in the handbook. An “at-will” statement specifically provides that the handbook is not a contract of employment, is not intended to create any binding contractual commitments between the employer or any of its employees, and that the employment relationship is “at-will” (i.e., the employer and its employees retain the mutual right to terminate the employment relationship with or without notice, cause or reason).

**_(Equal Employment Opportunity Policy)_**

An employer must ensure that it has an Equal Employment Opportunity (EEO) statement that provides that the employer has a policy of providing equal employment opportunities to all individuals regardless of their protected classification (e.g., sex, age, religion, disability, genetic predisposition, sexual orientation and other characteristics protected by the law). The EEO policy should cover all protected classifications of employees, including additional classes that may be protected by state law or local ordinances. For example, Illinois state law protects employees based on their “sexual orientation,”
whereas Federal law currently does not. This policy should be conspicuously posted in areas where employees will see it and should also be included in the employee handbook.

(Harassment and Retaliation Policies)

A prudent employer will also adopt an anti-harassment policy that prohibits sexual and all other unlawful types of harassment and discrimination (such as racial, national origin, pregnancy, etc.). This policy should be contained within the employee handbook. The anti-harassment policy should set forth (1) definitions of sexual harassment and other types of unlawful harassment, using examples; (2) the illegality of any harassment; (3) the internal complaint procedures available to employees to complain of the harassment, keeping in mind that there should be a number of individuals to whom an employee can complain in case the alleged harasser is individual to whom the employee is supposed to complain; (4) a statement explaining that a prompt investigation of the complaint will take place and that the appropriate remedial action will be taken to stop the unlawful harassment; and (5) assurances that employees who report harassment will not be retaliated against or discriminated against for making a complaint or reporting the harassment.

(Reasonable Accommodation Policy)

An employer should also consider developing a “reasonable accommodation” policy complying with the Americans with Disabilities Act and other federal, state or local laws dealing with disabled employees. The policy should also include the employer’s commitment to reasonably accommodate religious beliefs of its employees. In most circumstances, providing an employee with a reasonable accommodation will be a minimal cost to the employer and will avoid a costly and protracted legal battle if the employee sues for the requested accommodation. This policy should set forth the concept of a reasonable accommodation, the procedures to be followed when an employee needs an accommodation, and a commitment to provide reasonable accommodations that do not cause undue hardship to the employer.

(Hours of Work, Timekeeping, Overtime and FLSA “Safe Harbor” Policies)

In light of the huge increase in wage and hour litigation under the Fair Labor Standards Act (“FLSA”), employers should clearly outline policies addressing FLSA issues, such as hours of work, overtime, lawful deductions for exempt
employees and “safe harbor” rules. Initially, the FLSA mandates that “non-exempt” employees be compensated at a rate of time and a half for all hours worked over 40 hours a week. As a result, and because it is the employer’s burden to prove when an employee worked, it is important that every company have a clear way to track when employees come and go, and when they take a lunch or other break. Without an accurate timekeeping system, employers are exposed to claims for unpaid pay or overtime by current and past employees. An “hours of work” policy that is followed and enforced will help inform the workers when they are allowed to work and will help reduce potential FLSA claims.

Overtime can also be a thorny issue for employers. Depending on the industry, as well as other factors, overtime may be needed. An overtime policy should be implemented and clearly articulate when, and under what circumstances, overtime is allowed. For example, it is prudent to maintain a policy that provides that overtime is not allowed unless authorized in writing by a manager. This way, the company can easily and more efficiently track the use of overtime, as well as have a record of overtime so that improper FLSA overtime lawsuits can be defeated.

Under the FLSA, some employees are “exempt” from the payment of overtime. Many employers do not realize, however, that they can inadvertently eliminate the “exempt” status of an otherwise exempt employee, thereby entitling the employee to overtime. This is usually done when an employer improperly takes certain deductions from the “exempt” employee’s salary, which it is generally not allowed to do. For example, an employer is not allowed to take deductions from an “exempt” employee’s salary for certain absences from work for things such as lateness, violations of company policy or damage to company equipment. Thus, a policy prohibiting improper deductions, other than major safety violations, and what to do if a deduction is made, should be placed in the handbook.

The U.S. Department of Labor has provided employers with a defense if improper deductions are erroneously made by the employer. The employee will not lose his or her exempt status if the employer has a clearly communicated policy that prohibits improper deductions and sets forth a clear complaint procedure. Additionally, the employer should promptly reimburse the employee for any improper deductions and should make a good faith commitment to comply with the FLSA in the future.
(Workplace Violence Prevention Policy)

Since employers have a general duty to provide a safe working environment, and because they can be held vicariously liable for acts of their employees carried out in the scope of their employment (especially if they have prior notice of potentially violent behavior), it is absolutely critical to publish a workplace violence policy. This policy should provide that violence (or threats of violence) of any kind (including physical and verbal violence) is not tolerated, and that if any employee is found to have violated the workplace violence policy, he or she shall be subjected to discipline, up to and including termination. This policy should also provide guidelines for employees to report potential instances of workplace violence so that preventative measures can be implemented before a workplace incident becomes violent.

Moreover, since Illinois has now adopted a concealed carry firearms law, it is important to make a determination of whether or not permitted firearms are allowed to be brought into the workplace. If an employer does not want employees or third parties bringing authorized firearms into the workplace, it would be prudent to implement a written policy prohibiting firearms, including concealed firearms, and to post the state approved sign prohibiting firearms in the workplace, which can be acquired from the Illinois State Police.

(Discipline and Termination Policy)

Employers should have discipline and termination policies to ensure consistent treatment among employees whose working relationship with the company is ending, for whatever reason. All too often, employers encounter situations where one supervisor has disciplined an employee for a specific work rule infraction while a different supervisor has let the infraction go unpunished. Such disparate treatment leads to, at best, perceptions of unfairness impacting employee morale and, at worst, to charges of discrimination against the employer for disparate treatment.

Therefore, the discipline policy should contain a non-exhaustive list containing specific types of misconduct that will result in disciplinary action. The policy should also list what forms of disciplinary action may be utilized, such as verbal counseling, written warning, probation and/or termination. However, the policy should also state that one form of discipline will not necessarily precede another and that discipline decisions may be made on an assessment of all relevant factors, as determined by the employer. Care should be given to affording the employer as much flexibility as possible to address personnel decisions.
Voluntary terminations provide the employer with an opportunity to review its management practices, while involuntary terminations present a challenge to limit the employer’s liability for claims of wrongful discharge and discrimination. While there is no one correct discipline or termination policy, it is important to draft them in unambiguous terms and implement them consistently throughout the workplace. Accordingly, routinely training supervisors regarding discipline and termination procedures are critical.

(Immigration Policy)

The Immigration Reform and Control Act of 1986 (“IRCA”) prohibits employment discrimination on the basis of national origin or citizenship, or requiring more or different identification documents for particular individuals. The IRCA also provides for the imposition of civil monetary fines and criminal penalties on employers who violate the IRCA’s provisions regarding the restriction on employing aliens who are not legally authorized to work in the United States. Because the IRCA’s employer sanction provisions have potentially severe consequences for employers who violate them, it is essential that all companies that hire aliens be aware of the IRCA’s provisions and that they follow the IRCA regulations.

In today’s environment, employers should carefully implement policies prohibiting discrimination based on an employee’s national origin or citizenship. They must also not benefit from the employment of illegal aliens either by, for example, turning a “blind eye” to their employees’ citizenship status and/or paying them lower wages.

(Trade Secret/Confidentiality/Non-Disclosure Policy)

In virtually every industry, employers develop and maintain information and documents that they consider “confidential” or “trade secrets.” Generally, these are documents and information that provide the company with a competitive advantage in the marketplace and that are kept sufficiently secret from those outside the company, such as customer lists and pricing information. At all costs, employers should make every effort to keep these items confidential. However, it is also helpful to have a written policy informing employees of the employer’s policy to keep certain information and/or documents secret and to inform employees not to disclose such information to unauthorized individuals both during and after their employment.
A written policy regarding the non-disclosure of confidential information further reinforces the employer’s position and notifies employees that it is improper for them to disclose such information to unauthorized individuals. Likewise, if an employee has an employment agreement, similar language should be inserted into the employment agreement warning the employee that he or she can be immediately terminated for violating, or attempting to violate, such policy.

The law on how broad a confidentiality provision can be varies from state to state, so be sure to check the applicable law where you have employees. As well, ensure that any confidentiality policy (or agreement) does not prohibit employees from discussing their wages or terms and conditions of employment with their fellow employees. A prohibition on employees discussing terms and conditions of employment is viewed by the National Labor Relations Board as an interference with concerted activity and a violation of the National Labor Relations Act - even if your company is not unionized.

(Technology Resources Policy)

Almost all business today is conducted over electronic mail, internet or the telephone. And, employees are increasingly downloading, transferring, destroying or emailing to their home computers confidential and sensitive company information. Accordingly, employers must have coherent policies on technology use. These policies often address widely divergent topics such as downloading from the internet, monitoring e-mail, online shopping, personal use of the internet, e-mail and telephone use.

The improper use of technology can create liability for employers. For example, supervisors or employees who download pornography from the internet and distribute it to coworkers can create hostile work environment and sexual harassment claims. Apart from the threat of litigation, many employers institute internet policies to lessen the risk that employees will download disabling computer viruses and to make employees more productive while at work.

At a minimum, the policy should define what actions by an employee are unauthorized. For example, any use of the internet or e-mail to download or transfer sexually explicit material should be prohibited. The policy should further state that the employees’ use of company technology should be for business purposes only. There should be specific language in the policy that
the employee has no expectation of privacy in their use of the technology -- whether using the technology for business or personal use -- and that computer and internet use are subject to monitoring by the employer. Absent such a written policy, an employee likely has a reasonable expectation of privacy, and an employer may be subject to invasion of right to privacy claims by its employees for the monitoring of their technology use.

The impact of cell phones, Blackberrys and other personal digital assistants can also not be ignored. In particular, employers should be aware that the use of these items -- particularly when driving on company business -- can create liability for the company. Therefore, employers should publish policies to restrict the use of cell phones and other devices while driving except when using a “hands free” device. Further, “texting” should be prohibited and the policy enforced if violators are discovered.

Employees’ use of Facebook, Twitter, blogs, etc. has exploded recently. Employers generally cannot restrict this activity when employees use these services during personal time. However, employers may want to implement social networking policies limiting access to such sites during work hours, as well as what employees may post or disclose about their work and management. Employers can also be liable for employee off-duty social networking under the Federal Trade Commission’s new “endorsement” guidelines if employees make unauthorized endorsements, testimonials and similar positive statements on their blogs and social media sites about the company’s products or services, particularly when the employees fail to disclose who they work for. Additionally, to avoid the disclosure of confidential information, employers should have a clear policy regarding employees’ posts to work-related blogs.

Finally, employers should have all employees acknowledge that they have read the policy and agree to comply with its terms. By establishing a technology use policy, an employer can increase productivity, eliminate confusion about how employees are to use those services and avoid costly lawsuits.

(Leave of Absence Policies – FMLA, VESSA and USERRA)

It is appropriate to include all state or federally-mandated leave policies in an employee handbook. Such policies should address issues such as family, medical, military, jury, sick, bereavement, holiday, vacation and voting leave. However, care should be given to which policies are included in the handbook since the applicability of these leave policies depends on the size of the employer.
The Family and Medical Leave Act (“FMLA”) currently covers employers with 50 or more employees within 75 miles of one of the employer’s locations. The FMLA provides eligible employees with at least 12 weeks of unpaid leave in a 12-month period to, among other things, care for the employee’s own or immediate family member’s serious health condition. Also passed into law are various leave entitlements to eligible employees to care for an injured military service member or to handle various “qualifying exigencies.” (See Chapter V, Section C for a more extensive summary of the current status of the FMLA). An employer must ensure that its other leave policies and absenteeism policies are consistent with the requirements of the FMLA. Carefully drafted, an FMLA policy can ensure compliance as well as allow the employer to take advantage of certain provisions in the FMLA regulations which are beneficial to employers, such as preventing employees from taking 12 weeks of leave during the last quarter of the year, and then asking for 12 more weeks leave the first twelve weeks of the following year. Employers should be cautioned to review state laws, however, to determine whether a state leave act provides more generous leave of absence rights to employees. If so, the employer must modify its policy since the more generous leave law will apply.

In Illinois, and depending on the size of the employer, an eligible employee can take up to 12 weeks of unpaid leave in a 12-month period if the employee becomes a victim of domestic or sexual violence, or has a family or household member victimized by such violence pursuant to the Illinois Victims’ Economic Security and Safety Act (“VESSA”). Much like the FMLA, covered employees can take leave to seek medical attention and psychiatric counseling, obtain assistance from a victim services agency, seek legal counsel, and participate in civil and criminal legal proceedings, not only for themselves, but also to assist a family or household member in doing so. Under the VESSA, a “household member” is “any person who is related by blood or by present or prior marriage, and any other person who shares a relationship through a son or daughter.” The VESSA policy should provide a procedure under which threats and acts of violence against employees and third parties can be reported to the company. The procedure should state that such reports should be (but do not have to be) in writing. It should provide the names and contact information of the persons designated by the company to receive such reports. Finally, the VESSA leave policy should be incorporated by reference into the company’s FMLA policy and its health and life insurance policies/plans.

The Uniformed Services Employment and Reemployment Rights Act (“USERRA”) protects all employees who serve in the military from discrimination in employment and provides employees with certain benefits and
reemployment rights when they return from military duty. Unlike other federal labor and employment laws that exempt smaller businesses, the USERRA applies to all public and private employers in the U.S., regardless of size. Also, the USERRA applies to those employees that are in the active military, national guard, reserves, as well as certain employees in the commissioned corps of the Public Health Service and certain individuals involved in the National Disaster Medical System. Again, employers should be cautioned to review state laws since certain states may provide similar or additional protections for those employees serving in the military (or who have family members in the military).

*(Drug and Alcohol Policy)*

Employers should implement a drug and alcohol policy prohibiting the use, sale, purchase, transfer, possession or presence of alcohol or drugs in the employee’s system or at the workplace. This policy can also be a good opportunity to notify employees that, as a condition of employment, they are subject to pre-employment, as well as random, drug and alcohol testing. Further, the policy should state that any violation of the drug and alcohol policy will result in disciplinary action.

However, because many states have statutes regulating drug and alcohol testing in the workplace, employers must ensure that their policies comply with state law. These state laws often set forth the procedures, for example, for when testing can be done. Therefore, employers should obtain properly executed consent forms from employees authorizing the employer to conduct the testing (which can be done at the commencement of employment).

Finally, employers should be careful to ensure that their drug and alcohol policy and testing are being administered in a uniform and nondiscriminatory fashion and that they are not targeting certain protected groups. Also, be aware that under the Americans with Disabilities Act (“ADA”), alcohol testing is considered a physical examination and cannot be performed on an applicant until after a conditional offer of employment has been made. On the other hand, drug testing is exempted from the definition of a physical examination under the ADA and, therefore, employers can perform these drug tests prior to an offer of employment.

Depending on the size of the company, as well as the industry, there are literally hundreds of different policies that can be placed into an employee handbook. A more comprehensive list of potential handbook policies is attached to the Appendix as *Exhibit 1* (Pages 145-147).
D) Distribution and Acknowledgement Forms for Handbook and Policies

An employee handbook is ineffective unless it is distributed to all the employees of the company. Therefore, once an employee has been hired, it is critical that the handbook be distributed to the employee. Similarly, if a specific policy or handbook is modified or updated, the new policy or handbook should be distributed to all the company’s employees and a record should be kept of that distribution, such as the date of the distribution and to whom it was distributed.

Forms acknowledging an employee’s receipt, review and understanding of the company’s employee handbook and policies are also essential. For example, if a company does not maintain a handbook but otherwise is governed by the FMLA, it is legally required to distribute to each new employee the FMLA “General Notice” and, given this requirement, it would be prudent for the employer to keep some acknowledgment of the employee’s receipt of the FMLA “General Notice.” Unless the employee acknowledges in writing that they have received, read and understood the policy or handbook, an employer runs the risk that the employee will later claim that he or she never received the handbook (and that he or she never saw the policy). For obvious reasons, this could hamstring the employer when it comes time to terminate the employee for violating provisions in the handbook or, worse yet, when the employee sues the employer for wrongful termination.

An executed acknowledgement form should be obtained from the employee as soon as possible after his or her hire and such form should be placed in his or her personnel file. The acknowledgement form should also disclaim that the handbook creates any contractual rights, specify that policies can only be modified in writing, specify that the new handbook supersedes the old handbook, and if the company is not unionized, reaffirm the “at will” nature of the employment relationship.

E) Employer’s Right to Unilaterally Modify the Handbook and Policies

It is also advisable to insert language at the beginning the employee handbook that the employer reserves the right to unilaterally add to, modify, or delete any terms, conditions or policies set out in the handbook with or without notice to the employee. This will be especially important since specific personnel policies may change over time. However, it is important to make sure that the new policy is distributed and the receipt of the new policy is acknowledged in writing by all employees.
Also, the handbook should also expressly state that any written or oral statements to the contrary of the written statements in the handbook are expressly disavowed and should not be relied upon by the employee unless made in writing by an authorized representative of the employer.

Finally, if a prior handbook did create a contract (and the employer wants to modify it), the employer must offer consideration to rescind the handbook. This can be done by making, for example, year-end bonuses contingent upon the employee rescinding the prior handbook and acknowledging receipt of the new handbook.
CHAPTER V

EMPLOYMENT STATUTES AND WHO THEY GOVERN

There are literally hundreds of employment and labor laws governing employers in this country. Therefore, as an owner, manager or supervisor in a company, it is important to know what employment statutes exist, what they provide and whether those statutes apply to the company. Below is a list of many of the significant federal and Illinois employment statutes, as well as to what size employers they apply.

A) Federal Employment Statutes

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<tr>
<th>Statute</th>
<th>Coverage</th>
<th>Governs</th>
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<tbody>
<tr>
<td>Age Discrimination in Employment Act (ADEA)</td>
<td>Federal statute that makes it unlawful for an employer to refuse to hire or to discharge, or otherwise discriminate against an individual who is forty years of age or older.</td>
<td>Employers with 20 or more employees (in 20 or more weeks in the current or prior year).</td>
</tr>
<tr>
<td>Americans with Disabilities Act (ADA)</td>
<td>Federal statute that provides that no employer shall discriminate against an employee with an actual or perceived disability.</td>
<td>Employers with 15 or more employees (in 20 or more weeks in the current or prior year).</td>
</tr>
<tr>
<td>Civil War Reconstruction Era Federal Civil Rights Statute (Section 1981)</td>
<td>Federal statute that affords all individuals regardless of race the rights of all laws and benefits for the security of persons and property.</td>
<td>All employers.</td>
</tr>
<tr>
<td>Civil War Reconstruction Era Federal Civil Rights Statute (Section 1983)</td>
<td>Federal statute that provides a cause of action for individuals whose rights have been deprived by someone acting under the color of law.</td>
<td>All people who act under the color of law.</td>
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<td>Statute</td>
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<tr>
<td>Employee Retirement Income Security Act (ERISA)</td>
<td>Federal statute that requires employers to, among other things, protect the interests of employee benefit plan participants and their beneficiaries and to provide participants the right to sue for benefits and breaches of fiduciary duty.</td>
<td>Employers that provide employee benefit plans (some exceptions).</td>
</tr>
<tr>
<td>Equal Pay Act</td>
<td>Federal statute that prohibits paying different wages for equal work based on an employee’s sex.</td>
<td>All employers.</td>
</tr>
<tr>
<td>Fair Labor Standards Act (FLSA)</td>
<td>Federal statute that establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments.</td>
<td>All employers (some exemptions).</td>
</tr>
<tr>
<td>Family and Medical Leave Act (FMLA)⁷</td>
<td>Federal statute that requires covered employers to grant eligible employees up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons: for the birth and care of the newborn child of the employee; for placement with the employee of a son or daughter for adoption or foster care; to care for an immediate family member (spouse, child, or parent) with a serious health condition; to take medical leave when the employee is unable to work because of a serious health condition; because a “qualifying exigency” arising out of the fact that a covered employee’s spouse, child or parent is on, or has been called to, active duty in the Armed Forces. The FMLA also allows eligible employee’s up to 26 weeks of unpaid leave to care for an injured “servicemember.”</td>
<td>Employers with 50 or more employees in a 75 mile radius.</td>
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⁷ Note that some states provide greater leave benefits than the FMLA. In those states, the more generous state law would apply to eligible employees.
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<tr>
<th>Statute</th>
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<tr>
<td>National Labor Relations Act</td>
<td>Federal statute that guarantees workers the right to join unions without fear of reprisal from management and makes it an unfair labor practice for an employer to discourage organizing or to prevent workers from negotiating a union contract.</td>
<td>Most employers in the private sector.</td>
</tr>
<tr>
<td>Sarbanes – Oxley Act (SOX)</td>
<td>Federal statute that, among other things, requires principle officers of companies filing periodic reports under section 13(a) or 15(d) of the Securities and Exchange Act of 1934 to certify the accuracy of the reports.</td>
<td>Officers and executives of companies filing reports under section 13(a) or 15(d) of the Securities and Exchange Act of 1934.</td>
</tr>
<tr>
<td>Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)</td>
<td>Federal statute that prohibits employment discrimination against service men and women on the basis of their military service.</td>
<td>All employers.</td>
</tr>
<tr>
<td>Civil Rights Act of 1964 (Title VII)</td>
<td>Federal statute that makes it unlawful for an employer to discriminate or retaliate against an individual on the basis of such individual’s race, color, religion, sex, or national origin.</td>
<td>Employers with 15 or more employees.</td>
</tr>
<tr>
<td>Worker Adjustment and Retraining Notification Act (WARN)</td>
<td>Federal statute that requires an employer to give 60 days notice to each affected employee and to the State before ordering a plant closing or mass layoff.</td>
<td>Employers with 100 or more employees (excluding part-time employees) or 100 or more full- and part-time employees working a total of at least 4,000 hours per week (excluding overtime).</td>
</tr>
<tr>
<td>Immigration Reform and Control Act (IRCA)</td>
<td>Federal statute that requires employers to hire persons who may legally work in the U.S. It further provides guidelines on how the employer must verify the identity and employment eligibility of anyone to be hired.</td>
<td>All employers.</td>
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<td>Statute</td>
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<tr>
<td>Consolidated Omnibus Budget Reconciliation Act (COBRA)</td>
<td>Federal statute that allows workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan for limited periods of time under certain qualifying circumstances such as a voluntary or involuntary job loss.</td>
<td>Employers with 20 or more employees that sponsor a group health insurance plan.</td>
</tr>
<tr>
<td>Genetic Information Nondiscrimination Act of 2008 (GINA)</td>
<td>Federal statute that prohibits the improper use of “genetic information” when making hiring, firing, job placement or promotion decisions.</td>
<td>Private employers who have 15 or more employees in each of 20 or more calendar weeks in a current or preceeding year.</td>
</tr>
<tr>
<td>Consumer Credit Protection Act</td>
<td>Federal statute that prohibits the discharge of an employee due to garnishment/wage deduction for a debt.</td>
<td>All employers.</td>
</tr>
<tr>
<td>Drug-Free Workplace Act</td>
<td>Federal statute that requires covered employees to have a drug free policy and awareness program.</td>
<td>All employers with federal contracts of $100k and over.</td>
</tr>
<tr>
<td>Occupational Safety and Health Act (OSHA)</td>
<td>Federal law that requires employers to keep workplace free from recognized hazards likely to cause harm or death.</td>
<td>All employers.</td>
</tr>
<tr>
<td>Patient Protection and Affordable Care Act</td>
<td>Federal law that, among other things, requires most employers to provide health insurance to their employees and to modify their existing health care plans in certain circumstances.</td>
<td>All employers are impacted depending on the specific provision of the Act.</td>
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## B) Illinois Employment Statutes

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<tr>
<th>Statute</th>
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<tr>
<td>Illinois Wage Payment and Collection Act</td>
<td>Illinois statute that requires employers to pay employees wages and final compensation (upon employment ending) within a prescribed number of days following the pay period in which the wages were earned.</td>
<td>All Illinois employers.</td>
</tr>
<tr>
<td>Illinois Nursing Mothers in the Workplace Act</td>
<td>Illinois statute that requires that employers provide reasonable unpaid break time each day to employees who need to express breast milk. The law also requires employers to make reasonable efforts to provide a room or other location, other than a toilet stall, where an employee can express her milk in privacy.</td>
<td>Illinois employers with more than 5 employees, not including members of the employer’s immediate family.</td>
</tr>
<tr>
<td>Illinois Worker Adjustment and Retraining Notification Act (WARN)</td>
<td>Illinois statute that provides that, an employer may not order a mass layoff, relocation, or employment loss unless the employer gives 60 days written notice of the order to all the affected employees, the Department of Commerce and Economic Opportunity and the chief elected official of each municipal and county government within where the employment loss, relocation, or mass layoff occurs.</td>
<td>Illinois employers with more than 75 employees, excluding part-time employees.</td>
</tr>
<tr>
<td>Illinois Victims’ Economic Safety and Security Act (VESSA)</td>
<td>Illinois statute that requires employers to provide up to twelve weeks of unpaid leave within a 12 month period to employees who are victims of domestic or sexual violence, and to a family or household member of a victim of such abuse. The Act further prohibits discrimination against any person because they are suspected of being victims of domestic or sexual violence, or have taken leave in accordance with this Act.</td>
<td>Private sector employers in Illinois with 15 or more employees, and all public sector employers.</td>
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<td>Statute</td>
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<tr>
<td>Illinois Abused and Neglected Child Reporting Act</td>
<td>Illinois statute that requires certain Illinois workers, such as Information Technology personnel, to report child pornography that they discover on the job. The law immunizes an individual making a required report.</td>
<td>All Illinois employers.</td>
</tr>
<tr>
<td>Illinois Human Rights Act</td>
<td>Illinois statute that makes it a civil rights violation for any employer to refuse to hire, segregate, or discriminate against an employee on the basis of a protected classification (as defined by the Act and which is much more expansive as Title VII), or due to an arrest or criminal history record information ordered expunged, sealed or impounded under Section 5 of the Criminal Identification Act.</td>
<td>Employers with 15 or more employees (unless under a handicap, sexual harassment or retaliation, then 1 employee).</td>
</tr>
<tr>
<td>Illinois Employee Blood Donation Leave Act</td>
<td>Illinois statute that requires an employer to allow an employee one hour of paid leave every 56 days to donate blood.</td>
<td>Illinois employers with 51 or more employees.</td>
</tr>
<tr>
<td>Illinois Health Care Worker Background Check Act</td>
<td>Illinois statute that requires health care employers to conduct a criminal background check of certain applicants for health care positions. The Act prohibits the hiring of any applicant or retaining of any employee involved in direct patient care who has been convicted of any of the enumerated criminal offenses, unless the applicant or employee obtains a waiver.</td>
<td>All health care employers, including hospitals, nursing homes, home health agencies, hospices, nursing agencies, life care and community living facilities and day training programs certified by the Department of Mental Health and Developmental Disabilities.</td>
</tr>
<tr>
<td>Illinois Employee Classification Act</td>
<td>Any individual performing services for a contractor is deemed to be an employee to the contractor unless the contractor can prove, among other defenses, the individual is free from control by contractor or is deemed a legitimate sole proprietor or partnership.</td>
<td>All Illinois construction, construction-related and trucking companies that deliver to construction sites.</td>
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<tr>
<td>Chicago Clean Indoor Air Ordinance</td>
<td>Chicago ordinance that bans smoking in enclosed workplaces and requires the posting of notices and signs.</td>
<td>All employers.</td>
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<tr>
<td>Illinois Wage Assignment Act</td>
<td>Illinois statute that obligates employers to honor a valid wage assignment.</td>
<td>All employers.</td>
</tr>
<tr>
<td>Illinois Uniform Conviction Information Act</td>
<td>Illinois statute that requires employers who obtain criminal background checks to obtain applicants' written consent.</td>
<td>All employers conducting criminal background checks.</td>
</tr>
<tr>
<td>Minimum Wage Law (Illinois)</td>
<td>Illinois law that currently requires that employees be paid $8.00/hour, to be increased to $8.25/hour on 7/1/10.</td>
<td>Most employers.</td>
</tr>
<tr>
<td>Personnel Records Review Act</td>
<td>Illinois statute that allows employees to inspect their personnel file twice a year and add their own statements or rebuttals.</td>
<td>Employers with 5 or more employees.</td>
</tr>
<tr>
<td>Illinois Family Military Leave Act</td>
<td>Illinois statute that requires employers to provide unpaid leave to an employee who is the spouse or parent of a person called to military service lasting longer than 30 days. Any employee who exercises the right to family military leave under this Act, upon expiration of the leave, shall be entitled to be restored by the employer to the position held by the employee when the leave commenced or to a position with equivalent seniority status, employee benefits, pay and other terms and conditions of employment.</td>
<td>Illinois employers with between 15 and 50 employees must allow up to 15 days leave. Employers with more than 50 employees must allow up to 30 days leave.</td>
</tr>
<tr>
<td>Illinois Equal Pay Act of 2003</td>
<td>Illinois statute that makes it unlawful for an employer to discrimination against employees on the basis of sex by paying wages to an employee at a rate less than the rate at which the employer pays wages to another employee of the opposite sex for the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.</td>
<td>Illinois employers with 4 or more employees.</td>
</tr>
<tr>
<td>Statute</td>
<td>Coverage</td>
<td>Governs</td>
</tr>
<tr>
<td>--------------------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Illinois Whistleblower Act</td>
<td>Illinois statute that provides that an employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency if the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation.</td>
<td>All employers not including government entities.</td>
</tr>
<tr>
<td>Right to Privacy in Workplace Act</td>
<td>Illinois statute that prohibits employers from discriminating against applicants or employees for their lawful activities outside of working hours.</td>
<td>All employers, excluding some nonprofits.</td>
</tr>
<tr>
<td>Illinois Election Code (Time off to Vote)</td>
<td>Illinois law that requires employers to allow employees up to two hours to vote to the extent they can't vote during non-working hours.</td>
<td>All employers.</td>
</tr>
<tr>
<td>Jury Act</td>
<td>Illinois law that obligates employers to allow employees time off for jury duty.</td>
<td>All employers.</td>
</tr>
<tr>
<td>Unemployment Insurance Act</td>
<td>Illinois law that requires employers to pay unemployment insurance contributions. Also requires quarterly filings of the employer's Contribution and Wage Report and to report all new hires within 30 days of employment.</td>
<td>All employers.</td>
</tr>
<tr>
<td>Employee Credit Privacy Act</td>
<td>Illinois statute that prohibits obtaining or using of an applicant's or employee’s “credit history” in making employment decisions.</td>
<td>All employers except banks and lending institutions, insurance or surety businesses, state law enforcement units, state and local governmental agencies and “debt collectors.”</td>
</tr>
<tr>
<td>Illinois Religious Freedom and Marriage Fairness Act</td>
<td>Illinois law that provides same-sex spouses in Illinois all the legal rights and obligations to which opposite-sex spouses are entitled under Illinois law.</td>
<td>All employers.</td>
</tr>
</tbody>
</table>
C) **Family and Medical Leave Act**

Under the federal Family and Medical Leave Act of 1993 (“FMLA”), employers with 50 or more employees in a 75 mile radius generally have to provide up to 12 weeks of unpaid leave to eligible employees who have a serious health condition, employees who are needed to care for a parent, child or spouse with a serious health condition, as well as to family members of military personnel called to active duty. The FMLA further allows eligible employees who provide care to wounded U.S. soldiers up to 26 weeks of unpaid leave. The FMLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of FMLA rights, as well as to discharge or otherwise discriminate or retaliate against any employee who exercises their rights under the FMLA.

**(Eligibility)**

To be eligible for FMLA leave, an employee must work for a covered employer (employer with 50 or more employees within a 75 mile radius) and: (1) have worked for that employer for at least 12 months (not necessarily continuous); and (2) have worked at least 1,250 hours during the 12 months immediately preceding the start of the FMLA leave; and (3) work at a location where at least 50 employees are employed at that location or within 75 miles of that location.

**(Leave Entitlement)**

A covered employer must grant eligible employees up to 12 workweeks of unpaid leave in a 12 month period for one or more of the following reasons:

- for the birth of a son or daughter and to care for the newborn child;
- for the placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;
- to care of an immediate family member (spouse, child or parent – not an “in law”) with a “serious health condition”;
- when the employee is unable to work because of a “serious health condition”; or
- because of a “qualifying exigency” arising out of the fact that a covered employee’s spouse, child or parent is on, or has been called to, active duty in the Armed Forces and deployed to a foreign country. A “qualifying exigency” is defined as: (1) short-notice deployment,
(2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, and (8) additional activities to address other events that arise out of a covered service member’s active duty or call to active duty status (provided the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave).

Pursuant to the National Defense Authorization Act of 2008, a covered employer must grant eligible employees up to 26 workweeks of unpaid leave in a 12 month period to allow the employee to care for an injured service member. A covered service member is defined as an active or veteran member of any branch of the military. Military caregiver leave is also to be applied on a per-covered service member, per injury basis. In other words, an employee may be entitled to take more than one 26-week leave during his or her employment, but only if the leave is to care for a different service member or to care for the same service member with a subsequent serious injury.

(Same-Sex Spouses in Illinois)

The FMLA regulations define “spouse” as “a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides.” In light of the overturning of the Defense of Marriage Act, as well as the passage of the Illinois Religious Freedom and Marriage Fairness Act, marriage based FMLA rights will extend to “spouses” of the same-sex. Therefore, Illinois employers who have same-sex employees who reside in Illinois and/or are legally married are entitled to the same FMLA benefits as an opposite-sex married couple.

(Broad Definition of “Son or Daughter”)

In 2010, the U.S. Department of Labor clarified the definition of “son or daughter” under the FMLA with respect to non-military leave. The new interpretation expands the definition and grants leave rights to individuals who assume the responsibilities of a parent by providing day-to-day care or financial support for the child, regardless of whether there is a legal or biological relationship between the individual and child. The new interpretation codifies the intent of Congress to make clear that employees who have no biological or legal representation with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave. Practically, this expands the ability
of employees to take FMLA leave to include same-sex parents, grandparents and anyone else who stands in loco parentis with the child. Employers are entitled to get substantiation from the employee of the relationship between the employee and child, but a simple statement from the employee asserting the requisite family relationship exists is all that is generally required.

(Serious Health Condition)

A “serious health condition” means an illness, injury, impairment, or physical or mental condition that involves: (1) an overnight stay in a health care facility, (2) a period of incapacity of more than 3 days and involves two or more treatments by a health care provider (within 30 days of the incapacity, the first of which must be within 7 days of the incapacity) or a regimen of continuing treatment under a health care provider’s supervision, (3) any period of incapacity due to pregnancy or prenatal care, (4) any period of incapacity due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.) provided that the employee have at least 2 visits to a health care provider per year and (5) any period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer’s, stroke, terminal illness, etc.)

There are certain ailments and conditions that are not considered a “serious health condition” under the FMLA. For example, conditions that only require taking over-the-counter medications, such as aspirin and antihistamines do not qualify as a “serious health condition. Also, routine dental problems and periodontal disease and cosmetic treatments, such as acne or plastic surgery are not covered unless inpatient hospital care is required or complications develop. Finally, such things like the common cold, flu, earache, upset stomach, minor ulcer, and headaches (other than persistent migraines) do not qualify as “serious health conditions.”

(Employee Notice Requirements)

Under the FMLA, employees have to provide notice (30 days if leave is foreseeable or “as soon as practicable” when the leave is not foreseeable) to their employer that they need leave for an FMLA-qualifying reason. However, an employee need not even mention the statute by name to qualify for leave under the FMLA. In fact, notice is sufficient if the employee merely states that leave is needed for a potentially qualifying reason. Then, the burden shifts to the employer to inquire further to determine if the leave is for an FMLA-qualifying reason. The implications for an employer who fails to properly
inquire and designate leave as FMLA leave are significant. For example, if an employee is able to show that he or she was harmed by the employer’s failure to designate, the employee may be entitled to additional leave beyond the 12-week maximum or other monetary or equitable relief.

As you can imagine, what constitutes “sufficient notice” by the employee is frequently litigated. Increasingly, the burden is being placed on the employer to determine whether the requested leave is FMLA-qualifying. However, the FMLA regulations make clear that an employee calling in “sick,” by itself, is insufficient. Significantly, if an employee exhibits noticeable behavior changes or a deterioration in job performance, that may be enough to put the employer on notice that the employee may need FMLA leave.

The bottom line is that employers increasingly face a burden to ascertain whether an employee needs FMLA leave. They cannot sit back and wait for an employee to specifically ask for FMLA leave. Instead, employers must recognize that changes in an employee’s performance or behavior may put them on notice of the need to explore whether the employee should be given FMLA leave, especially when the behavior or performance change is related to an underlying physical or psychological condition.

(Employer Notice Requirements)

One of the objectives in implementing the new regulations for FMLA in 2009 was to educate employers and employees on FMLA rights and obligations. The new notice requirements set out no fewer than four mandatory notices employers must issue.

First, a general notice (WH Publication 1420) must be posted in every workplace and incorporated into any employee handbook. If a company does not maintain an employee handbook, the notice must be distributed to each employee upon their hire.

Second, employers must issue a personalized “Eligibility Notice” (Part A of Form WH-381) within 5 days of an employee’s request for FMLA leave to notify the employee of his or her eligibility for leave. If the employee is not eligible, the notice must state at least one reason why the employee is not eligible.

Third, employers must also issue to an employee a written “Rights and Responsibilities Notice” (Part B of Form WH-381) at the same time the “Eligibility Notice” is issued.
Fourth, the new regulations provide that employers must issue a “Designation Notice” (Form WH-382) within 5 days after receiving sufficient information to inform the employee that the leave is being designated as FMLA-qualifying.

The penalty for failing to provide any of these required notices is potentially draconian. If the employee is able to prove that he or she incurred actual harm as a result of not receiving the Notice, such as lost compensation or benefits or termination of employment because of the employer’s failure to give any of the required notices, the employer will be liable for those damages. These new and updated FMLA forms can generally be found in the U.S. Department of Labor website.

(Medical Certification)

An employer may require the need for FMLA leave be supported by medical certification issued by a health care provider. An employer must allow the employee fifteen (15) calendar days to obtain the medical certification. It is generally advisable to allow a little additional time (15 additional days) in the event of transmittal problems. Also, an employer should always track the mailing or delivering of FMLA leave documents sent to the employee.

If the employee provides an incomplete or insufficient certification, the employer must notify the employee, in writing, of the deficiency and give the employee seven calendar days to cure it. Leave may be denied if the employee fails to cure the deficiency.

Significantly, under the new rules, the employer (but not the employee’s direct supervisor) can contact the employee’s medical provider directly to authenticate the certification form or to obtain clarification. And, like before, a company may, at its own expense, require that the employee obtain a second medical certification from a health care provider of its choosing. If the first and second medical certifications differ, then a third binding one may be obtained at the expense of the employer. The employer’s right to seek a second or third medical certification does not apply to military caregiver leave.

(Intermittent/Reduced Schedule Leave)

Undoubtedly, this is the thorniest issue related to the FMLA and the regulations do not do much to clarify this issue. The FMLA permits employees to take leave on an intermittent basis or to work a reduced scheduled under certain
circumstances. This may only be allowed, however, when medically necessary to care for a seriously ill family member, because of the employee’s own serious health condition, to care for an injured service member, or for a “qualifying exigency.”

Only the amount of leave actually taken while on intermittent/reduced schedule leave may be charged as FMLA leave. Employees may not be required to take more FMLA leave than necessary to address the circumstances that cause the need for leave. Significantly, employers must account for FMLA leave in the shortest period of time that their payroll systems use, provided it is one hour or less.

In intermittent/reduced schedule leave, the employee must work with their employers to schedule the leave so as to not unduly disrupt business operations. Therefore, transferring the employee to a position that accommodates periods of leave better is allowable provided that the position has equivalent pay and benefits.

*(Job Restoration and Key Employee Exception)*

Upon the return from FMLA leave, an employee must be restored to his or her original job, or to an “equivalent” job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions.

Under limited circumstances where restoration to employment will cause “substantial grievous economic injury” to the employer and its operations, an employer may refuse to reinstate certain highly-paid, salaried “key” employees. However, in order to do so, the employer must notify the employee in writing of his/her status as a “key” employee, the reasons for denying job restoration, and provide the employee with a reasonable amount of time to return to work after notifying the employee.

*(Interplay Between FMLA and Bonuses)*

Bonuses and incentive awards based on things such as attendance or production can be denied based on an employee taking FMLA leave. The caveat is that the employer must treat employees on non-FMLA leave the same way. For example, if paid vacation does not disqualify an employee from receiving a perfect attendance award, paid vacation used during FMLA leave cannot be considered a disqualifying absence either. Similarly, employers are free to
“prorate” bonuses premised on the achievement of a goal, such as a production bonus, to account for an employee’s absences under the FMLA, provided that it is not done in a discriminatory fashion.

*(Practical Tips for Employers)*

Under the FMLA, it is paramount for covered employers to take steps to comply with the FMLA and its regulations. A company’s failure to do so could lead to significant legal exposure and liability. Here are some suggestions to help employers comply with the FMLA:

1. Post the Department of Labor FMLA Poster with all other legally-mandated employment and labor law posters in a conspicuous location visible to both employees and applicants. If a majority of your workforce is comprised of workers who are not literate in English, the FMLA poster must be provided in a language in which the employees are literate.

2. If you have an Employee Handbook, revise your FMLA policy to comport with the FMLA regulations. If you do not have an Employee Handbook, ensure that you provide each new employee with a copy of the FMLA poster upon their hire. You should have employees acknowledge receipt of the FMLA poster by having them sign a paper acknowledgment or electronically, but make sure you keep a copy of the acknowledgment.

3. Review other Employee Handbook policies, such as bonus policies and perfect attendance awards, to ensure they comport with the FMLA regulations.

4. Start using the FMLA forms, including the Notice of Eligibility, Rights and Responsibilities Notice, Designation Notice and Medical Certification forms.

5. Train supervisors, managers and individuals responsible for administering FMLA leaves, including the FMLA military family leaves and the applicable regulations. The changes to the FMLA are significant so these individuals should be aware of the regulations so that they can properly respond to FMLA leave requests without running afoul of the law.

6. To the extent that you use specific health care providers for second and/or third opinion or medical certifications, ensure that they also know about the updated regulations.
D) **Patient Protection and Affordable Care Act**

Probably the most significant piece of legislation passed recently was the Patient Protection and Affordable Care Act (the “Healthcare Act”). While the long-term effect of the Healthcare Act has yet to be seen, it is undisputed that it will have a profound effect on individuals and companies throughout the country. The Healthcare Act requires most U.S. residents to obtain health insurance and provides government subsidies to help lower-income and under insured individuals to do so through state health insurance exchanges and marketplaces. It also imposes significant responsibilities on employers throughout the country that will fundamentally alter the nature of employer-sponsored healthcare in the workplace. The Healthcare Act is thousands of pages long so this section is certainly not meant to be an exhaustive summary of the Act; instead, this section only serves to highlight some of the more significant new responsibilities and requirements that the Healthcare Act will impose upon employers.

*(General Provisions)*

The most significant aspect of the Healthcare Act is that, starting in 2015/2016, employers with 50 or more employees will be required to provide “affordable” health insurance or face a penalty to help defray the cost of health insurance (and specifically the cost of employees receiving government subsidies to purchase their own insurance through a health insurance exchange). While the first 30 workers are exempted from the penalty, an employer will face two types of penalties depending on whether they offer inadequate health insurance or no insurance at all. First, if an employer’s insurance is inadequate or too costly, the employer would pay $3,000 per full-time employee who obtains a tax credit up to a cap of $750 times the total number of full-time employees. Second, if an employer offers no health insurance at all, it would be required to pay $2,000 per full-time worker if any employee obtains tax credits for the purchase of health insurance. The penalties are assessed on a monthly basis.

The Healthcare Act allows certain low-income employees who do not qualify for a federal subsidy to opt out of employer-sponsored coverage. The low-income employees would receive “free-choice vouchers” from their employers equal to the value of benefits of the employer plan that could be used to join a state-sponsored exchange plan. There does not appear to be any restriction on employees’ ability to cash in any amounts received from employers in excess of the amount required to purchase insurance through the exchange, which may prompt some workers to opt to forgo employer coverage and causing employers to face new direct costs in the form of either a penalty or a voucher.
The Healthcare Act also requires employers to automatically enroll their employees in their health plans. In other words, the days of employer-mandated waiting periods are over. And, effective in 2010, the Act requires healthcare plans to be modified to allow for coverage for non-dependent children of covered employees up to the age of 26. Additionally, starting in 2013, there are no more annual limits for essential health benefits. Effective now, there are also no pre-existing exclusions for children under the age of 19 and pre-existing condition exclusions are prohibited altogether by 2013.

Employers who offer flexible spending accounts (“FSAs”) and workers who use them face new contribution limits under the Healthcare Act. Beginning in 2013, salary reductions for FSAs will be capped at $2,500 which will be indexed for inflation. Since healthcare costs will likely exceed inflation for the near future, the viability of FSAs may be compromised under the Healthcare Act as currently drafted.

*(Healthcare Act and Small Businesses)*

While the Healthcare Act does not necessarily require small employers to maintain a healthcare plan, it does offer incentives for some small businesses (25 full-time employees or fewer) to offer health insurance for the first time or to continue to maintain existing coverage for employees. Specifically, the Act provides small employers with a tax credit for non-elective contributions towards the purchase of health insurance for their employees. The credit can offset the employer’s regular tax or its alternative minimum tax liability.

To be considered an “eligible small employer,” the employer must: (1) employ fewer than 25 full-time equivalent employees for a tax year, (2) pay wages averaging less than $50,000 per employee per year, and (3) provide health care coverage under a “qualifying arrangement.” A “qualifying arrangement” is an arrangement where the eligible small employer makes non-elective contributions on behalf of each employee who enrolls in a health plan offered by the employer in an amount equal to no less than 50% of the premium cost for the coverage. Small employers with 10 or fewer full-time employees who pay annual average wages of $25,000 or less will be entitled to receive full tax credit.

While the calculation of the tax credit can be complicated, the credit is generally 35% of the employer’s non-elective contributions toward the employees’ health insurance premiums. This percentage increases to 50% for years after 2013 and phases out as the size of the company and average wages increase. Also, the maximum tax credit differs whether or not the company is a for-profit or a tax-exempt organization.
In light of the foregoing, and depending on whether the company meets the eligibility requirements, this tax credit for eligible small businesses can be financially significant.

**E) Illinois Religious Freedom and Marriage Fairness Act**

Following up on The Illinois Religious Freedom Protection and Civil Union Act, which was enacted in Illinois in 2011 and which granted certain rights to civil union partners, Illinois recently became the sixteenth state to allow same-sex marriage. Entitled the Religious Freedom and Marriage Fairness Act (the “Act”), effective June 1, 2014, Illinois recognizes same-sex marriages and provides same-sex spouses all the legal rights and obligations to which opposite-sex spouses are entitled to under Illinois law. Therefore, all employers offering benefit plans issued in Illinois must extend benefits to same-sex spouses to the same extent as they are offered to opposite-sex spouses.

The impact of the Act will be far reaching for Illinois employers. Specifically, same-sex spouses are entitled to the same benefits afforded to opposite-sex spouses “whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law.” Therefore, the Act gives committed couples and their families access to hundreds of state rights and benefits, including but not limited to: 1) state spousal benefits (such as workers’ compensation), 2) domestic relations rights, 3) adoption and parental rights, 4) spousal tax benefits at the state level, 5) emergency medical decision-making power, and 6) state inheritance rights. Now, many state leave laws, such as the Illinois Family Military Leave Act and the Victims’ Economic Safety and Security Act are now interpreted to apply to same-sex spouses.

The Act also applies to benefits and rights under federal law when the U.S. Supreme Court recently held that the Federal Defense of Marriage Act (“DOMA”) was unconstitutional. DOMA defined “spouse” as applying only to a marriage between a man and a woman. When that ruling was invalidated, it essentially paved the way for all federal benefits to be afforded to spouses recognized under state law. Therefore, since the Act recognizes same-sex spouses, same-sex spouses are entitled to protections under some federal laws like COBRA and FMLA. Same-sex couples also have the right to claim an IRS tax exemption for health benefits. In effect, same-sex spouses in Illinois must be treated as married for federal and state purposes, regardless of where they reside after their marriage. For employers, this means that policies, handbooks and practices must be updated so that same-sex spouses have the same rights as opposite-sex spouses.
F) Illinois Concealed Carry and Medical Marijuana Laws

(Illinois Firearms Concealed Carry Act)

In July 2013, Illinois became the last state to enact legislation authorizing the concealed carry of firearms. Called the Illinois Firearms Concealed Carry Act (the “Act”), it authorizes a concealed carry license holder to carry a “loaded or unloaded” concealed firearm on his or her person or in his or her vehicle. While there are some locations where a concealed firearm is still prohibited, such as preschools, day cares, elementary and secondary schools, colleges and universities, hospitals, government buildings and public play grounds, the Act generally does not prohibit employees and others from bringing concealed firearms into the workplace.

The Act does, however, allow employers to prohibit firearms on their property so long as the employer conspicuously and clearly posts 4 x 6 inch signs, approved by the Illinois State Police, at the entrance of the property stating that firearms are prohibited. In addition to the state approved posting, it would be prudent for employers to have a written weapons policy or violence prevention policy restricting both employees and visitors from carrying firearms in the workplace.

The Act does have a parking lot exception to an employer’s right to prohibit firearms in the workplace. Specifically, the Act allows registered concealed carry permit holders to carry concealed firearms within a vehicle on the employer’s parking lot or in the immediate area surrounding the employee’s vehicle in the parking lot.

(Compassionate Use of Medical Cannabis Pilot Program Act)

Illinois has now joined almost two dozen other states in allowing marijuana use for medical purposes. The “Compassionate Use of Medical Cannabis Pilot Program Act” (the “Act”) is a four-year pilot program, meaning it will automatically be repealed after four years unless it is reauthorized by the Illinois Legislature. While the Act has many different aspects to it, regarding employment, it prohibits Illinois employers from discriminating against an individual who is a registered user or caregiver. The Act also prohibits employers from denying any state benefits to a registered marijuana user.

Notwithstanding the foregoing, the Act does not prevent an employer from restricting or prohibiting the medical use of marijuana on its property. Therefore, employers do not need to allow registered users to carry or use medical marijuana
at their worksite. More importantly, the Act also allows employers to adopt and enforce reasonable rules relating to the use of medical marijuana. For example, any employer can discipline or terminate an employee who is impaired at work or who is not fulfilling their duties. Finally, the Act does not prohibit the discrimination of medical marijuana users to the extent that allowing the use of marijuana would cause the employer to violate federal law or cause it to lose a federal contract or funding. Accordingly, private employers who must comply with the Federal Drug Free Workplace Act, or who must comply with federal laws and regulations such as Department of Transportation regulations, are allowed to not hire and/or terminate employees who are registered marijuana users.

In the end, employers must be diligent and careful in dealing with applicants and employees who are registered marijuana users, especially since the condition underlying the need for medical marijuana use could qualify as a disability under federal and state law. Prudent employers in Illinois should ensure their drug testing and other policies are compliant and consistent with the Act and that front-line managers and human resource personnel are armed with the resources to identify and properly deal with registered medical marijuana users.
CHAPTER VI

HIRING OF EMPLOYEES

A) Hiring Principles

As a company grows, attracting high-quality employees is one of the most important areas where business owners need to spend their time. In other words, a well-selected work force is paramount to any business, so learning where and how to look for qualified candidates, as well as how to interview and screen those candidates, is important to a business’ success in the marketplace.

There are a large number of federal, state and local laws and regulations that affect the hiring process. The overall goal of these laws and regulations is to ensure that each potential applicant is afforded an equal opportunity to be selected for a position, irrespective of their race, gender, national origin or other protected classification (see Chapter IX, Section A for all current protected groups in Illinois).

Generally, the recruiting and hiring process commences with a systematic plan consisting of the following categories, each of which are critical to successfully hiring a good work force: (1) identifying an open position, as well as a list of the skills and qualifications required by the employer to fill that open position, (2) advertising and recruiting qualified applicants, (3) screening potential applicants once the resumes are gathered, (4) properly interviewing those applicants to maximize the employer’s ability to hire the most qualified candidate, and (5) selecting the applicant.

B) Employment Applications

It is highly recommended that employers design and distribute employment applications for prospective employees. An employment application is important because it is a uniform and consistent form that all applicants must fill out before being considered for an open position. It gives the employer the ability to consistently, and in writing, communicate certain
messages to the applicant. An employer’s employment applications should, at a minimum, contain and request the following information: (1) the applicant’s address and contact information, (2) the applicant’s employment history and pertinent information (e.g., licenses, special skills, etc.), (3) the applicant’s requested job, job category and/or times of work availability, and (4) references. Moreover, the application should include an “at will” statement, EEO and non-discrimination disclosures, as well as a certification from the applicant that the information on the application is true and correct. Employment applications should not request an applicant’s date of birth or any other information that could disclose the applicant’s age (such as dates attended high school). And, if the application requests the disclosure of a criminal conviction, an exception has to be made for expunged or sealed records. Finally, if the employer conducts any type of background check (such as a criminal background check or drug test), the employer should obtain written consent from the applicant to do so.

C) Illinois Employee Credit Privacy Act

Effective January 1, 2011, Illinois employers are limited in their ability to obtain and use credit history information regarding applicants and employees. The Employee Credit Privacy Act (“ECPA”) applies to virtually all Illinois employers except for banks and financial institutions, insurance companies and surety businesses, state law enforcement units, state and local governmental agencies and debt collection agencies.

The ECPA specifically prohibits covered employers from inquiring about an employee or applicant’s credit history, obtaining credit reports and taking any employment action based upon an employee or applicant’s credit history report. The only exception to this restriction is for positions in which a credit history is a “bona fide occupational qualification.” To meet this standard, one or more of the following circumstances must exist: 1) employer is required to bond or obtain security for the employee, 2) employee has unsupervised access to $2,500 in cash or marketable assets, 3) employee has or will have signatory power over business assets over $100.00 per transaction, 4) job involves access to personal or confidential information, financial information, trade secrets or security information, 5) job meets state or federal criteria designed to establish when credit history can be a bona fide occupational qualification, or 6) person’s credit history is required by, or exempt under, state or federal law.
The ECPA also prohibits retaliation against anyone who files a complaint, participates in an investigation or opposes a violation of the Act. The ECPA also prohibits employers from requiring applicants or employees to waive their rights under the Act. Employers who violate the ECPA can be subject to civil liability for damages, injunctive relief and responsible for the attorneys’ fees and costs of the applicant or employee.

D) **Background Checks**

*(Fair Credit Reporting Act)*

In light of safety risks, potential lawsuits and other risks posed by potential employees, it is important to conduct some type of background check on each applicant who is being seriously considered for a job. However, the type of background check needed obviously varies based on the nature of the position for which the applicant is applying. There are many types of background checks such as credit reports, criminal background checks, driving records and investigative consumer reports.

Despite the importance of background checks, employers need to be particularly careful when conducting background investigations of new or potential employees, especially when using third party consumer reporting agencies to gather the information. For example, the use of a credit report that disparately impacts certain minorities can be unlawful and expose the employer to a wide variety of discrimination lawsuits. As well, as discussed below, the federal Fair Credit Reporting Act (FCRA) requires that, among other things, employers who use third party consumer reporting agencies to perform background checks on employees notify potential employees before using material from a consumer report.

When an employer uses a consumer reporting agency to do a background check on an applicant (as opposed to performing an in-house background check such as calling references, prior employers, etc.), there are four steps that must be followed to stay in compliance with the FCRA. At each step, the FCRA spells out what needs to be included in the disclosures, notification and certification, including providing the applicants with a list of their rights under the FCRA. The four steps are:
Step 1: Initial disclosure and written authorization.

An employer must make clear to the job applicant that it may be requesting a consumer report about the applicant, and the employer must obtain written consent from the applicant. The disclosure and consent form must be separate from the employment application.

Keep in mind that applicants and potential employees cannot waive their rights under the FCRA and that an employer’s request for them to waive a prospective employee’s rights under the FCRA is illegal.

Step 2: Certification to the consumer reporting agency.

The employer must next sign a certification that it gives to the consumer reporting agency performing the background check. The certification must state that: (1) the employer has already made the initial disclosure to the applicant; (2) the employer has obtained the applicant’s consent to perform the background check; (3) any information the employer receives will be used for lawful purposes; and (4) if the employer takes adverse action based on the report, it will provide a copy of the report and summary of rights to the applicant.

Step 3: Pre-adverse action disclosure.

If you have received a copy of the report and there exists some information that causes the employer concern (and where it might take an adverse action based on the report), the employer must: (1) notify the applicant that it is considering not hiring the applicant because of some information that it has received from the consumer report, (2) provide the applicant with a summary of consumer rights; and (3) provide the applicant with a copy of the consumer report that contains the information that is concerning the employer.

Step 4: Post-adverse action notification.

Assuming that the employer has decided not to hire the applicant and has pulled a copy of the applicant’s credit report, the employer now has to send another disclosure to the applicant. This notice must provide the applicant with information about the consumer reporting agency that did the background check and explain the agency’s role (i.e., a statement that the agency did not actually make the decision not to hire the applicant and that the agency does
not know why the decision was made). The notice must also explain that the applicant has the right to obtain a free copy of the report by making a request within 60 days, and that the applicant has the right to dispute the accuracy or completeness of the report with the agency.

Background check information and consumer reports on job applicants and employees should be kept separate from their applications or personnel files. The primary reason for this is so that supervisors or managers who may have access to the personnel files not be allowed to see them. Since the statute of limitations for bringing a claim under the FCRA is the lesser of five years or two years after it is discovered that an employer made an adverse decision because of the information on the consumer report, it is advisable to keep background checks for at least two years.

(Arrest and Conviction Records)

In Illinois, employers generally cannot make adverse employment decisions (e.g., terminate or refuse to hire) based upon arrest records or sealed or expunged criminal histories. Illinois employers may, however, consider conviction information to evaluate prospective employees for job suitability. When obtaining conviction information, employers should obtain a signed release from the applicant or employee.

While not necessarily the law, the EEOC has come out strongly against employers conducting criminal background checks on applicants and employees asserting that minorities and other protected groups have a much higher conviction rate and, therefore, such screening disproportionately impacts minorities. In this regard, the EEOC appears to prefer that employers eliminate criminal background procedures altogether. However, this is impractical for employers who have concerns about negligent hiring, retention and supervision claims. Here are some suggestions to balance the need of the company to hire a good employee while minimizing an argument that the company’s criminal background check policy is discriminatory:

1. Don’t automatically discharge or not hire an applicant just because they have been arrested. You should perform an independent investigation that confirms the conduct underlying the arrest and, if taking an adverse action against the individual committing such acts is job related and consistent with business necessity, the company may take the adverse action.
2. Keep in mind that the earlier in the process you perform criminal background checks, the larger number of applicants will be impacted. Therefore, conduct the criminal background check only after a conditional offer of employment has been made, which is based on a successful completion of the background check. This will impact fewer potential applicants and be less costly.

3. If there is an arrest or conviction on the applicant’s record, investigate as to whether it is job related and consistent with business necessity. Specifically, employers should consider (a) the nature and gravity of the offense or conduct, (b) the time that has passed since the offense or conduct and (c) the nature of the job held or sought.

4. Consider the conviction record in the context of the position being sought. If you are hiring a driver for your company, you likely can exclude those convicted of driving under the influence. However, a conviction for driving under the influence may not be relevant to a receptionist position. In short, weigh and analyze the conviction with the actual job duties.

5. Document your efforts to consider whether the conviction is job related and consistent with business necessity. Documenting your efforts will better prepare your company in the event of an investigation or litigation.

6. Allow the applicant the opportunity to explain and provide documentation or evidence that may mitigate the applicants’ criminal history. This will be strong evidence that you are appropriately investigating whether or not the history is job related and consistent with business necessity.

7. Remember that compliance with federal law is a defense. Therefore, if you have a federal contract that requires you to perform certain criminal background checks, you can avoid liability for this reason as well.

E) Interviewing – Proper and Improper Questioning

Because an employer’s conduct during the interview process can expose it to liability, it is crucial to understand the types of questions that can and cannot legitimately be asked of an interviewee. The litmus test for an interviewer is generally to ask himself/herself: What do I really need to know about
this applicant to decide whether he or she is qualified to perform the job? Therefore, questions about an applicant’s sex, age, health, marital status, veteran status, children, religion, future family plans, sexual orientation, past workers’ compensation claims (or any protected classification) should all be avoided. Those persons who undertake face-to-face employee interviews must be trained about the types of questions that may not be asked during an interview. This training should include providing the interviewers with a list of topics that should not be asked during the interview and avoiding improper questions.

(Helpful Interviewing Tips)

The effective interviewer usually incorporates the following elements into the interview:

• The interviewer should know the job requirements and hiring process and be uniquely aware of the difference between “essential” attributes and “desirable” attributes.

• Prior to the interview, review the candidate’s application and plan for the interview. Ask the applicant to fill in the gaps of the job history and explore the reasons he or she left prior employers. Also, do not make any misleading statements or unintended promises about the job or the company.

• Ask open-ended questions and follow-up on any relevant issues. Moreover, in the interview you want to observe the candidate’s body language.

• Plan a smooth closing. Thank the applicant for his or her interest in the job and get any follow-up information that may be needed. Tell the applicant that the director of human resources, or other applicable person, will contact the applicant about his or her decision.

• The bottom line is that the job interview is also the first significant contact with the potential employee. Therefore, the interviewer should positively promote the image of the company.

• When an interviewee volunteers information about an “off limits” topic, such as his or her children or family plans, don’t follow up, write it down, consider it or share it with other employees making the hiring decision.
Attached to the Appendix of this Toolkit as **Exhibit 2** (Pages 148-149) is a non-exhaustive list of legitimate work-related questions that can be asked of an applicant during the interview process.

**(Avoiding ADA Pitfalls)**

The Americans With Disabilities Act (ADA) requires that inquiries about disabilities be made in two separate stages of the hiring process. The questions you may ask before an offer is made differ from what you may ask afterwards. For example, before an offer is made, questions cannot be asked about the nature or severity of the disability; the condition causing the disability; any prognosis or expectation regarding the disability; or whether or not the person will need treatment or special leave because of the disability. Therefore, when interviewing applicants (including those with disabilities), make the most of your interview by: (1) asking whether the person knows of any reason that he or she cannot perform the essential functions of the job; (2) describing or demonstrating an essential job function and asking applicants whether or not they can perform the functions with or without a reasonable accommodation; (3) asking questions regarding ability to perform all job functions, not just those essential to the job; (4) providing information on the company’s regular work hours, leave policies, absence policies, and any special attendance standards for the job, then asking the applicant if those work/attendance requirements can be met.

Remember that although the ADA allows you to ask an applicant with a visible disability to describe or demonstrate how he or she will perform specific job functions, the applicant’s performance of non-essential functions cannot be used to eliminate him or her from consideration. Again, the focus must be on the applicant’s performance of the job’s essential functions.

**(Avoiding Other Pitfalls)**

It is also unlawful to discriminate on the basis of an applicant’s race, ethnic group, genetic information, or other protected classification. Consequently, asking about or merely mentioning any of those protective subjects could be considered discriminatory if it puts the applicant at a disadvantage or you cannot show that the inquiry is related to a bona fide job requirement. For example, legal problems can result if you solicit information about clubs or social organizations to which the applicant belongs and indicates the applicant’s religion, national or ethnic
religion, race or color. Additionally, asking about an applicant’s feelings about working with people of different races, asking about an applicant’s birthplace, asking an applicant’s maiden name or any inquiries regarding the applicant’s marital status, number and ages of children, and questions about any other protective classification should be avoided during the interview process. Under the Genetic Information Nondiscrimination Act, it is now unlawful to ask an applicant or employee about their family medical history or any genetic diseases for which the applicant or employee believes he or she might be at risk. The Illinois Human Right Act even makes it unlawful to inquire about, or use arrest information, as a basis to refuse to hire. Therefore, questions about an applicant’s arrest record or convictions should be avoided.

Attached to the Appendix of this Toolkit as Exhibit 3 (Pages 150-151) is a non-exhaustive list of questions that should be avoided during the interview process.

F) Drug Testing Applicants

Many employers like to use pre-employment tests as a way to screen out applicants who are not suitable for the job. These tests include, among others, medical and drug tests. Although you are allowed to do some testing of applicants, both state law and federal law impose numerous restrictions on what you can do. As a result, you should only use tests that are absolutely necessary and you should consider consulting with a lawyer before administering the test to make sure that it will pass legal muster in your particular state.

While some states have very strict restrictions on drug testing, Illinois does not have a specific statute regulating drug testing by private employers. In fact, under the Illinois Human Right Act, the term “handicap” specifically excludes any employee or applicant who currently is engaged in illegal drug use when the employer acts on the basis of such illegal drug use. Therefore, an employer may adopt and administer reasonable policies or procedures, including drug testing, to ensure that an applicant or employee is no longer engaging in illegal drug use. Specifically, the employer may: (1) prohibit illegal drug use and use of alcohol in the workplace by all employees; (2) require that employees not be under the influence of alcohol or engage in illegal drug use in the workplace; (3) require that employees’ behavior conform with the requirements established under the federal Drug-Free Workplace Act of 1988 and state law; (4) hold an employee who is engaged in illegal drug use or who is an alcoholic to the same qualification standards for employment or
job performance and behavior as are imposed on other employees even if the employee’s unsatisfactory performance or behavior is related to drug abuse or alcoholism.

Courts have generally held that both blood and urine collection are minimally intrusive procedures which are not harmful to job applicants or employees, especially when they are conducted outside the employment environment (such as where applicants or employees are required to go to a doctor’s office to provide a sample) without direct observation by the tester. In other words, it may be an invasion of privacy for an employer to require a job applicant to provide a urine sample while other people are in the room watching, especially coworkers or other employees. Therefore, if a company will be conducting blood or urine testing for current drug use, it is advisable to have a third-party conduct the drug testing to limit any privacy claims from the applicant or employee. And, with the passage of the Genetic Information Nondiscrimination Act, it is important that any medical testing of applicants or employees not improperly request or collect genetic information (including family medical history).

Equally important, however, is the fact that if an employer does conduct drug testing on applicants, it should do so in a consistent fashion. In other words, employers should not pick and choose to test only certain applicants for a position (for example, based on educational experience, looks, or any other characteristic). It must test all applicants for the same job in a similar manner, or risk a claim that it is screening out particular applicants based on a protected classification.

G) Other Employment Testing of Applicants

Employers use employment tests in the hiring process to determine which job applicants are the most skilled and competent for a particular job. Some of the most common employment tests are physical tests, personality tests and cognitive tests. Although employment tests can be very helpful for employers, employers must be cautious when administering these tests to avoid violations of the Americans with Disabilities Act (the “ADA”), the Age Discrimination in Employment Act (the “ADEA”) and Title VII of the Civil Rights Act of 1964 (“Title VII”).

If an employer administers tests that may have the effect of disproportionately screening out applicants of a protected class, the employer must make certain
that the tests are “job-related and consistent with business necessity.” This can be a difficult task. Therefore, the Equal Employment Opportunity Commission (the “EEOC”) has developed mandatory guidelines called the Uniform Guidelines on Employee Selection Procedures (the “UGESP”) to help employers design their tests. Explanations of the three most common types of employment tests (physical tests, personality tests, and cognitive tests), and examples of how the ADA, ADEA, and Title VII apply to these three types of tests are described below.

(Physical Tests and Medical Examinations)

Employers use physical tests to measure an applicant’s physical ability to perform a particular task, e.g. strength, agility and endurance. Employers use medical examinations to assess an individual’s overall physical and mental health. The results of these tests help employers identify which applicants are in the most desirable physical or mental condition to perform specific job-related tasks. If a job does not require an applicant to have an elevated degree of physical ability, employers should avoid using physical tests and medical examinations altogether to avoid violating the ADA, the ADEA, and Title VII.

The ADA has specific restrictions on employers’ use of medical examinations. With regard to job applicants, the ADA prohibits employers from requiring an applicant to undergo a medical examination prior to making a job offer to the applicant. Employers are allowed to condition the job offer to an applicant on the successful completion of such medical examination. However, if an employer chooses to require an applicant to take a medical examination, the employer must require all entering employees of the same job category to complete the medical examination regardless of whether they have a disability. Additionally, if the medical examination screens out individuals with disabilities, the exclusionary criteria must be job-related and consistent with business necessity. Furthermore, the information obtained from such medical examinations must remain confidential.

The requirements of the ADEA also apply to employers’ use of physical tests. For example, if an employer requires applicants to complete a physical agility test, which disproportionately screens out individuals that are 40 or older, the employer must show that a certain job task requires employees to exert the level of agility that is required by the test.
Employers must also abide by the restrictions of Title VII. For example, an employer could not require only female applicants to undergo a strength test because this would intentionally discriminate against female applicants. Additionally, if a necessary job task requires applicants to lift only 50 lbs., an employer could not require all applicants to take a strength test where they are required to lift 100 lbs. because this may disproportionately exclude female applicants. Furthermore, an employer could not require male applicants to lift 120 lbs. to pass a strength test, and at the same time require female applicants to lift only 80 lbs. to pass the same test, because the employer would be using different cutoff scores based on sex in violation of Title VII.

(Personality Tests)

Employers use personality tests, also referred to as integrity tests, to assess the degree to which a person has certain character traits or dispositions. For example, an employer could use a personality test to measure desirable traits, such as dependability, cooperativeness, and motivation. Personality tests are also used to predict the likelihood that a person will engage in certain conduct. For example, an employer could use a personality test to determine the likelihood that an applicant will steal, or will be absent from work. Personality tests are a great tool to help employers screen out applicants with undesirable character traits, and to find applicants whose personalities will best fit with the particular work environment.

The restrictions of the ADA, however, apply to personality tests. For example, if a personality test includes questions that tend to reveal an applicant’s mental illness or disorder, the personality test may be considered a medical examination and, therefore, will be prohibited by the ADA, unless the employer has already given a conditional offer to the applicant. Additionally, employers must ensure that the results of such personality tests accurately reflect the personality trait that the test was designed to assess. Further, if a personality test is a written test, the employer may need to allot a greater amount of time for an applicant with a learning disability to comply with the “reasonable accommodations” requirement.

The restrictions of Title VII also apply to employers’ use of personality tests. For example, employers may violate Title VII if they use a personality test that is designed to test applicants’ vigor, where the test asks whether the individual played on a “football team?” because this may disproportionately screen out female applicants. Even though the vigor test may be job-related and
consistent with business necessity, there may be less discriminatory methods of measuring an applicant’s vigor, such as a test that asks gender neutral questions. Moreover, employers cannot (1) adjust the scores of, (2) use different cutoff scores for, or (3) otherwise alter the results of personality tests on the basis of race, color, religion, sex, or national origin.

(Cognitive Tests)

Employers use cognitive tests, also referred to as pen & paper tests, to assess reasoning, memory, perceptual speed, perceptual accuracy, and skills in arithmetic and reading comprehension. Cognitive tests can assist employers to determine whether applicants have the requisite knowledge and aptitude to perform a particular job function.

However, the ADA and ADEA apply to cognitive tests as well and may restrict the ability of an employer to use them. For example, if an applicant has hand use limitations, an employer may have to offer a verbal response version of the test to comply with the “reasonable accommodation” requirement of the ADA. Additionally, cognitive tests should ask questions that are age-neutral, unless the questions are based on a reasonable factor other than age, to avoid violating the ADEA.

The requirements of the Title VII also restrict employers’ use of cognitive tests. For example, employers should be careful not to administer cognitive tests that may have the effect of discriminating against a particular race, unless the tests are job-related and consistent with business necessity. Additionally, employers must be cautious when choosing a particular scoring method. For example, the scoring method of “race norming,” or altering scores on tests so that the mean score is the same for each race, is illegal because it alters the results of cognitive tests, and, therefore, violates Title VII.

The bottom line is that employment testing of applicants can be a dangerous and thorny endeavor and care should be given to ensure that any tests given are legitimate, consistent with business necessity and comport with federal and state laws.

H) Protecting the Company When Interviewing and Hiring an Employee From a Competitor

Not only do employers have to be concerned about the specific questions they ask during the interview process, they also have to be concerned if they knowingly or unknowingly hire employees from competitors. For example, if a
company hires an employee from a competitor, it is very possible the employer will be on the receiving end of an expedited lawsuit along with the new hire for, for example, breaching his or her restrictive covenant with the former employer. Therefore, it is essential to perform “due diligence” on the prospective employee to protect the company and to reiterate its lack of interest in the competitor’s customers.

(Investigate the Employee’s Employment Background)

At the outset of considering an employee to hire, it is advisable to determine whether there is any employment agreement or restrictive covenant limiting the employee’s employment rights. If so, it is prudent to discuss this fact with the prospective employee and obtain a copy of the agreement. A determination of the likelihood of a successful lawsuit against the company should be made at this point. If so, and if such a suit would seriously impair the employee’s usefulness to the company, the employment decision should be reconsidered. If there is already a written employment agreement with the new employee, it should be terminated immediately in the event an enforcement action is brought.

When hiring a prospective employee, an employer should (to the extent possible) also determine the reasons for the employee’s departure and whether any grounds exist for invalidating or limiting the employee’s restrictive covenant with his or her former employer. For example, as discussed above, if the prior employer materially breached the employment agreement (termination in bad faith, material change in terms of employment, significant reduction in pay or duties, etc.), then the departing employee, as well as the hiring employer, may have good grounds to invalidate the restrictive agreement and avoid liability if litigation ensues.

(Ensure That Interviews Are Conducted Carefully)

Regardless of whether the employer is aware of any restrictive covenants, it should make clear to the employee that the company is not interested in the competitor’s trade secrets and will honor valid non-compete agreements. In conjunction with this, it is important not to elicit specific information about the competitor, especially when it comes to confidential pricing and customer information. However, keep in mind that general information that is publicly known is fair game and can be discussed with the prospective employee or applicant.
An employer should further not review or take any documents or information of the competitor that would be considered a trade secret or confidential. This information would include pricing or commission sheets that the prospective employee may bring to the company. Such documents could contain highly confidential information about specific customer pricing and is the last thing an employer will want for purposes of potential liability. Consider such documents “Exhibit A” in any lawsuit filed against the company by the employee’s prior employer.

(Limit Written Communications With the Prospective Employee)

The new employer should never communicate in writing with the prospective employee at his or her place of employment. Therefore, no e-mails to or from the prospective employee should be sent to the employee’s computer system at work or to a personal account since those e-mail communications can be traceable and discoverable in litigation. Not only are such e-mails traceable and discoverable, but they also create the presumption that the new employer is trying to steal the employee during work hours.

Similarly, ensure that all discussions with the potential new employee are conducted after regular business hours or, if this is not possible, then during his or her lunch hour or on the employee’s day off. Interviewing the prospective employee during regular business hours gives weight to an argument against the employee that he or she is breaching a fiduciary duty by working for a competitor while working for his or her existing employer.

(Have the Prospective or New Employee Sign a “No Prior Restrictions” Agreement)

The new employee should sign an agreement representing, among other things, that he or she is not a party to any agreements or other obligations restricting his or her ability to work with the new company. Additionally, the employer may want the employee to warrant that they do not possess any trade secrets of his or her former employer and, further, to indemnify the company if the employee breaches any of the warranties. If this turns out not to be true, the company can still use this as evidence that it acted appropriately. Further, if the employer is sued by the employee’s prior employer, these provisions will allow the employer to terminate the employee’s employment and may allow the employer to seek indemnity from the employee if it incurs any damages.
(Instruct Prospective or New Employees Not to Use Prior Employer's Documents, Information or Property)

Make certain the new hire has “clean hands” before commencing employment. The employer should provide a memorandum to the new employee indicating that the employee is not to use or disclose to the new employer any legally protected trade secrets and that the employee should not retain or use any documents or property of the former employer. This means that all documents, computers, PDAs, flash drives and other property belonging to the former employer has been returned intact.

The employer should also instruct the employee in writing not to download, copy or e-mail any documents or files of the former employee before departing (or thereafter) absent express permission from the former employer.

Similarly, the employer should instruct the employee to purge all information relating to his former employer from any personal computer he or she may have. The employee should likewise return all documents and property that may be in his or her possession at his residence to his former employer. This would include not only confidential documents, but also cellular phones, Blackberrys, computers, credit cards, etc.

The new employer should also instruct the new employee not to “warehouse deals” before resigning, or to advise his clients that he is leaving to work for a competitor while still employed. Additionally, instruct the employee not to engage in any work for the new employer before resigning.

Finally, instruct the employee not to solicit employees of his/her former employer and to refrain from discussing the employee’s business activities with his or her former coworkers.

(If Possible, Assign the Employee to New Accounts and Territories)

Effort should also be made to have the new employee work for clients outside of his or her own former book of business. In other words, the new employee should not be working on only the clients he or she might have brought over from the prior employer. Similarly, consider a phase in of solicitation activities for the new employee.

While it may not be possible in every situation to enforce all the measures that have been suggested throughout this section, the more safeguards a new
employer uses at the beginning of an employment relationship, the more protection that employer will have if the hiring is brought into question. Thus, an employer would do well to cover all its bases from the outset (including at the interview stage), and then later enforcing the measures that are applicable.

I) **Benefits of an Orientation Program for New Employees**

To the extent you believe there is any relationship between an employee’s commitment to the company and the company’s performance, a new employee orientation program is an excellent first step in maximizing that correlation and getting the most from your employees. Generally, and particularly in this competitive work environment, employers feel that they do not have time to properly orientate new employees. However, this sends a bad message to the employee from day one. A full orientation program can communicate to new employees the values, beliefs, culture and history of the company, all of which can instill upon new employees the desire to be committed to the company and its operations.

In almost every case, new employees know very little about the company and probably know next to nothing about the company’s history or its key accomplishments. They are not familiar with their coworkers, supervisors, job responsibilities, expectations or what issues may be important to the company. There will never be a better opportunity to shape impressions and expectations upon new employees than at the beginning of their employment. And, the fact that you take the time to inform the new employee about the company sends an important message to the employee that they are important, which is never a bad message to convey. Rest assured, a new employee will receive an orientation, whether the company provides one or not. If the company does not provide one, a disgruntled employee who has no use for the company or its goals may provide the new employee with misinformation and bad advice. This should be avoided at all costs and can be a one way ticket to hiring a very unproductive and non-committed employee.

In order to make an orientation more productive, you should provide the new employee with, among other things, an explanation of the company’s expectations, policies, opportunities for advancement, introduction of coworkers and to the operations within and outside new employee’s specific department. It is also strongly recommended that new employees be introduced not only to their fellow coworkers, but also to supervisors and managers so that they feel that they are being welcomed into the company. The orientation is also a good time to stress the importance of safety at the company. Obviously, it is in the company’s interest that all employees work in
a safe environment and go home at the end of the day. Therefore, a message of safety is always a good message to send to new employees and communicates that the company cares about them.

Orientation programs can also be expanded to include existing employees. It is never a bad idea to inform all employees of the company’s major accomplishments and goals. Not only does it instill an element of pride within the workforce, it also illustrates to the employees that the company thinks that they are important and an integral part of the company’s success.
CHAPTER VII

PROTECTING CONFIDENTIAL INFORMATION – RESTRICTIVE COVENANTS

Today’s business environment is substantially different from the past. In the past, an employee was likely to stay with one or two employers over his or her professional career. Today, employees frequently move between companies, many times to work for direct competitors in the same industry. Therefore, in today’s dynamic business world, it is important to ensure that your company maintains its competitive advantage in its industry. Whether you are involved in sales, medicine or providing specialized services, there are many tools that employers can use to protect their assets and competitive advantage.

A) The Basics of Restrictive Covenants

Restrictive covenants are frequently used in today’s business environment. They are traditionally signed at the beginning of an employment relationship to govern the employee’s conduct post-termination. They also bring to attention the competing interests between the employer and the employee. On the one hand is the employer’s interest in protecting its confidential and trade secret information, as well as to preclude a former employee from unfairly competing against it or soliciting its employees to leave after the relationship ends. On the other hand is the employee’s legitimate interest to use his or her skills, knowledge and expertise to the maximum allowable extent to earn a living. The restrictive covenant balances those competing interests.

An employer must initially determine what type of restrictions most appropriately protect the company. There are three major types of restrictive covenants: (1) covenants not to compete; (2) covenants not to solicit; and (3) covenants not to disclose confidential information. Covenants not to compete are the most common and are certainly the most difficult to enforce.
While a properly drafted restrictive covenant is enforceable in Illinois, they are looked on with disfavor by the courts because they restrain free trade in a fashion inconsistent with the notion of a free marketplace. They are closely scrutinized and will be enforced only if the employer’s right is clear. Some states, such as California and Colorado either prohibit restrictive covenants altogether or only allow them in very rare circumstances. As a general rule, restrictive covenants are enforced in the context of a written employment agreement, if they are supported by adequate consideration, they are reasonably tailored to protect the employer’s legitimate business interests, and so long as they are reasonable as to scope and reach. In light of the close scrutiny placed on restrictive covenants by the courts, it is advisable to confer with an employment attorney before having employees enter into them.

*(Geographic Scope Must Be Reasonable)*

In order to determine whether a covenant’s geographic scope is reasonable, courts tend to look at whether the restricted area corresponds with the area in which the employer is doing business. This is determined on a case-by-case basis. For example, a covenant with a very limited geographic scope may be held to be unenforceable in one case, where a nationwide restrictive covenant may be held to be enforceable in another case. Employers must evaluate the nature of their own particular business to determine whether the scope of proposed covenant is appropriate. If you are a local or regional company, you don't want to use a national non-compete. It is important to note, however, that a growing number of companies servicing national and global markets may have strong arguments for the enforcement of covenants with nationwide restrictions.

*(Temporal Scope Must Be Reasonable)*

The primary factor in determining whether the temporal scope of a restrictive covenant is reasonable is the amount of time it takes an employer to develop a relationship with its clients. Courts are more likely to enforce covenants with time period restrictions related to the amount of time the business has invested in developing clients. While this analysis is also fact specific to each case, restrictions of up to two years have generally been enforced in Illinois.
(Prohibited Activity Must Be Narrowly Tailored)

The specific competitive activities prohibited by a restrictive covenant must be described with particularity in order for a court to determine whether its restrictions are more extensive than reasonably necessary to protect the employer’s legitimate business interests. As a rule, the restriction must be consistent with the specific industry in which the employer is engaged, as well as to the specific functions in which the employee and employer are involved. Therefore, in drafting covenants, it is best to ensure that the activity being prohibited is narrowly described to the industry and job functions of the employee. Otherwise, it may be invalidated by the court if enforcement is challenged. In fact, courts do not hesitate to invalidate restrictive covenants that simply preclude a departing employee from working “for a competitor,” as such a restriction, while understandable, is vague and too broad to be reasonable.

(Covenant Must Involve a Protectible Interest)

In order to secure the protection of a restrictive covenant, the employer must have a “near-permanent” relationship with its customers and must show that, but for the employment, the employee would not have had contact with the customers that the covenant protects. In Illinois, courts use two tests to determine whether a customer relationship is “near-permanent”: (a) the “nature of the business” test and (b) the “seven objective factor test.” The nature of the business test is premised on the concept that certain types of businesses are more likely to develop permanent relationships and/or customer loyalty, than others. These types of businesses often provide a unique product or personal service. A business engaged in professional services or providing a unique product or service is typically more successful in enforcing a covenant than is a business engaged in ordinary sales, where customers use many suppliers in a competitive industry, often simultaneously, to satisfy their needs.

When the seven objective factors test is utilized, the following factors are considered in determining if a “near-permanent” relationship exists: (1) the number of years required to develop the customer; (2) the amount of money invested to acquire the customer; (3) the degree of difficulty in acquiring the customer; (4) the extent of personal contact with the customer by the employee; (5) the extent of the employer’s knowledge of its customers; (6) the duration of the customers’ association with the employer; and (7) the continuity of the
employer-customer relationship. “Near-permanent” relationships with clients have been used as a basis to enforce a restrictive covenant, for example, where the company has developed an extensive marketing system, and the employee had no prior contact with the industry. “Near-permanent” relationships with clients have generally not been found to support enforcement in businesses engaged in sales.

No “near-permanent” relationship exists where the employer’s business is sales of a non-unique product, its customers also do business with its competitors and its customers are generally known to the competitors, or are ascertainable by reference to telephone or specialized directories. Similarly, employers generally do not have a protectible interest in customers in highly competitive fields, or when the customers were the employee’s, that is, brought to the business by the employee in the first place. Restrictive covenants are not typically enforceable in these situations.

(There Must Be Adequate Consideration)

Restrictive covenants, like any other contract, must be supported by consideration (i.e., a reciprocal benefit bestowed or a forbearance given). When the covenant is included as part of the initial offer of employment (which is the case most of the time), the initial agreement to provide employment (as well as the promise to pay a salary or wages to the employee) is usually considered adequate consideration⁸. However, the situation becomes a little more complicated if an employer attempts to have an existing employee sign a restrictive covenant. A salary increase, promotions and bonuses which are conditioned on the employee signing the restrictive covenant will in virtually all jurisdictions be adequate consideration to enforce the restrictive covenant. In many states, without such enhanced consideration, a restrictive covenant signed after employment has begun will not be enforced.

The requirement in Illinois is more relaxed because Illinois is an “at will” employment state. Continued employment for a “substantial period of time”

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⁸ This general rule has been called into question, at least in the state courts located in Cook County, Illinois. In 2013, the Illinois Appellate Court for the First District held in Fifield v. Premier Dealer Services that, unless an employee is employed for more than two years, an employee must be given additional consideration beyond employment for a restrictive covenant to be enforceable. In effect, this ruling means that Illinois employers in Cook County must provide additional consideration beyond hiring the employee, such as a non-refundable signing bonus, in order to enforce a restrictive covenant against an employee who has been employed less than two years.
has been held to be sufficient consideration for a restrictive covenant even if signed after the employee has begun work. However, what constitutes a “sufficient period of time” has been a subject of dispute. In Illinois, two to three years of continued employment has been held to be a “sufficient period of time,” whereas seven months has not.

B) **How to Structure a Restrictive Covenant to Maximize Protection of Employer’s Competitive Advantage**

In addition to drafting a restrictive covenant in a narrow fashion in order to protect the employer’s legitimate business interests (as discussed above), there are a number of other things that employers can do to draft restrictive covenants that are both enforceable and broad enough to effectively protect the employer’s confidential trade secret information. Additionally, employers should always draft their restrictive covenants with enforcement in mind. Therefore, the company, with the assistance of employment counsel, should take some time to determine whether a court will strike the restriction because it is too broad, or whether a lawsuit relating to the restrictive covenant will be brought in a favorable forum. Here are some additional recommendations to make restrictive covenants more likely to be enforceable.

*(Secure the Promise Not to Compete During Pre-Hire Negotiations)*

It is much easier to secure a legally-binding promise or agreement not to compete from an employee during pre-hire negotiations compared to trying to secure one after an employee has already begun employment. If a restrictive covenant is obtained during employment (as opposed to before or as a condition of), courts will generally look to see whether valid consideration was given in exchange for the covenant. As discussed above, in Illinois, continued employment for “a substantial period of time” (e.g., two or more years) has been held to be sufficient consideration for a restrictive covenant to be enforceable after an employee has already begun work. However, there is always the question of what constitutes a “substantial period of time.” This rule of law does not apply in every state.

Yet another reason why it is better to secure a pre-employment agreement not to compete is that, in some states with strong employee protections, terminating an employee for refusing to sign a confidentiality agreement or non-compete agreement can be a wrongful termination in violation of public policy.
(Consider Venue and Forum Selection Clauses)

An employer’s failure to include within an agreement the protections of a venue and forum selection clause may be outcome-determinative. Since an employee may avoid a restrictive covenant’s enforcement by rushing into a employee-favorable state or federal court, this omission may be fatal. Employers should carefully balance the merits of a forum where jurisdiction is easily obtained and where a quick hearing may be held against the importance of finding a forum that will apply favorable law.

In light of this consideration, employers should draft into their restrictive covenants venue and forum selection clauses to avoid to the extent possible the unwanted “race to the court.” If an employer can ensure that the merits of a case are heard in the forum most favorable to the employer’s arguments, the employer’s likelihood of protecting its interests will be greatly enhanced.

(Consider Choice of Law Provision)

A choice of law provision may also be essential to enforcing a restrictive covenant. A choice of law provision dictates what state law applies (regardless of where the case is filed) and certain states have more favorable laws when it comes to the enforceability of restrictive covenants than others. When inserting a choice of law provision, a drafter must pay particular attention to make sure that the choice of law provision actually helps to enforce the restrictive covenant. For example, choosing California law will clearly undercut any attempt to enforce a restrictive covenant since it is against that state’s public policy to restrict an employee from working for a competitor.

It is also important, as with all contracts, that the choice of law provision bears a reasonable relationship to the state where the employer is located or where the employment agreement has been executed. A court will likely invalidate a choice of law provision which dictates that Illinois law will apply when, for example, the employer is located in California, the employee lives in California and the employment agreement was entered into in California.

(Consider Savings and Extension Clauses)

A “savings clause” is a clause in a contract which states that if any of the provisions contained in the agreement are declared unreasonable, against public policy, or otherwise void, the agreement should still be interpreted
to bind the employee to the maximum extent provided by law. Although different states adopt different rules, savings clauses are generally recognized and serve as a substantial advantage to employers since they can rescue potentially invalid or overly broad non-compete agreements.

Equally as important is a provision that extends any restriction during an employee’s breach. For example, if an employee has a one-year restrictive covenant and litigation over the restrictive covenant takes a year, without an extension clause, the employee will be able to compete at the end of the litigation regardless of the outcome of the litigation. In short, an extension clause is a way to ensure that the employer gets the benefit of the bargain and the full protection of the restrictive covenant.

(Carefully Consider Arbitration Clauses)

Arbitration is a dispute resolution mechanism whereby parties to a contract agree to submit any disputes arising under the agreement to resolution by a neutral arbitrator or arbitrators selected through a procedure outlined in the agreement. The arbitration mechanism is authorized by both state and federal courts. The decision rendered by the arbitrators is generally final and not appealable.

Whereas many employers prefer arbitration since it involves less preliminary process and because the ultimate claim resolution is quickest, and typically because arbitrators are selected due to their expertise in a given field, arbitration is not always an appropriate means to resolve restrictive covenant disputes. For example, it does not always offer a means for securing immediate injunctive relief to stop a breach on a temporary basis and the costs of the arbitrators can be quite high, often running into the tens of thousands of dollars (whereas the filing fees in common law courts are small). Moreover, securing the testimony of a non-cooperative, out-of-state witness can be difficult, if not impossible, during an arbitration.

However, if you do use an arbitration clause, make sure that it is drafted carefully and enforceable. For example, don’t limit remedies that would be available to an employee in court and don’t require employees to pay for the costs of arbitration -- both of these could invalidate the arbitration agreement on grounds that it is unfair or unconscionable to the employee. Additionally, make sure the arbitration clause provides for adequate discovery,
is sufficiently clear, conspicuous and unambiguous and that it clearly outlines which issues can be arbitrated. Finally, make sure that language is included in the agreement that the arbitrator must render written findings of fact and a reasoned decision.

(Consider Attorney Fee and Injunction Provisions)

While not specifically related to whether a restrictive covenant is enforceable, it is prudent for employers to insert an attorney fee provision in their employment agreements stating that the employee agrees to pay all reasonable attorneys’ fees and costs incurred in enforcing the restrictive covenant. Among other reasons, simply having this provision can serve as a deterrent to a former employee who may not want to run the risk of having to pay its former employer’s attorneys’ fees if there is litigation about the covenant. Such attorney fee provisions are generally enforced by the courts. However, be aware that some jurisdictions may not enforce a one-sided provision that purports to award fees only to the employer.

The same provision should also include language expressly providing that the employer shall be entitled to an injunction restraining the breach or illegal competition by the former employee. This may further serve to protect the employer from protracted and costly litigation. In fact, very frequently these cases are, in practical effect, decided virtually upon filing if the employer seeks and is granted a temporary restraining order against the competitive activity. This order usually puts the ex-employee out of work and deprives him/her of the means to pursue the battle in the long term, especially if the agreement has an attorneys’ fees clause. Continued defense of the claim by the ex-employee becomes too great of an economic risk.

(Ensure That the Restrictive Covenant Is Executed by the Proper Parties)

Today, many companies have several affiliated or related companies, as well as assumed names that they use in their particular industries. Moreover, there are many instances where companies are purchased by others but corporate formalities are not observed. These and other similar situations pose roadblocks for employers in the enforcement of restrictive covenants. If, for instance, a restrictive covenant is in an employment agreement signed by Company A, but Company B, for whatever reason, attempts to enforce the agreement, a court is likely to hold that it is not enforceable because, among
other reasons, a protectible interest has not been sufficiently established. Likewise, if the enforcing employer is not in good standing with the Secretary of State, enforcement will not lie.

Similarly, Illinois law is clear that if a corporation uses a wrong name, it will not be permitted to benefit from the protections afforded them under the law. In fact, a corporation’s failure to properly use its corporate name will stop it from asserting a legal right to which it may otherwise be entitled. If corporate formalities are not adhered to, an employer runs the risk of having a court invalidate the restrictive covenant on basic contract principles.

(Include Assignability Provision)

Many states will not enforce a restrictive covenant when the identity of the employer has changed (e.g., by an asset sale) unless the agreement includes a consent to assignability. Therefore, make clear in any restrictive covenant agreement that the company may assign the covenant to an affiliated company or successor in interest without notifying the employee. Also, defining the employer at the beginning of the agreement to include the company’s successors and assigns is likewise recommended.

C) Other Legal Theories That Can Protect Confidential Information From Unlawful Disclosure

While a written covenant not to compete is extremely helpful in precluding a former employee from working for a competitor and unfairly competing (and therefore protecting an employer’s confidential trade secret information), all is not lost if a restrictive covenant has not been drafted and signed. There remain statutory and common law theories useful to stop a former employee from unfairly competing.

(Uniform Trade Secrets Act)

Many states, including Illinois, have adopted the Uniform Trade Secrets Act. The Illinois Trade Secrets Act (“ITSA”) prohibits the “actual or threatened misappropriation” of trade secrets. To state a claim under the ITSA, an employer must allege that specific information was: (1) a trade secret, (2) misappropriated and (3) used by the former employee. A “trade secret” is broadly defined as information that is sufficiently secret to derive economic value, actual or potential, from not being generally available to the public.
and that is subject to reasonable efforts to maintain its secrecy. Information such as customer lists and technical data have routinely been held to be trade secrets, if an employer has taken reasonable steps to ensure secrecy or confidentiality. Generally, the more an employer does to protect its trade secrets and confidential information, the more likely it is that a court will find they are protected.

**(Tortious Interference With Prospective Economic Advantage)**

Tortious interference with prospective economic advantage is a claim recognized in many states, including Illinois. In order to establish this claim, the employer must show that: (1) it has a reasonable expectation of entering into a protectible business relationship with customers, (2) the employee knew about the employer’s expectancy, (3) the employee intentionally interfered with the employer’s expectancy, and (4) the employer suffered damages as a result of the interference. This tort frequently results where an employee is asked to solicit business or contact potential customers, but the employee decides to leave (or has left), and underbids his former employer or uses unfair means to take away the potential client. Such behavior may give rise to the tort of tortious interference with prospective economic advantage.

**(Employee’s Breach of Fiduciary Duty of Loyalty)**

Most states also recognize some form of fiduciary duty and/or duty of loyalty attendant to the employment relationship. Pursuant to this duty, courts have placed limits on what employees can do pre-resignation in preparing to compete post-termination. For example, usurping business opportunities or soliciting customers while still employed has been held to violate these duties.

In order to prove a breach of fiduciary duty claim, however, an employer usually will have to show that the employee went beyond modest and reasonable preliminary competitive activities (such as interviewing and communicating with the competitor) and actually in some way commenced doing business as a rival concern while still employed. This tort typically arises when an employee informs his customers that he is leaving to work for a competitor and begins soliciting those customers to send business to the competitor. Breach of fiduciary duty claims against former employees rise and fall on whether the employer can show that improper activity took place while the employee was still employed.
(Tortious Interference With Contract)

This claim is very similar to tortious interference with prospective economic advantage, except that it applies to existing contracts between the employer and third parties. An essential element of this cause of action is the existence of an enforceable contract. This cause of action can effectively be used by employers against former employees who, subsequent to leaving their employ, use confidential information, such as pricing information, to steal existing customers of the employer away to their new employer. This cause of action may also be available to sue the new employer if it can be shown that the new employer knew of the existence of a restrictive covenant and still interfered with that contractual provision.

(Tort of Unfair Competition)

Some jurisdictions, including Illinois, recognize a common-law tort of “unfair competition.” Although sometimes limited to situations where the former employee or new company “passes off” products as those of the former employer, other states extend the tort to a wider range of conduct, including the misappropriation of confidential information. In essence, it is unfair to use confidential information acquired from a former employer and use that information in a competing business. In Illinois, where the claim arises out of alleged interference with third-party relations (i.e., customers), the same elements and proof are required for an unfair competition claim as are required for a claim of tortious interference with prospective economic advantage.

(Computer Fraud and Abuse Act)

The Computer Fraud & Abuse Act (“CFAA”) is a federal statute that prescribes criminal and civil penalties, as well as injunctive relief, to halt the unauthorized access of computer information. CFAA has become an increasingly powerful tool in litigation for employers to assert continuing control over departing employees.

In order to prove a CFAA claim, an employer need only show that the employee: (1) either fraudulently or intentionally accessed a protected computer “without authorization or [in excess of] authorized access,” and (2) that as a result of such conduct, caused damages of at least $5,000. An employer need not prove that the information accessed by the former employee was a trade secret or even confidential or that the employee is using or threatening to use the information. Therefore, any time a departing employee “accesses” information
from company computers after accepting employment at a new company (or even after interviewing), or downloads materials from the company and forgets to return them before starting the new job, the former employee faces a risk of exposure to a CFAA claim. It is for this reason that employers should have clearly articulated policies on what conduct is prohibited with respect to the company’s technology resources.

D) Practical Pointers to Protect Confidential Information

(Employee Handbook Provisions Addressing Trade Secrets and Confidential Information)

Confidentiality provisions in an employee handbook are a powerful tool. Written properly, an employee handbook with a confidentiality provision demonstrates an employer’s efforts to maintain secrecy, while at the same time establishes that the employee knew that the information was confidential. As such, the handbook policy should identify the trade secret information (e.g., customer lists, pricing information, etc.) and should specifically prohibit employees from using or disclosing the information during and subsequent to their employment. As discussed below, though, just having a written policy may not be enough.

All employee handbooks should also have an accompanying acknowledgement of receipt for the handbook, indicating that the employee has read and understands its contents. In certain circumstances, it also may be prudent to actually have the employee sign a separate acknowledgment form confirming that they have read and understand the employer’s confidentiality policy.

It may also be prudent to periodically distribute memoranda reminding employees of their obligation to maintain the confidentiality of documents and information. Doing so is particularly important if the confidentiality provision of the employee handbook is ever updated. The more evidence there is to show that the employer’s information is confidential (and that the employee knew it and agreed to it), the easier it will be for the employer to enforce that understanding in a court of law.

(Have Employees Execute Confidentiality and Non-Disclosure Agreements)

A solid confidentiality and non-disclosure agreement is a good way to protect your company’s proprietary and confidential information and to give your
company a contract claim against any employees who depart with important company records. The economic turmoil since 2008 has made competition stiff and, unfortunately, encouraged employees facing termination to take risks in order to obtain employment elsewhere. As a result, more and more employees are taking employers’ trade secret information to their new employment. Confidentiality and non-disclosure agreements executed by employees at the commencement of their employment can be an important tool in protecting documents and information that are important to your company from getting in the hands of a competitor.

(Limit Access to Trade Secret and Confidential Information)

An employer should limit access to its confidential documents and information. If every employee has access to such information, the employer will have a much harder time convincing a court that the information is confidential. Therefore, an employer should set up mechanisms whereby only those employees with a need to know the confidential information actually have access to that information. Otherwise, the employer is significantly disadvantaged at claiming certain information is a trade secret or confidential. Additionally, trade secret and confidential information should not be left unprotected or open to public view.

(Implement Computer Security)

Access to computers, as well as information about the company, should be password protected. Passwords should be themselves confidential, and only certain users should be able to access certain databases. An employer should also consider placing a computer use and technology security policy into its handbook memorializing that passwords are confidential and should not be exchanged or distributed. If possible, software and database access should be monitored and routine backup tapes should be maintained and marked confidential.

(Implement Document Handling Procedures)

Any documents that are confidential should be marked with a visible warning that they are confidential and proprietary. If possible, confidential documentation should be printed on colored or dark paper to discourage photocopying. Confidential documents should also be separated from non-confidential documents and kept in separate, locked storage cabinets.
It is important to differentiate between documents and things that are confidential and proprietary and those that are not. Indiscriminate claims of confidentiality over documents clearly not falling into such categories is inadvisable as doing so calls into question the claim of privilege and confidentiality, even those documents that are legitimately claimed by the employer as being confidential.

**(Train Company Employees)**

It is important to train employees and new hires basic security awareness, the company’s policies and procedures on security, their responsibilities for the security of company property and procedures for dealing with the theft or misappropriation of company secrets. This training should be done on an annual basis and records should be kept memorializing the training given to the employees.

**(Protect Company Information Upon Employee’s Termination)**

Once it is known that an employee is resigning or otherwise being terminated, it is essential to limit and/or disable all accounts and access privileges of the departing employee, especially those areas that contain confidential or restricted information. This can be done by changing access codes and rights, as well as discontinuing any remote electronic access for the employee. These steps are crucial since a vast majority of damage to company property is usually done when an employee knows they will be departing.

**(Examine Departing Employee’s Computer)**

If the company has any suspicion that the employee has acted improperly or misappropriated the company’s confidential information, it is prudent to remove the employee’s computer from active use and examine the employee’s computer or laptop to determine if the employee has accessed or copied sensitive information in recent months. However, great care should be taken and this examination should only be done by a trained computer forensic professional since even turning on a computer can impact the ability to prove that a departing employee has misappropriated company information. For further information and guidance on this issue, please review Chapter XIII, Section D.
How to protect your business from liability and comply with state and federal employment laws

(Take Immediate Action Once It Has Been Discovered That a Former Employee Is Competing)

Being proactive is also critically important considering the nature of restrictive covenant actions. In almost all cases involving violations of restrictive covenants (and where a former employee goes to work for a competitor), the employer is forced to seek immediate injunctive relief in order to protect its trade secrets. In virtually all jurisdictions, the employer will need to show irreparable harm if the former employee is not immediately enjoined from working for the competitor or using confidential trade secret information. To that extent, an employer who takes a “wait and see” attitude will have a difficult time proving to the court that the employer will suffer immediate, irreparable harm. As such, the employer should always remember that proactive, aggressive litigation strategies are more likely to succeed. If that were not bad enough, an employer who develops a reputation for not enforcing its restrictive covenants will embolden and encourage dissatisfied employees to leave and violate the employer’s restrictive covenant.

(Do Not Materially Breach the Employment Contract)

An employer will be unable to enforce an otherwise enforceable restrictive covenant if it materially breaches the employment contract. As a general rule, where a party has materially breached a contract, it cannot take advantage of the terms of the contract or recover damages from the other party to the contract. A material breach is one described as a lack of performance of a term without which the parties would not have entered into the agreement. Material breaches have been found to be, for example, the employer’s refusal to pay an employee’s salary, refusal to provide an employee’s promised benefits, and the holding of secret meetings without giving notice to shareholders who have a right to attend shareholder meetings.

Moreover, when an employer terminates an employee in bad faith, a court will likely not enforce the restrictive covenant. Accordingly, employers should ensure that they comply with the terms of the employment agreement including, but not limited to, paying the employee all the money and benefits to which he or she is entitled.
In order to establish that a company has a protectable trade secret, it is well-settled that the company take reasonable measures designed to protect and maintain the secrecy of the information at issue. In other words, unless the company implements reasonable measures to protect the trade secret, a court will likely find that the relevant information is not a trade secret worth protecting. In this regard, employers should routinely conduct an audit to ensure that they are taking necessary steps to protect their valuable information. The specific scope of a trade secret audit varies depending on the industry, as well as the assets the company is seeking to protect. However, in general, an audit identifies the assets and reviews the employees who have access to those assets. Additionally, an audit will help the company identify how it is securing those assets and what procedures and protocols are in place to maintain and secure those assets. A company’s efforts to maintain its trade secrets should be ongoing and reviewed on a regular basis.
CHAPTER VIII

CLASSIFICATION OF WORKERS

An issue of great concern to all employers is whether they are properly complying with the Fair Labor Standards Act (“FLSA”) and state laws when it comes to compensating employees for hours worked. An employer’s failure to properly classify its workers can have a detrimental financial impact on a company, subjecting it (and its owners) to liquidated damages, back pay, fines, and attorneys’ fees. Of particular concern is: (1) whether the employees are exempt or nonexempt for purposes of overtime compensation, and (2) whether nonexempt employees are properly receiving at least the minimum wage for hours worked and time and one-half their regular rate for hours worked over 40 in one week. Another area of increasing importance is whether to classify a worker as an independent contractor (as opposed to an employee) and what legal ramifications that classification may have for the employer.

A) Classification of Employees – Exempt v. Non-Exempt

Under the FLSA, employees are generally eligible for overtime after working over forty (40) hours in a work week if they are not exempt. Put another way, if an employee is exempt, he or she can work beyond 40 hours a week and not be entitled to overtime. The FLSA establishes threshold tests as to whether an employee is exempt from overtime. First, if an employee earns a salary less than $455.00 per week (as opposed to being paid hourly), the employee does not qualify for salary rate and is eligible for overtime. Second, if the employee does not fit into an exemption classification, as defined by the U.S. Department of Labor, the employee is also entitled to overtime. Some of the different exemption classifications are: (1) highly compensated, (2) executive, (3) administrative worker, (4) professional, and (5) outside salesperson. While these exemption classifications are defined and explained in the statute and accompanying regulations, an employer should be very careful because the exempt status is determined by the actual job duties that the employee is performing. The employee’s job description, title, or salaried status is not controlling for the purposes of classification.
B) Dangers of Not Classifying Employees Correctly

Employers cannot ignore the FLSA. Unlike most other laws, the FLSA effectively places the burden of proof on the employers to prove that the employees are properly being compensated. An employee only needs to allege that he or she worked overtime, that he or she was not compensated for that overtime and then the employer has to prove that such employee was properly compensated.

The penalties, fines and liability that attach to employers who ignore the FLSA or misclassify their workers can be onerous. Specifically, an employer who fails to pay its employees the minimum wage or overtime specified by the FLSA is liable to the employee for the amount of unpaid wages. Additionally, an employer who fails to make the required minimum wage or overtime payments may also be liable to its employees for liquidated damages equal to the amount of the unpaid wages or overtime, essentially, “double back pay.” If that were not enough, an employer who willfully violates the FLSA is liable for a fine of up to $10,000, and multiple violations of the FLSA by an employer can subject the employer to imprisonment for each later conviction. Finally, employees who prevail in an FLSA lawsuit against their employer are entitled to collect their attorneys’ fees, which is precisely why there has been an explosion of FLSA lawsuits in the recent past.

C) How to Stay Out of Trouble

There are a number of things that employers can do to help prevent employees from performing unauthorized work, thereby minimizing an employer’s exposure to liability. In short, employers must take steps to ensure that work they do not want to pay for is not actually performed by employees.

First, the best defense to FLSA claims is to maintain accurate time records. The time clock seems to be the most reliable and respected manner of tracking hours. Another method of tracking hours is to have the employees submit timesheets, but this could lead to abuse if not properly monitored.

Second, and as discussed earlier, an employer should establish a policy or rule against unauthorized work. That policy, in turn, must be enforced through disciplinary measures, if necessary. Third, the company should also adopt a clear time and attendance policy that outlines when employees are allowed to
work and should also emphasize that the policy is the authoritative guide on working time. This policy should send a clear message that employees are not to work “off-the-clock,” even if a manager tells them to. This policy should also prohibit the falsification of payroll records (over reporting or under reporting) and obligate employees to inform the employer if they observe such behavior.

Fourth, it is prudent to require managers to review weekly time entries to make sure that the employees are not only properly recording their time, but that the employees are being compensated appropriately for that time. This also has an added benefit of monitoring the profitability and efficiency of the workforce. More importantly, it ensures that employees are not working longer than they are supposed to pursuant to the policy.

Fifth, not only is it important to train managers and employees about the proper ways to record working time, it is also important to train the payroll department to identify questionable timesheets by having the managers describe to them what types of work the employees perform and what hours the employees generally work. This is another check and balance measure that employers can implement to ensure that the employees are being properly compensated and to avoid a FLSA lawsuit.

Sixth, employers should make sure that any disciplinary action they take against an employee for performing unauthorized work is applied to all employees, regardless of their job position. Employers have a better chance of defending against an FLSA lawsuit if they can prove that they made a sincere attempt to prohibit their employees from working “off-the-clock” and if they are able to show that they uniformly enforced their working time policies.

(Special Note on Mobile Communications Technology)

The widespread use of mobile communications technology, such as cellular phones and PDAs, has resulted in many companies allowing and encouraging their employees to be accessible and/or work after hours. By way of example, many employers issue Blackberrys and expect their employees to be available and to respond to messages after working hours. For exempt, salaried employees, this is not a problem. However, by encouraging, or even acquiescing to such conduct for non-exempt employees, employers may be exposing themselves to overtime and other wage-related liability under the FLSA.

Under the FLSA, an employer is obligated to pay employees for work the employer has “suffered or permitted,” regardless of whether the employer requested that
the work be performed. New mobile communications technology certainly makes it easier for employees to argue that they have worked after regular work hours and, therefore, that they should be compensated. In the past year, several FLSA lawsuits have been filed in this regard and this trend is likely to increase as companies become more dependent on mobile communications technology.

In order to reduce exposure to such FLSA claims, employers are encouraged to undertake several measures. First, employers should only issue Blackberrys or similar PDAs to salaried, exempt workers and not hourly employees. Second, employers should only implement and enforce policies that prohibit non-exempt employees from using such devices for work purposes outside of work hours. Third, employers should implement and enforce agreements with hourly employees that set parameters for when and how the employee will use such devices, and detail how much work they will perform in exchange for additional compensation.

D) How Should Employers Correct Misclassifications?

FLSA litigation often results from employers’ misconceptions that if they pay their employees on a salaried basis, or if they have a policy prohibiting unauthorized overtime, they cannot run afoul of the FLSA. Another area that is problematic is where employers allow for deductions from the pay of exempt employees for absences or rule violations. Both these scenarios can land the employer in hot water.

Employers need to take a hard look at what their employees are actually doing at work, and not just rely on their job descriptions or job titles. Employers also need to periodically examine their pay practices to make sure they can demonstrate that non-exempt employees are being paid for all hours worked and that exempt employees are being paid on a “straight salary” basis without improper deductions from their pay.

Once a problem with an employee classification or pay practice surfaces, it is important to investigate whether the problem is widespread (i.e., whether there are additional victims) and how much money is involved. How much money involved is generally dictated by the length of time the pay practice has been going on, as well as the number of employees the pay practice affects. It is equally important that any investigation and remedial action is done in a way that does not send employees running to their attorneys. Taking a proactive
step to assess potential classification and pay problems in a confidential manner will prevent you from becoming engulfed by an FLSA lawsuit.

E) Use of Independent Contractors

The legal landscape involving independent contractors has dramatically changed over the last several years. For decades, the use of independent contractors by companies was rarely challenged, and companies were willing to risk the slight chance that they would have to defend a lawsuit that they had misclassified certain employees as independent contractors as opposed to employees. Recently, however, governmental agencies have increasingly cracked down on the use of independent contractors on grounds that employers are improperly classifying workers as independent contractors in order to avoid taxes and other employment obligations. The use of independent contractors and the related liability issues, therefore, continue to be crucial matters for employers. This section will address the factors favoring and disfavoring the use of independent contractors, the various tests used in determining an individual's status as an employee or independent contractor and provide a checklist of questions to determine whether a worker is properly classified as an independent contractor.

(Benefits of Independent Contractors)

The use of independent contractors can present an attractive option to many businesses, especially smaller businesses who may not have the resources or capital to maintain the overhead associated with employees. A business that validly uses independent contractors avoids numerous obligations imposed by the Internal Revenue Code, as well as certain obligations to comply with federal and state employment-related statutes. For example, employers are not obligated to withhold FICA tax to independent contractors and independent contractors are specifically excluded from coverage under state unemployment insurance laws, overtime and minimum wage requirements of the Fair Labor Standards Act, as well as certain employment statutes such as Title VII, the ADEA and the ADA. Therefore, the labor costs associated with using independent contractors versus employees is significantly less.

In addition to the labor cost savings, there can be additional financial reasons to utilize independent contractors. For example, independent contractors can be excluded from employer sponsored retirement and insurance programs.
And since independent contractors are generally unsupervised, a company can save costs associated with an employee workforce, such as office space, utilities and support staff, hiring managers and supervisors and other overhead costs.

Finally, independent contractors are also helpful in times of economic duress. By way of example, where a business has seasonal peaks and valleys in its need for workers, hiring independent contractors is a good way to avoid the need to continuously hire and then terminate employees, which carries with it significant costs and exposure under employment laws. Similarly, since independent contractors have special expertise and knowledge, hiring them usually is more efficient and cost-effective since training expenses are minimized.

(Dangers of Independent Contractors)

Despite the benefits, numerous factors weigh against the use of independent contractors. Over the last several years, there have been a wave of regulatory and legislative initiatives at both the federal and state level seeking to reduce the use of independent contractors, such as the Illinois Employee Classification Act. Companies have been faced with substantial judgments brought on behalf of classes of workers who have successfully established that they were common law employees and improperly classified by their employers as independent contractors.

One of the greatest risks businesses face by using independent contractors is that the relationship may be re-characterized by the Internal Revenue Service or other federal or state agencies. In those circumstances, an employer can be liable for federal income tax, the employer’s share of FICA, state and local income tax, state unemployment compensation, disability insurance program, state employment tax, as well as interest and penalties. Even criminal penalties can be assessed for willful violations of improperly classifying employees as independent contractors.

Another drawback is that if an agency deems an independent contractor to be an employee, that employee would be entitled to all the employer-sponsored benefit plans, including health insurance and all the other benefits that are either mandated by law or voluntarily offered by the employer. Needless to say, damages resulting from an employer’s denial of those benefits to an employee can be substantial.
(Different Tests to Determine Independent Contractor Status)

Unfortunately, there is no standard test in order to determine whether an independent contractor is properly classified as such. Various different tests have been adopted by different federal and state agencies, as well as the courts, to determine whether an independent contractor relationship truly exists. In other words, the legal test to determine independent contractor status varies according to the law being enforced. However, there are generally three types of tests used by different agencies, all of which essentially boil down to whether or not the employer “controls” the independent contractor: (1) right to control test, (2) relative nature of the work test, and (3) economic realities test.

The “right to control” test basically asks whether a company or the individual providing the services has the right to control the manner and means by which the results are to be accomplished. Several factors considered in this analysis are: (1) the worker’s control over hours of work, (2) the authority of the worker to hire employees or assistants without company approval, (3) supervision of the individual by the company, (4) possibility for earnings or profits by the worker, and (5) the worker’s opportunity to perform work for others.

The need to supplement the “right to control” test when its application proves inconclusive has been acknowledged. Generally, in these circumstances, the “relative nature of the work” test is applied. This test considers: (1) the worker’s requisite skill, (2) whether that skill is an integral part of the employer’s business, (3) whether the services rendered are a regular part of the employer’s regular business, (4) whether employment is continuous or intermittent and whether its duration is sufficient to constitute continuance services, rather than contractually related to a particular job, and (5) whether the worker functions in the capacity that allows for the distribution of the risk of injury.

Finally, the test considered by most courts in determining whether an individual is an employee for purposes of the Fair Labor Standards Act is commonly referred to as the “economic realities” test. The factors considered in this test are: (1) the nature and degree of the alleged employer’s control as to the matter in which the work is to be performed, (2) the worker’s opportunity for profit or loss, (3) the worker’s investment in equipment or materials required for the task, or its employment of its own workers, (4) whether the services rendered by the worker required a special skill, (5) the degree of permanency and duration of the working relationship and (6) the extent to which the service rendered is an integral part of the alleged employer’s business operation.
(Checklist to Determine Independent Contractor Status)

Whether a worker is an employee or independent contractor is a very fact specific inquiry. The following is a list of non-exhaustive questions that, if answered in the affirmative, are more likely to indicate the existence of an independent contractor relationship (as opposed to an employment relationship):

- Does the worker provide services to the public at large?
- Does worker have his or her own office?
- Does the worker advertise his or her services in newspapers, yellow pages, journals or other media?
- Is the worker able to retain assistants without the employer’s approval?
- Does the worker furnish his or her own tools and equipment?
- Does the worker have a certificate of incorporation, partnership or other business filings?
- Does the worker file his or her own federal income tax schedules every year?
- Has the worker made a significant investment in the business, for example, purchasing or leasing of a building or office space?
- Does the worker hold any particular license or other specific skills that the company does not maintain?
- Does the company file and submit 1099 forms for the worker’s compensation?
- Does the worker get paid on a project basis rather than on a hourly, weekly or monthly basis?
- Does the worker’s invoice the company for the services provided?
- Is the worker allowed to dictate the when, where and how of the particular project?
- Does the worker generally set his or her own hours?
- Is the worker allowed to work off the company’s premises?
- Is the worker allowed to work for more than one company at a time?
- Is the worker insulated from being terminated as long as he or she produces the result under the contract’s specifications?
- Does the worker have his or her own business cards and marketing materials?
• Is the worker free from training by the company?
• Does the worker perform a function for the company that other employees at the company are unable to perform?
• Does the worker have his or her own federal identification or IDES number?
• Is the worker not entitled to benefits from the company?

Again, assuming that the answers to most of these questions are “yes,” a company has a better chance of establishing that a worker is truly an independent contractor as opposed to an employee. Of course, detail and care should be taken when entering into an independent contractor relationship. Simply naming or classifying the relationship as an independent contractor relationship alone will be insufficient, as courts and agencies will look well beyond the actual written agreement between the parties to ascertain the true nature of the relationship. As such, companies should always consult legal counsel before finalizing any of their independent contractor agreements or entering into an independent contractor relationship.

F) Responding to Government Audits

In this highly regulated business environment, it is just a matter of time before a company is audited by a federal or state agency. In Illinois, both small and large companies have been the target of various audits by agencies such as the Illinois Department of Employment Security and the U.S. Department of Labor. This section attempts to provide companies with initial information and general recommendations to follow in the event that they are audited by a governmental agency. Keep in mind, however, that it cannot be stressed enough that, upon notice of an audit or investigation, a company should immediately contact and involve their attorneys to properly respond to the audit.

(Responding to an Illinois Department of Employment Security Audit)

In an effort to increase the amount of unemployment insurance taxes paid by Illinois employers, the Illinois Department of Employment Security (the “IDES”) has stepped up its enforcement of audits on the issue of proper withholding of payroll and income taxes, especially for those workers that may be improperly classified as independent contractors. Such audits are frequently triggered by complaints from disgruntled workers, but they can also be done randomly by the IDES.
According to the IDES, the classification of an individual as an independent contractor, rather than an employee, means less money for the unemployment insurance compensation fund, and as a result, such classifications are closely scrutinized by the IDES. Under the IDES’ rules, it is the actual work done by the individual that determines his or her employment status, not how the parties classify themselves. Therefore, as you can imagine, it is irrelevant whether or not the parties have negotiated an independent contractor agreement. Instead, it is important to determine whether or not the worker is performing an integral business function of the company. The following are several steps that employers should take immediately prior to and during an IDES audit.

1. As an initial matter, employers should closely scrutinize whether anybody who is being classified as an independent contractor is truly an independent contractor under the IDES test. The IDES has a specific definition of an independent contractor that must be met in order to properly classify the worker as an independent contractor. Therefore, before an audit is even on the radar, a company should closely scrutinize its independent contractors.

2. Decide who will be the “point person” to interact with the IDES auditor. This person should be well-qualified, responsive, understand the facts and be familiar with the classifications of the employees at the company.

3. Be prepared for the IDES audit, but if necessary, you can usually request a continuance. Be courteous when requesting a continuance and have a legitimate justification for why the continuance is being requested. This will help maximize the chances that the auditor will agree to and grant a necessary continuance.

4. We also recommend that any audit be conducted off the company’s premises. If the audit is conducted on company premises, the auditor may be able to interview employees and request documents that may not otherwise be readily available if the audit is conducted offsite. Therefore, we suggest that the audit be scheduled at the company’s accountant’s or attorney’s office instead of at company property.

5. Always be cooperative with the auditor and don’t try to hide or complicate the information being provided to the auditor. Rest assured, if the auditor feels the need to obtain further information, he or she will obtain that information, and there is simply no legitimate reason to stonewall the auditor. Remember that the burden of proof is on the
company to establish that the worker is an independent contractor as opposed to the other way around.

6. IDES auditors generally audit a company for only one year at a time if the total assessment as a result of the audit is less than $5,000. This should be kept in mind, as it may effect the strategy for handling and responding to the audit. The IDES auditor can legitimately go back four years but this is highly unusual unless there are repeated assessments in excess of $5,000 each year.

7. Always contact your attorney upon receiving a notice of an audit or if the IDES auditor simply shows up at the company’s door step. Certainly, do not turn over any records until such time as you have contacted your attorney and obtained their counsel.

8. Always make copies of the documents being requested by the auditor, especially in the event that they want to make copies or take the requested files or documents with them.

*(Responding to a U.S. Department of Labor Audit)*

Similar to an IDES audit, companies must also be prepared for Department of Labor audits, both at the federal and state level. At the federal level, audits can be unannounced especially by Wage and Hour Division investigators. Unsuspecting and unknowledgeable employers who may not fully understand their legal rights may feel compelled to comply with the investigator’s requests. This is generally a mistake, as employers are usually (absent a subpoena or warrant) not obligated to turnover records or allow Department of Labor investigators into non-public areas of their premises. In addition to the steps identified above, the following are advisable steps a company should take in the event that they are on the receiving end of a Department of Labor audit.

1. Ensure that your attorney is involved from the very beginning of the audit process. This will help insure that the company provides to the investigator all responsive information and that such information is not only accurate, but that it is also favorable to the company’s position.

2. As with an IDES audit, always be polite to the investigators. Always remember that being disrespectful to any governmental agent with the power to audit and penalize is usually an unwise business decision, as they can make your life very difficult in the context of penalties and fines.
3. Do not turn over any records, answer any substantive questions or arrange for any employee interviews until you have actually talked with your attorney. Generally speaking, while the Department of Labor has the ability to obtain this information, they also have to give you adequate notice of such request so that you can properly respond and prepare for them.

4. Do not try to sway or influence your employee’s answers when responding to a Department of Labor audit. This could create the impression that you are pressuring and/or retaliating against the employees, and investigators will not hesitate to use that against the company in the context of an investigation or audit. Always tell employees to tell the truth and do not mandate them to answer questions in a certain way. And let them know that they are entitled to have an attorney present during an interview.

5. It goes without saying that every company should make sure that their time and payroll records are in order and organized before the Department of Labor conducts an audit. Your time and payroll records should be accurate and organized in such a way as to allow them to be easily viewed and inspected by either the lawyer or the Department of Labor auditor who is conducting the audit.

(Responding to an OSHA Audit)

Like any other audit, properly responding to an OSHA audit is important for all employers. If the employer does not respond to an OSHA audit in an appropriate fashion, there is a potential for adverse consequences anywhere from the waiver of guaranteed legal rights to civil and criminal liability. And, since employers typically do not receive advance notice of an OSHA inspection, preparation must be done in advance in order to properly respond to an audit.

An OSHA audit can result from a number of incidences. A large number of inspections result from employee complaints about workplace conditions. Other parties such as clients, subcontractors and independent contractors can also file formal complaints about the safety conditions at a particular jobsite which can trigger an inspection. Additionally, where there is a fatality or other significant injury at the workplace, it is very likely that an OSHA inspection will promptly follow. However, in order for OSHA to seek an inspection they must have legal probable cause to do so.
Apart from immediately contacting legal counsel, the following are some guidelines to follow prior to, during and after an OSHA inspection:

1. **Verify the compliance officer’s credentials.** When the OSHA compliance officer arrives, he or she should display official OSHA credentials. If the compliance officer does not offer his or her credentials, you should request them, as well as to request the basis for the inspection. This should be done prior to allowing the OSHA inspection to proceed. If necessary, you can contact the local OSHA office to confirm the compliance officer’s authority and credentials.

2. **Verify the basis of the inspection.** OSHA compliance officers are generally required to inform the company of the basis for the inspection. For example, in the event that OSHA inspection is a result of an employee complaint, the employer representative should ask for a copy of the written complaint (without the complaining employee’s name). Obtaining this information early can be helpful in properly responding to the OSHA inspection.

3. **Always be polite and respectful.** It is important to maintain a business-like manner with all OSHA investigators. Employers do have the legal right to demand a search warrant before allowing an OSHA inspection. However, the decision of whether to require the warrant is a business decision, and it is best made with the advice from the legal counsel, as it can aggravate an OSHA inspector, whose job is to find potential OSHA violations.

4. **Select the appropriate employer representative.** Before the compliance officer begins the inspection, the company will normally be asked to select a representative to accompany the inspector. Care should be taken to have a pre-designated representative on behalf of the company. Ensure that at least one employer representative is with the OSHA inspector at the time of the initial inspection and never leave the OSHA inspector unaccompanied to wander throughout the facility without supervision. If the workforce is unionized, a union representative may also accompany the compliance officer.

5. **Participate in the inspection with the OSHA compliance officer.** Assuming that the employer decides to allow the inspection, the next issue will involve the scope of the inspection. In other words, it must be decided by management where to allow the inspector to
go within the worksite. This is significant because, if the employer allows the inspector broader access than would be allowed to evaluate the scope of the specific complaint, the employer may be subject to additional citations for anything the inspector observes. In other words, whatever the inspector observes during an inspection that is in “plain view” is subject to citation, even if it is broader than the scope of the complaint.

6. Take notes and pictures of the OSHA inspection. In many instances, the OSHA compliance officer will take notes, pictures, and/or videotapes. Employers subject to an OSHA inspection should attempt to take a matching set of photographs from the same angle as the compliance officer and take additional notes on what the inspector saw and also notes on any items that were corrected. Additionally, employers should take additional photographs and videos from other angles that may actually support a defense to any citations.

7. Be prepared for employee interviews. During any OSHA inspection, it is very likely that the compliance officer will request employee interviews, both from management and non-management employees in order to gather facts as to whether there have been any OSHA violations. Many employers simply do not know their rights in this regard and also fail to advise the employees of their rights during such interviews. As you can imagine, if an employee gives inaccurate, incomplete or confusing responses, their statements can be a basis for civil and criminal liability against themselves and/or the employer. In this regard, all employees have the right to refuse to be interviewed by the compliance officer, as well as the right to have a person of their choice (including an attorney) attend an OSHA interview. Moreover, the employee has every right to terminate the interview at any time since the interview is completely voluntary. The employer also has the right to end any interviews if they become disruptive, such as unreasonably interfering with ongoing business operations. Because it is impossible to determine whether criminal charges will follow as a result of the OSHA interview, it is absolutely critical that legal counsel be contacted and present for all OSHA interviews with employees. Moreover, in circumstances where there may be a language barrier, it is crucial that a competent interpreter be made available by the employer to ensure that the employee being interviewed can understand the questions and respond accurately.
8. **Participate in the closing conference.** After an OSHA inspection is completed, the compliance officer will generally conduct a closing conference with the employer. The compliance officer may describe the alleged violations, however, any citations and penalties will be received later in the mail. If possible, during the closing conference, the employer should produce any records to show compliance with applicable OSHA standards. Any effort to show good faith compliance can help reduce proposed penalties.

9. **Determining whether to appeal a citation.** If your company is unlucky enough to be issued a citation for an OSHA violation, it is absolutely critical that you understand your appeal rights. In the event that you decide to appeal a citation, you must notify the OSHA area director in writing within fifteen (15) working days of the receipt of the citation. This written notification, also called a Notice Contest, must clearly state what is being contested – the citation, the penalty, the abatement or any combination of these. The timeline for filing a Notice of Contest is not negotiable and is strictly enforced by OSHA.
CHAPTER IX

DISCRIMINATION

A) Protected Groups – Preventing Discrimination in Illinois

Below is a chart of all the protected groups in Illinois, broken down by federal statute, state statute, Cook County Ordinance and Chicago Ordinance. Care should be taken before any employment decisions are made if an employee falls into any one of the categories below:

<table>
<thead>
<tr>
<th>Protected Classes</th>
<th>Federal Statute</th>
<th>Illinois Statute</th>
<th>Cook County Ordinance</th>
<th>Chicago Ordinance</th>
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<td>X</td>
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<tr>
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</tr>
<tr>
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<tr>
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<tr>
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<tr>
<td>Gender Identity</td>
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</table>
B) Effective Anti-Discrimination Policy in Employee Handbook

A prudent employer will adopt an anti-harassment policy that prohibits sexual and other unlawful types of harassment (based on the protected classifications), and ensure that the policy is contained in the employee handbook so that all employees can read the policy. The importance of such a policy (and training related to the policy) cannot be understated, as some states allow for the imposition of personal liability against an alleged sexual harasser. The anti-harassment policy should set forth and contain: (1) definitions of sexual harassment and other types of harassment, giving examples, (2) a statement that harassment is illegal, (3) the internal complaint procedures available to employees to complain of harassment, (4) a statement explaining that a prompt investigation of the complaint will take place and that the appropriate remedial action will be taken by the employer to stop the unlawful harassment, and (5) assurances that employees will not be retaliated or discriminated against in any fashion for making complaints of harassment, or cooperating in the investigation of any harassment.

The policy should clearly identify the procedures for employees to follow to complain about harassment without requiring the employee to complain through a harassing supervisor. For example, it is prudent for employers to provide alternative avenues to complain. This is critical because if the policy clearly outlines complaint procedures for the employee to complain about harassment and they fail to follow those procedures, employers may be entitled to a legal defense absolving it from liability for co-worker harassment. However, caution should be also served if too many avenues are provided (e.g., anybody in management) since it will effectively put the employer on notice if the employee complains to anyone (including those individuals that may not be adequately trained to respond to complaints).

A proper anti-discrimination policy is critical in today’s legal environment because it not only provides employees and employers with standard guidelines to address problems of harassment, it also affords employers legal defenses to allegations of harassment when properly handled. Therefore, time must be taken to draft a comprehensive and effective anti-discrimination policy.

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9 Even more significant is the fact that some states, such as California, are mandating that all employers provide regular sexual harassment training.
C) Strategies for Discrimination Prevention

In addition to having a well-drafted and thorough policy prohibiting discrimination, there are a number of steps that can been taken to reduce the risk of harassment occurring in the workplace. First, and depending on the available resources, employers should train their employees at least once a year on, among other topics, what constitutes harassment and discrimination and how to report instances of harassment and discrimination in the workplace. These sessions should teach employees what harassment is, explain to employees that the workplace should be free from harassment, disclose the complaint procedures and encourage the employees to use them. A record of such training should be kept and maintained, along with a list of all attendees.

Second, all managers and supervisors should be trained separate and apart from the employees on a semi-annual basis. These training sessions should inform managers and supervisors about harassment and explain to them how to deal with and address complaints of harassment. Additionally, the managers and supervisors should be aware of what steps must be taken if harassment is discovered, observed or reported.

Third, it is also important to routinely monitor the workplace by going out into the workforce to ask employees and managers about the work environment. Asking for input about working conditions is a way to diagnose other problems that may exist in the work force. Also, keep close communications with the managers and supervisors about what is going on in the workplace.

Fourth, no matter how small the complaint, take all complaints of harassment seriously. Additionally, take prompt measures by conducting a thorough investigation and take prompt, remedial action, if required.

D) Americans With Disabilities Act Issues

The purpose of the Americans with Disabilities Act (“ADA”) is to prevent discrimination against people with disabilities in the workforce by requiring that “reasonable accommodations” be made for individuals with disabilities. There is much litigation surrounding when the ADA applies, as well as when an “accommodation” is reasonable or when an individual is “disabled.”
Therefore, like other forms of harassment, all employers must make a concerted effort to deal with and address issues of disability discrimination.

The ADA applies to all employers who employ 15 or more people for a minimum of at least 20 weeks. The ADA prohibits discrimination against disabled individuals in the application process, hiring, training, promotion, pay and benefits, discharge or other conditions of employment. A person is “disabled” for the purposes of the ADA if he or she actually has, or is thought to have, a physical or mental impairment that substantially limits one or more major life activities. Typical examples of covered disabilities include confinement to a wheelchair, blindness, deafness, a serious learning disability and certain types of mental illnesses. However, employees whose current use of alcohol or drugs prevents them from performing their jobs are not protected by the ADA, but an alcoholic who can perform the duties of his or her job despite his or her addiction is protected, as is a recovered alcohol or drug user.

The final regulations implementing the ADA Amendments Act of 2008 (“ADAA Act”) were published and became effective on May 24, 2011. Among other things, the ADAA Act provides some additional context to the ADA, as well as guidance to employers in order to comply with the ADA. For example, the definition of “disability” is construed broadly, the effect of which makes it easy for an employee to establish they are disabled. In this regard, and unlike before the implementation of the ADAA Act, impairments that are episodic or in remission are still considered disabilities. Similarly, whether an impairment is a disability must be considered without regard to mitigating or ameliorative measures (e.g., medicine, wheelchair, medical devices, etc.). Finally, even impairments that are of short duration, if severe enough, can be deemed disabilities under the ADA. The practical effect of the ADAA Act is to focus less on whether an employee has a disability and more on whether the disability can be accommodated.

Assuming that an employee is disabled under the ADA, an employer has a responsibility to make a “reasonable accommodation” for the employee’s disability. Generally speaking, a reasonable accommodation allows a disabled employee to perform in the same manner as a non-disabled employee. Examples of reasonable accommodations include: (1) changing job duties to allow a disabled employee to perform the work, (2) moving the employee to a vacant position or to temporary light-duty position, (3) installing special equipment to help the employee perform the employee’s duties, and (4) modifying the employee’s work schedule.
While the ADA compels employers to reasonably accommodate disabled employees, it does allow the employer some latitude in refusing to accommodate the disabled employee. For example, if the essential job duties are such that the disabled employee could not perform the job with an accommodation, the employer’s duty to accommodate is relieved. Additionally, if the accommodation is not reasonable or would cause an “undue hardship” then the employer does not have the duty to accommodate the disabled employee; however, in those circumstances, it would be prudent for the employer to engage in a dialogue with the employee to ascertain whether any accommodation would be reasonable. Whether a requested accommodation causes an “undue hardship” depends on the employer’s particular situation. For example, what is a reasonable accommodation for a large, multinational corporation with thousands of employees might be unreasonable for a small local company with limited resources.

As discussed above, with the passage of the ADAA Act, it is much easier for individuals to establish that they are disabled under the ADA. Therefore, employers should generally focus their attention on whether or not the particular employee or applicant can be accommodated. In this regard, employers should keep the following principals in mind in order to stay on the correct side of the law.

- **Ensure that the right employees are involved:** The managers who are charged to handle the accommodation requests must be appropriately trained and knowledgeable about the interactive process. Information must be appropriately kept confidential, but managers must know who to talk to in the organization in order to respond to the accommodation request and whether it is acceptable.

- **Keep lines of communication open:** The interactive process can take time. Therefore, employers can take simple steps of checking in with the affected employee as to what is going on and what the company is doing to assist them. If an accommodation is granted, the company would be best served in periodically checking in with the employee to make sure the accommodation is working and to communicate the company’s commitment to a solution.

- **Make sure the accommodation makes sense:** The accommodation does not have to be the best solution, it just needs to be one that works and is “reasonable.” Therefore, the employer does not have to accept everything an employee requests, and should take stock as to what accommodation makes sense for both the employee and the company.
• **Ask for input from employee:** Employers should resort to employees requesting or receiving an accommodation to speak up when an accommodation is not working. And it is always advisable to treat the employee with sensitivity and respect.

Finally, keep in mind that the Illinois Human Rights Act (“IHRA”) also prohibits discrimination against employees who are disabled and the definition of a “disabled” employee under the ADA is virtually identical to the definition of a “disabled” employee under the IHRA. Significantly, the provision in the IHRA addressing “disabled” employees governs essentially all employers in Illinois, regardless of their size. As a result, smaller employers in Illinois must be especially careful in dealing with disabled employees since they cannot shield themselves from the ADA size threshold (i.e., 15 employee requirement).

E) **Avoiding Defamation and Reverse Discrimination Claims**

After conducting an investigation into complaints of harassment in the workplace, the employer may find it necessary to take disciplinary action against the alleged harasser. However, employers must be careful to protect themselves from being sued on the grounds that, during or after the investigation process, the employee was defamed or that the disciplinary action was motivated by an illegitimate reason. By taking a few considerations into account, employers can effectively shield themselves from such liability.

Although it is difficult to carry on an investigation into harassment claims on a totally confidential basis, it is important that the relevant facts be disclosed only to those who have a “need to know.” Disclosure of facts to persons outside the “need to know” circle may give rise to defamation liability. Generally, those in the “need to know” circle include officers of the company acting in the normal course of business.

A claim for defamation requires the publication of a false statement by the employer to a third person that damages the reputation of the employee. It is important to note that communications between supervisory and non-supervisory employees constitutes publication. Therefore, to limit exposure to such claims, employers should keep internal reports as confidential as possible; only persons with a legitimate “need to know” position should receive a copy of the report or have access to it. Employers should emphasize to all those involved in the investigation, including the complainant, the accused and
witnesses, that it is company policy to keep discussions of the investigation strictly confidential and that disciplinary consequences may result from a breach of this confidence.

Those responsible for the investigation should be careful to avoid making any accusations or unfounded statements, whether written or oral. In order to ensure against incurring liability, employers should make every effort to avoid using defamatory terms and inflammatory adjectives in their investigatory reports and during the underlying investigation. For example, it is more prudent to say that an employee has failed to comply with a particular employment policy than that the employee is a “thief” or “sexual harasser.” Such statements could give rise to a defamation suit.

In order to avoid reverse discrimination claims, employers should always be able to show that a non-discriminatory reason was the actual reason for disciplinary action, and that the employer did not intentionally discriminate against the employee on the basis of a protected classification. Among the most common methods to demonstrate that an employer’s explanation is illegitimate is to show that similarly-situated persons of a different race or sex received more favorable treatment. Therefore, it is important for the employer to have a rational, well-articulated reason supported by all available evidence to justify the disciplinary action. If an employer honestly and reasonably believed that the underlying harassment incident occurred, the disciplinary action may be justified even though the reason for the action turns out to be false. Employees may attempt to show that the employer’s belief was tainted by pointing to: changes and inconsistencies in the stated reasons for the adverse action; the employer’s failure to follow established procedures or criteria; the employer’s general treatment of minority employees; or discriminatory statements by the decision maker.

Corrective action should always reflect the severity of the harasser’s conduct. It is important that the employer consistently follow the company’s disciplinary guidelines when resolving these cases. Failure to follow the guidelines may result in claims by the disciplined employee. Similarly, failure to administer comparably severe discipline to similarly-situated employees may result in claims by the complainant that the company favored the harasser.

Overall, in order to avoid defamation and reverse discrimination suits by alleged harassers, employers must conduct their investigations in the most confidential manner possible. In addition, disciplinary measures should always be uniformly administered and readily justifiable.
CHAPTER X

PROPERLY INVESTIGATING HARASSMENT AND DISCRIMINATION

As discussed in Chapter IX, Section B, every company should maintain and distribute an anti-harassment policy that contains a clearly articulated complaint procedure for employees to complain of harassment and discrimination. However, recognizing when a complaint raises legal issues, promptly investigating complaints of harassment and taking quick and appropriate corrective action in response to the alleged harassment are all important to avoid or reduce liability. All too often, what initially begins as simple workplace humor turns into an expensive harassment (or, even worse, a retaliation) claim, when the employer does not conduct an effective investigation. Since an employer’s prompt and effective response to complaints can limit or entirely eliminate its liability in a discrimination, harassment or retaliation lawsuit, it is imperative that employers have an effective mechanism to investigate and resolve problems in the workplace.

A) The Importance of Training for Managers and Supervisors

As a preliminary matter, it is absolutely critical that all managers and supervisors are repeatedly trained regarding what constitutes harassment, discrimination and retaliation and how to respond to and address complaints that they observe in the workplace, or that are otherwise reported to them. Without the appropriate training of managers and supervisors on these important issues, an employee’s complaint will never make it to management or those individuals responsible for investigating complaints. This failure could expose the employer to significant liability if a lawsuit ensues since courts inevitably look to see what, if anything, the employer did to remedy the situation. And, the better trained the company’s managers and supervisors are to identify personnel problems in the workplace, the more quickly and effectively the employer can take prompt and appropriate action to resolve the workplace conflict.
In Illinois, training of all supervisors and managers is even more important. Pursuant to a recent case decided by the Illinois Supreme Court, an employer is strictly liable for sexual harassment by a supervisor, regardless of the supervisor’s actual authority over the victim. While this case was decided under the Illinois Human Rights Act (the state version of Title VII), the case represents a significant departure from federal case law interpreting discrimination claims against employers. As a result of the decision, it appears that an employer in Illinois may be held liable for harassment more easily, thereby validating the importance of training all supervisors, managers, and others in a position of authority.

**B) What to Do Once a Problem Is Reported or Observed**

The next issue for an employer is what to do once harassment, discrimination and/or retaliation is reported or observed. While managers and supervisors should be trained to identify these events, they should not try to investigate the complaints themselves (unless they are the individuals designated by the employer to conduct the investigation). Instead, they should immediately report the complaint to the appropriate individual at the company (e.g., human resource director, personnel manager, etc.) charged with the responsibility of investigating complaints of workplace harassment and discrimination. The investigator should have a clean background (no conviction record or history of harassment, etc.), have a working knowledge of the company’s policies and equal employment opportunity obligations and generally be competent to remain impartial, objective and fair during the investigation. As well, since the interviewer will likely end up being a crucial witness during any litigation, care must be taken to ensure the interviewer will make a good witness, or more importantly, accepts the fact that he or she will be called to testify in a deposition and at trial. These attributes ensure that the investigation is conducted in a consistent and competent fashion.

Once a complaint has been reported, the employer should ask the employee who makes the complaint for a full narrative of the facts underlying the complaint. In this regard, it may be advisable for the company to maintain a Harassment Complaint form for the employee, in writing, to identify: (1) the date of the incident; (2) the approximate time of the incident, (3) the place of the incident, (4) the company employees involved, (5) any witnesses to the incident, (6) the precise nature of discrimination, and (7) any additional comments. The complaining employee should sign and date the form. If this form is not available, then, at a minimum, the employer individual designated
to investigate the incident should promptly gather and memorialize in writing this information from the complaining employee, keeping in mind that anything written down can and will be used against the company if litigation results.

C) **Interviewing the Complaining Employee**

It is crucial to promptly interview the complaining employee because a delayed investigation may impose liability on the employer, or worse, justify an award of punitive damages. When interviewing the complaining employee, there are a number of appropriate questions to ask the complainant other than the who, what, when, where, and how of the alleged harassment. Following are some examples of additional interview questions to ask the complaining employee:

- How did you react?
- What response did you make when the incident occurred or afterwards?
- How did the harassment affect you?
- How has the harassment affected your job?
- Are there any other persons with relevant information?
- Did the person who harassed you harass anyone else?
- Do you know whether anyone else has complained about harassment by that person?
- Can you continue to work in your worksite?
- Are there any notes, physical evidence or other documentation regarding the incidents?
- Did you tell anyone else about the harassment?
- How would you like to see this situation resolved?
- Do you know of any other relevant information?

After the interview, it is important to remind the complaining employee that he or she will not be retaliated against for providing truthful information. Remember that a victim of harassment should not have to work in a less desirable location as a result of raising a complaint. Therefore, it is safest to withdraw the alleged harasser’s access to the victim. Moreover, if the alleged harasser is a supervisor or co-worker with whom he or she frequently works,
it would be advisable to send the alleged harasser home with pay until the company has time to conduct and finalize its investigation. Reiterate to the complaining employee to immediately communicate any further instances of alleged harassment to the investigator.

In some circumstances, the complaining employee will want to remain anonymous, so as to not cause any disruptions. In other cases, the complaining employee may even complain of harassment and then ask the employer not to investigate since it “is not a big deal.” In these circumstances, the employer still has the legal obligation to investigate and, if appropriate, remedy the conflict. The company can inform the complaining employee that it will make every effort to keep the matter confidential, but that it cannot promise to do so, since it has the legal obligation to fully investigate the workplace dispute and the disclosure of events and names may be inevitable.

D) Interviewing the Alleged Harasser

Once all the facts have been gathered from the victim, it is certainly prudent to give the alleged harasser an opportunity to respond to the allegations. This can be done orally or in writing, but to the extent it is done orally, it is important to accurately and fairly document the reasons the alleged harasser gave for his or her actions. Initially, inform the alleged harasser that a complaint has been brought against him or her and that the company, as the employer, is required by law to investigate all complaints whether or not they are valid.

Some important questions to ask the alleged harasser are as follows:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Have any other complaints been made against you?
- Have you ever been disciplined before for harassment?
- Are there any persons who have relevant information?
- Are there any notes, physical evidence or other documentation regarding the incidents?
- Do you know of any other relevant information?
E) **Interviewing Other Witnesses**

To fulfill the employer’s legal obligation to investigate harassment in the workplace, it is paramount to interview all other witnesses with potentially relevant information, such as those individuals identified in the Harassment Complaint form or those other employees who have been identified during the investigation. Since some of the employees being interviewed may have no idea why they are being interviewed, it is advisable for the investigator to provide the witness with a brief introduction that includes the reason for the interview, as well as a disclosure that the employee will not be retaliated against for providing truthful information. Additionally, the interviewer should start the interview by stating that the company has a legal obligation to investigate the incident. It would also be advisable for the interviewer to have a witness present not only to take notes, but to serve as a corroborating witness in the event the employee being interviewed later tries to challenge the content of the interview. Following are some important questions to ask third parties or witnesses:

- What did you see or hear?
- When did the incident occur?
- Describe the alleged harasser’s behavior towards the complainant and towards others in the workplace.
- What did the complainant tell you?
- Has the conduct occurred in the past?
- Do you know of any other relevant information?
- Are there any other persons who have relevant information?

After gathering all the relevant information, the interviewer should inform the employee that they should not behave any differently towards any of the parties involved (to the extent that names were disclosed or easily identifiable based on the questioning). Unless the employee is noticeably affected, instruct him or her to return to work and to follow up with the investigator if they observe or witness any further harassment or discrimination. Finally, to the extent possible, inform the employee to keep the content of the interview confidential and to not discuss it among coworkers. The investigator should caution all the employees being interviewed that attempting to influence the investigation or disclosing confidential information by discussing it with others can be cause for disciplinary action.
After all interviews have been completed, carefully review the interview notes. If there are any inconsistencies, conduct follow-up interviews regarding those inconsistencies with any of the parties previously interviewed. An investigation will be deemed incomplete if it fails to follow up with second interviews after other interviews or other evidence raises questions. Therefore, it is important to tie up loose ends so that the appropriate action can be taken to resolve the workplace dispute.

F) Taking Prompt, Remedial Action in Response to Complaints

Once all the interviews have been finalized, and credibility issues are resolved, management should make a determination as to whether harassment, discrimination or retaliation has occurred. That determination could be made by the investigator, or by a management official who reviews the investigator’s report. While a discussion of what constitutes a reasonable and appropriate action to take after a workplace complaint is dependent on the specific facts of each situation, it is important that any action taken against the alleged harasser be done only after a thorough investigation. In other words, a company wants to corroborate the complaints (or defenses) and ensure that it is not acting in a retaliatory fashion before imposing a discipline.

Similarly, the employer has an obligation to treat similar complaints of harassment in a similar fashion. What this means is that if an employee gets immediately terminated for making sexually explicit comments to female coworkers, an employee who later conducts himself in a similar fashion should likewise be immediately terminated. All too often, this rule is inadvertently violated which, by itself, can prove that the complaining employee is being treated differently than others. In litigation, a company will have to prove that it acted reasonably and fairly and such a goal is compromised if the actions taken by the company in similar situations are inconsistent.

In some circumstances, the investigation may be inconclusive or reveal that no harassment occurred. For example, there are no corroborating witnesses to the harassment (e.g., “he said/she said” situation). In these situations, it is completely acceptable to inform the parties that a thorough investigation was conducted and was inconclusive. Inform the complaining employee to immediately report any further instances of harassment, discrimination or retaliation, and that the company will conduct another investigation.
G) **Document the Investigation and Actions Taken**

It is certainly advisable to document the investigation process, such as when the complaint came to the employer’s attention, who was interviewed, what was disclosed, when and where the interviews took place, as well as who was present, what remedial action was taken and why it was taken. This step is important because the employer may be required to demonstrate when and how it investigated the employee’s complaint at a later time, perhaps during an EEOC investigation or trial.

However, the company has to decide how detailed and specific it wants to document the investigation. Keeping in mind that all non-privileged documents memorializing the investigation will be produced later in discovery if litigation results, there certainly can be drawbacks to taking very detailed and copious notes, especially if there are inconsistencies in those notes. On the other hand, well-drafted notes regarding the company’s investigation of the alleged harassment, as well as a description of the reasons it took the employment action, can protect the company from future litigation.

There are a number of simple steps that a company can take to ensure that the documentation is appropriate. First, the person drafting the notes should review them for accuracy and make sure that there are no inconsistencies. Second, the notes should be taken contemporaneous with, or soon after, each interview, so as to be reliable. Investigation notes drafted long after the relevant events, or worse, only after a discrimination lawsuit is filed, are less reliable than those taken at the time of the employee’s first complaint. Third, the notes should clearly identify when they were drafted and who drafted them, as well as whether anybody else was present. This step is important since the company will want to ensure the identity of who conducted the investigation and whether anybody else can corroborate the contents of the notes if the investigator is no longer employed by the company or available. Fourth, if the notes are in handwriting, make sure they are legible; if not, it is prudent to have the interviewer transcribe them into a computer version. Fifth, at the conclusion of each interview (or as soon as possible thereafter), the investigator should review with the witness the points contained in the notes to confirm their accuracy and, if possible, get the witness to sign and date the notes indicating their accuracy. Finally, but certainly not least important, given the importance of a proper investigation, it is always advisable to consult an employment attorney to ensure that any documentation created by the company related to its investigation is drafted correctly and can affirmatively be used to defend the company in a subsequent lawsuit.
Incorporating the foregoing steps into your investigations of workplace disputes will go a long way to minimizing or eliminating any potential liability of the company for employment claims. As well, it will foster a work environment that illustrates to the workforce that not only will harassment, discrimination and retaliation not be tolerated, but if it does occur, it will quickly and effectively be investigated and resolved.
A) **Basics of Workers’ Compensation**

“Workers’ compensation” refers to a system of laws outlining specific benefits to which injured employees are entitled, and the procedure for obtaining such benefits. Every state, including Illinois, has its own workers’ compensation laws, which are contained in statutes. Workers’ compensation statutes vary from state to state.

In Illinois, every business must have some form of workers’ compensation insurance to cover injured employees or demonstrate that they are self-insured and that they have the financial resources to cover any reasonably anticipated claim. Workers’ compensation laws are designed to ensure that employees who are injured on the job receive fixed monetary awards, without having to litigate their claims against their employers. In this way, workers’ compensation is an important safety net for employees when they are injured on the job.

When an employee is accidentally injured on the job, the employer or insurance company pays for the medical care, lost wages and for rehabilitation and training due to the injury, regardless of fault. No part or the premium or benefits can be charged to the employee. Thus, even if an employee is responsible for his or her own accidental injury, the employee is covered by workers’ compensation under most circumstances, as long as the injury happened on the job.

It is important to note, however, that workers’ compensation is an injured worker’s “exclusive remedy” with respect to a work-related injury, unless he or she can point to a third party who contributed to his or her injuries. For example, because products or machinery used at work can often injure workers, they may, and often do, seek compensation from the manufacturers of such products or machinery.
Also, workers’ compensation benefit payments are not considered income and are therefore not subject to state or federal tax.

B) The Employer’s Responsibilities Under the Workers’ Compensation Act

With a few exceptions, all Illinois employers must provide their employees with workers’ compensation insurance. The cost of premiums for such insurance is determined by a number of factors such as the number of employees, how safe the workplace is, how many claims have been submitted, and how much the employees are paid. The trade off for this extra expense is that it limits the amount of money that can be awarded to an employee for a work-related injury. In other words, employers who maintain workers’ compensation insurance programs to cover on-the-job injuries are immune from liability unless they act intentionally to cause the injury. Coverage under the Act, however, does not bar an employee from seeking relief against a third party whose negligence may have contributed to the injury of the worker.

Under the Illinois Workers’ Compensation Act, employers are prohibited from harassing, discharging, or threatening any employee for asserting their rights under the Act. It is also illegal for an employer to refuse to hire or rehire an individual because they had asserted a valid claim for workers’ compensation benefits. Finally, it is unlawful for an employer to refuse to hire or rehire an employee who has a disabling condition from a prior injury.

Be careful if you release an employee who has filed or may file a workers’ compensation claim. Not only can you be exposed to potential liability, but it is against public policy to have a departing employee waive his or her rights under the Act. As such, any release or settlement agreement entered into between an employer and employee may not release workers’ compensation claims that the employee may have (although an employee can warrant that they are unaware of any existing workers’ compensation claims).

In Illinois, if an employee is injured on the job, he or she must notify the employer as soon as possible but no later than 45 days after the injury, the date when the effects of the injury first became apparent, or the date when the medical examination first reveals the injury. This notice must be written or oral. After receiving notice, an employer must promptly notify its insurance carrier. If the injury keeps the employee off work for more than three days, the employer must do one of the following: (1) start to pay the employee temporary total disability, (2) notify the employee in writing of the additional
information needed to begin making the payments, or (3) provide the employee with a written explanation of why benefits are being denied. The employer must further file an Employer’s First Report of Injury or Illness Form with the Illinois’ Workers’ Compensation Commission for all injuries that result in a loss of three or more days of work. The employer must also notify each injured employee of his or her right to rehabilitation services, the locations of available public rehabilitation services, and any other services known to the employer.

The employer or insurance carrier is obligated to provide necessary medical treatment. An employee may pick his or her treating doctor or hospital. The employer is responsible for the costs of all first aid and emergency services, two treating physicians, surgeons or hospitals of the employee’s choice, and additional care provided through referrals. The employer, on the other hand, may require an employee receiving benefits to submit to an independent medical examination by a physician selected and paid for by the employer. An employee’s refusal to submit to such an examination may be grounds for the cessation of benefits for the employee.

C) Occupational Safety and Health Act of 1970 (“OSHA”) Basics

OSHA provides for the promulgation of standards and conducting inspections to ensure that employers are providing safe workplaces. OSHA standards may require that employers adopt certain practices, methods or other processes reasonably necessary and appropriate to protect workers on the job. To that extent, covered employers must be familiar with the standards applicable to their establishments and eliminate hazards.

In general, OSHA covers all employers and their employees within the United States. OSHA defines “employer” as “any person engaged in a business affecting commerce who has employees, but does not include the United States or any state or political subdivision of a State.” Therefore, OSHA does not cover self-employed persons, farms which employ only immediate members of the family, and employees of federal or state governments or agencies.

Even in areas where OSHA has not set forth a standard addressing a specific hazard, employers are responsible for complying with OSHA’s “general duty” clause, which provides that each employer “shall furnish…a place of employment which is free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees.” Many states have equivalent OSHA-approved job safety standards that are at least the equivalent of the federal standards.
Federal OSHA standards are grouped into four major categories: general industry, construction, agriculture and maritime. While some standards are applicable only to the specific categories, there are a number of standards which contain similar requirements for all sectors, as follows:

**Personal Protective Equipment** – This standard requires employers to provide employees with personal equipment designed to protect them against certain hazards and to ensure that employees have been effectively trained on the use of the equipment.

**Access to Medical and Exposure Records** – This standard provides a right of access to employees, their representatives and OSHA to relevant medical records, including records related to employees’ exposure to toxic substances.

**Hazard Communication** – This standard requires employers to conduct hazard evaluations of the products they manufacture or import. If a product is found to be hazardous, the employer must so indicate on containers of the material, and the first shipment of the material to a new customer must include a material safety data sheet.

**Record Keeping** – Every employer covered by OSHA who has more than 10 employees, except for employers in certain low-hazard industries in the retail, finance, insurance, real estate and service sectors, must maintain three types of OSHA-specific records for on job-related injuries and illnesses. Covered employers must conspicuously post the OSHA Form 300 which is an injury/illness log containing work-related injuries, deaths and illnesses. They must also fill out an OSHA Form 301 which is a more detailed incident report. Sometimes an insurance or workers’ compensation form that provides the same detail can be substituted for the Form 301. Finally, employers are required to complete and post Form 300A - the “Summary of Work-Related Injuries and Illnesses.” Form 300A should include the total number of incidences in each category listed in Form 300 and must be completed even if there were no work-related injuries or illnesses during the year. These forms are available on the federal OSHA website.

**Reporting** – Each employer, regardless of industry or number of employees, must advise the nearest OSHA office of any accident that results in one or more fatalities or the hospitalization of three or more employees. The employer must do so within eight hours of the accident. OSHA frequently investigates such accidents to determine whether violations of the OSHA standards contributed to the event.
D) **Penalties and Sanctions Under OSHA**

Every employer covered by OSHA is subject to inspection. The individuals who conduct the inspections are thoroughly trained in OSHA standards and in the recognition of occupational hazards. These inspectors, whether state or federal, have the power to issue citations and propose penalties for violations.

OSHA authorizes a number of penalties and fines. OSHA treats certain violations, which have no direct or immediate relationship to safety, as de minimus, requiring no penalty. However, OSHA will not hesitate to impose violations where there is a standard violation, serious violation, willful violation, repeated violation or a failure to correct a violation. A normal violation, one which has a direct relationship to job safety and health, but probably will not cause death or serious physical injury, results in a fine of up to $7,000 per violation. A serious violation, which is one that has a substantial probability that death or serious physical injury could result, and where the employer knew, or should know of the hazard, results in a penalty of $7,000 for each violation.

A willful violation is one that an employer intentionally and knowingly commits. OSHA provides that an employer who willfully violates OSHA may be assessed a penalty of not more than $70,000 but not less than $5,000 for each violation. If an employer is convicted of a willful violation that has resulted in the death of an employee, the offense is punishable by a court imposed fine and/or by imprisonment for up to six months. A fine of up to $250,000 for an individual, or $500,000 for an organization may be imposed for a criminal conviction.

A repeated violation of any standard can bring additional fines of up to $70,000 for each violation. To serve as a basis for a repeat citation, the original citation must be final. A citation under contest may not serve as the basis for a subsequent repeat citation.

Finally, an employer’s failure to correct a prior violation may result in a civil penalty of up to $7,000 for each day the violation continues beyond the prescribed abatement date.
CHAPTER XII

IMMIGRATION ISSUES

The Immigration Reform and Control Act (“IRCA”) was passed in 1986 to address the growing number of immigrants in the workforce. Since that time, and in the aftermath of the events on September 11, 2001, immigration-related legislation has been proposed and debated in Congress on numerous occasions addressing the growing number of illegal immigrants in the workforce. With the increased enforcement focus of governmental agencies and the nationwide raids on companies, it has become increasingly important for companies to understand the law and recognize and preempt future immigration-related liability.

A) Prohibitions and Penalties Under the IRCA

The IRCA prohibits the employment of illegal aliens and imposes criminal and civil penalties against persons who knowingly hire and employ unauthorized aliens. At the same time, the IRCA prohibits employers from engaging in any unfair immigration-related employment practices. For example, the IRCA bars employers from making employment decisions based on national origin or citizenship or requiring potential employees from one or more nationalities to provide more documentation regarding proof of citizenship than others.

The penalties and fines under the IRCA can be stiff. Not only are monetary fines allowed for each unauthorized alien employed, an individual who knowingly hires an unauthorized alien can be imprisoned for up to six months. Additionally, fines can be imposed for each individual employed for whom the required verification was not obtained.

Increasingly, the Immigration and Customs Enforcement (“ICE”) agency has been conducting workplace raids on companies in order to determine whether there exist IRCA violations. A recent raid of a large company resulted in the arrest of over 1,000 aliens and the arrest of the company’s managers on criminal charges ranging from conspiracy to transporting illegal aliens to
inducing illegal aliens to reside in the U.S. for commercial advantage. These types of “immigration raids” will continue and, given the recent attention to immigration related issues, they will be conducted on both large and small companies alike.

As well, unions and legal workers are frequently suing employers who hire illegal workers claiming RICO violations (which carries treble damages against the employer if found guilty) and conspiracies to depress wages of legal workers.

B) Immigration Obligations on Employers

First, each employer is obligated, as a part of the employment process, to examine specific documents that verify both the individual’s identity and eligibility for employment. The documents examined must be original or certified copies (as opposed to photocopies). In some instances, only one document, such as a valid U.S. Passport, a Certificate of U.S. citizenship, a Certificate of Naturalization, etc. will suffice. For a full list of acceptable documents, please obtain a current copy of a Form I-9, which can be obtained on the U.S. Citizenship and Immigration Services website at www.uscis.gov.

Second, a valid I-9 Form must be completed for each employee. The I-9 Form verifies the identity and employment eligibility for all employees hired after November of 1986. This form must be completed within 3 days of employment and, further, must be retained for 3 years after the date of hire or 1 year after termination of employment, whichever is later. Also, it is prudent for an employer to let the employee choose the appropriate source of identification. Requiring employees to submit specific documents to verify employment eligibility can run afoul of the IRCA, especially when the I-9 Form allows the employee to choose from a number of different options of identification. Note, however, that in the event that an individual is unable to produce the required documents, but provides the employer with a receipt indicating that he or she has applied for the necessary documentation, verification need not be completed until 21 days after the hire.

For a more extensive explanation of I-9 Form requirements, please review the “Handbook for Employers - Instructions for Completing Form I-9” which can be downloaded for free from the U.S. Citizenship and Immigration Services website at www.uscis.gov.
C) **What Should an Employer Do if It Receives a Social Security Administration “No Match” Letter?**

Employers annually send the Social Security Administration (“SSA”) millions of W-2 forms of their employees. In many cases, the employee names and social security numbers do not match. When this occurs, the SSA sends letters back to the employers listing the names and social security numbers that do not match.

A common mistake of employers is to automatically assume that the mismatch indicates that the relevant employee is “illegal” and therefore should be terminated. However, the receipt of a “no-match” letter by the employer alone is not a valid basis to terminate the employee. Often these letters are the result of clerical errors or name changes. They can also indicate that the employer is hiring and employing unauthorized aliens. Therefore, the receipt of a “no-match” letter should be used as one of the triggers for an investigation.

The proposed “safe harbor” guidance communicated by the Department of Homeland Security (“DHS”) has been rescinded. Therefore, at present, there is unfortunately no formal guidance from the federal government as to what employers should do upon receipt of a “no match” letter. Thus, it is currently recommended that the following steps be taken in order to respond to a “no-match” letter and to minimize the risk that ICE will find that the employer had constructive knowledge that the “no match” employee was not authorized to work in the United States:

First, the employer must investigate and promptly check its records after receipt of the letter to determine whether the discrepancy is the result of the employer’s typographical, transcription or similar clerical error. If there is an error, the employer should correct the error and its records, as well as inform the SSA or DHS (depending on who issued the letter) of the error. The employer should also verify with the appropriate agency that the new number is correct and internally document the manner, date and time of the verification and keep it with the employee’s I-9 Form.

Second, if the discrepancy is not the result of the employer’s error, the employer should request that the employee confirm that the employer’s records are correct. If the employee is able to correct the records, the employer should make the correction, inform the relevant agency, verify that the corrected records match the agency records, make a record of the manner, date and time of the verification and keep it with the employee’s I-9 Form.
Third, if the discrepancy is still not resolved, the employer should request that the employee promptly (within 90 days) bring the necessary documents to the appropriate agency to resolve the discrepancy. The discrepancy will be resolved only upon the employer’s verification with the SSA that the employee’s name matches the social security number in the SSA’s records or that the DHS verifies that its records indicate that the immigration status or employment authorization document was assigned to that particular employee. The employer should make a record of the manner, date and time of the verification and keep it with the employee’s I-9 Form.

Fourth, if the discrepancy is still not resolved, it is currently advisable that the employer document this fact and complete a new I-9 Form for the employee. The employer should not accept any document containing the disputed social security number, or alien number or a receipt for a replacement of such a document. In addition, only documents with a photograph may be used to establish the employee’s identity.

Fifth, if, upon inquiry, the employee admits that he or she is unauthorized to work in the United States, the employer should immediately terminate the employee’s employment and document the employee’s admission.

Finally, if the discrepancy is not resolved and the employee’s identity and work authorization are not verified on a new I-9 Form using the required documents, the employer likely has the legal authority to terminate the employee. An employer’s failure to take certain steps to verify the eligibility of the employee may lead to a finding that the employer had constructive knowledge of the employee’s illegal status, thereby exposing the employer to significant fines and penalties. Currently, whether the employer has “constructive knowledge” of employing an illegal worker is based on the totality of circumstances. Therefore, it is important that employers not ignore “no-match” letters.

It is abundantly clear that employers are increasingly bearing the burden of ensuring that their entire workforce is authorized to work in this country. The resources provided to ICE are increasingly being used to target large and small employers who knowingly or unknowingly employ illegal aliens. Therefore, employers who receive “no-match” letters must take certain actions to timely respond to these letters or face significant civil and criminal penalties for knowingly employing illegal aliens.
An employer should apply these above procedures uniformly to all employees having unresolved “no-match” indicators. An employer’s failure to do so may violate the applicable anti-discrimination provisions of IRCA. And, because this area of law is constantly in flux, it is advisable to contact your attorney before taking any adverse action against an employee as a result of a “no-match” discrepancy.

D) What to Do if a Government Audit Is Implemented?

ICE and USCIS audits can be initiated in many ways including by informers, information provided by other governmental agencies and/or random selections based on the industry. While the chances are small of being audited, you should not panic if the government decides to audit the company. Apart from contacting your attorney, an employer should always designate in advance an individual as the primary person to respond to an inquiry, and select an alternate contact to stand in when the primary contact is absent.

Generally, there are two types of audits: first, an ICE audit usually involves a review of I-9s and compliance within the IRCA. Second, the USCIS Division of Fraud Detection and National Security (“FDNS”) has engaged outside contractors to conduct audits on employers’ use of H and L visa workers. Upon receiving notice of an ICE audit, an employer is entitled to be given three days notice prior to the commencement of an I-9 audit. Employers can usually negotiate a longer period of time for compliance. However, a FDNS audit generally does not involve notice. Notwithstanding this fact, an employer can generally request a short continuance.

Regardless of who is conducting the audit, the designated employee should ask the investigator for identification and record the investigator’s name, title, agency and contact information. Asking for their business card may also be acceptable.

During a FDNS investigation, the investigator typically asks to meet with a company representative who is knowledgeable of the H-1B and L-1 workers, as well as the H-1B and L-1 workers themselves. A representative of the company should be present with the investigator at all times and take detailed notes on the questions asked by the investigator. You should not leave the investigator to speak alone with anyone, including the H-1B/L-1 worker or any other employee.
In general, the investigator will seek information related to the petitioning employer, the relationship between the employer and the visa employee, whether the visa employee is employed in the location and capacity as described by the employer, and whether the visa employee has the requisite experience and/or qualifications. Therefore, the visa worker and employer should be prepared to give consistent answers to these questions and topics.

During an ICE I-9 investigation, an ICE team of forensic auditors will conduct a review of the I-9s (for both current and terminated employees). In some cases, the company representative will be asked to appear in person for a personal interview. So that an ICE audit goes smoothly, make sure the company’s I-9 records are ready for review.

E) Other Practical Tips to Avoid Liability

Other than the safe harbor procedures above, there are a number of other steps employers can implement to avoid a finding that they are knowingly employing illegal aliens. First, employers should have a written “no-match” letter policy, incorporating the procedures outlined above. This will not only provide guidance to those employees charged with the duty of verifying employment eligibility, but it will also serve as another indicator to ICE and other agencies that the employer is acting in good-faith to comply with the IRCA and its regulations.

Second, consider conducting internal I-9 audits on a regular basis. This will allow the employer to correct existing or ongoing mistakes in I-9 procedures and documents, and it will also serve as a reminder to purge I-9 Forms that are no longer required to be retained (and which could leave the employer vulnerable to additional liability). This procedure may also show “good faith” on behalf of the employer, thereby mitigating any damages if ICE does conduct an audit and finds immigration-related violations.

Third, consider centralizing the storage of all I-9 Forms for the entire workforce (as opposed to keeping each I-9 Form in the employee’s personnel file). This step can make it much easier for the employer to quickly review and/or produce I-9 Forms in response to an ICE inquiry, or otherwise if the employer wants to conduct a self-audit of its employees’ work eligibility.

Fourth, if your company has H-1B or L-1 workers, we strongly recommend confirming in advance that these employees are actually performing the duties
and functions described in their petitions and that the company is following all provisions of any applicable Labor Condition Application.

F) The Status of E-Verify

The E-Verify Program is an internet-based program operated by the U.S. Citizenship and Immigration Services (“USCIS”) in collaboration with the Social Security Administration (“SSA”) that allows participating employers to electronically verify employment eligibility of newly-hired employees. Except for federal contractors, the E-Verify Program is a voluntary program available to employers at no cost. Notwithstanding the fact that E-Verify is not generally mandatory for all employers, there is clear support for the continuation and expansion of the E-Verify Program throughout the country, especially since the Obama administration has dropped the controversial social security “no match” regulations.

As of September 8, 2009, all employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation (“FAR”) E-Verify clause are required to use E-Verify to determine the employment eligibility of employees performing direct, substantial work under those federal contracts and new hires organization-wide, without regard to whether they were working on a federal contract. A federal contractor or subcontractor who has a contract containing the FAR E-Verify clause also has the option to verify the company’s entire workforce. For additional information related to the most up-to-date regulations applicable to the use of the E-Verify for federal contractors, you can go to the USCIS website.

Illinois has recently passed its new set of rules regarding the use of the federal E-Verify system by an amendment to the Illinois Right to Privacy in the Workplace Act. Prior to 2010, all Illinois employers were restricted from using the E-Verify system. However, effective January 1, 2010, Illinois employers are now allowed to voluntarily enroll in the E-Verify system. The law requires that E-Verify enrollees, including current E-Verify users, must attest, under perjury, to the Illinois Department of Labor that: (1) the company has received the E-Verify training materials from the Department of Homeland Security and all employees who have administered or are using the program have completed a computer-based tutorial (“CBT”) training provided by the Basic Pilot of E-Verify Program; (2) the company has posted the E-Verify program’s antidiscrimination notice issued by the Department of Homeland Security, which must be posted in a conspicuous place to all current employees.
and prospective employees; and (3) the company must keep signed original attestation forms, as well as the computer-based tutorial trainings certificates on file for inspection and copying by the Illinois Department of Labor.

Among other things, the new law also prohibits employers that enroll in E-Verify from: (1) failing to display the appropriate notices; (2) allowing an employer to use the E-Verify system prior to receiving the CBT training; (3) using the E-Verify program as a pre-screening mechanism for prospective employees; (4) terminating an employee prior to that employee receiving a final non-confirmation notice from the SSA and DHS; and (5) failing to notify the employee, in writing, of the employer’s receipt of a tentative non-confirmation notice and of the employee’s right to contest that tentative non-confirmation letter. These are all prohibitions that are already prohibited by the federal E-Verify laws and regulations.

A participating employer’s failure to follow the Basic Pilot or E-Verify Program’s procedures creates a cause of action for employees and prospective employees to file a charge of discrimination against the employer. And, if a court finds that a violation is willful and knowing, the court may award the employee or applicant damages plus costs, reasonable attorneys’ fees and actual damages. In order to determine whether you are governed by the E-Verify Program, or if you would like to voluntarily participate in the E-Verify Program, you should contact your legal counsel before doing so to ensure that the company complies with the many guidelines and regulations related to the Program.

G) Issues Arising From the Termination of H-1B Employees

There are several important legal issues relating to the termination of H-1B employees in the United States. Due to increased enforcement by the federal agencies relating to immigration issues, employers should be aware of what obligations they have with respect to any H-1B employees that they employ and terminate.

For example, if any H-1B worker is laid off before the end of the employee’s authorized period of stay, the employer must provide reasonable costs for the employee to return to his or her last country of residence. The law requires the employer to provide only the employee with reasonable transportation costs, such as an airline ticket, and not the transportation costs of the employee’s associated family members. Also, the requirement to provide reasonable transportation costs is usually waived if the H-1B employee chooses and is authorized to remain in the United States.
With respect to fulfilling its obligation to pay the return travel costs, the employer has several options. Initially, the employer can provide a financial amount equal to the reasonable return costs and a written release from the terminated H-1B employee. Alternatively, the employer can provide the H-1B employee with a return plane ticket from the employer’s travel agent within a reasonable time after the employee’s termination. Either way, it is important for the employer to document its actions and compliance with these obligations.

The current law also provides that each H-1B employer should notify the INS immediately of “any material changes in the terms and conditions of employment” regarding an H-1B employee. Therefore, immediately upon the decision to terminate an H-1B employee, the employer should send a letter to the same INS Service Center that approved the H-1B petition, notifying the Center of the termination of the employee. Also, it is suggested that the employer send written notice of termination to the H-1B employee so that the H-1B employee can consider making alternative arrangements to maintain legal work visa status in the United States. The employer may consider informing the employee in its termination letter that it is obligated to inform the INS and that, therefore, eventual revocation of the H-1B petition will occur.

The U.S. Department of Labor has also published regulations that require employers to pay an H-1B employee until termination. What this means is that, if the employee is temporarily not working due to the employer’s request or lack of work, the employer must continue to pay the H-1B employee his or her regular wages until the actual termination of employment.

In conclusion, it is important for H-1B employers to be aware of the obligations and responsibilities that arise once an H-1B employee is terminated. The key is to maintain clear written records when fulfilling these obligations and to contact your legal counsel to ensure that the company’s actions are consistent with existing immigration laws and regulations (which, in today’s legal environment, are frequently changing).
CHAPTER XIII

DISCIPLINE AND TERMINATION OF EMPLOYEES

Employment-related lawsuits continue to increase in the United States at alarming rates. The rise in employment litigation is a function of many factors, such as economics and the ease of access to the court system by terminated employees. However, another reason that has led to the increase in litigation are employers’ inability to properly discipline and/or terminate problem employees. For example, those employees who exhibit poor work performance, are continually late or absent from work, or suffer from poor attitudes, pose problems for employers if they are not properly disciplined or terminated.

Each employer should establish a disciplinary policy based upon objective bases. Developing objective bases to measure an employee’s performance provides a way to consistently apply job criteria and allow managers to minimize the risk of making arbitrary discipline or termination decisions. However, in addition to a clear discipline and termination policy, the following areas also help to reduce an employer’s liability when terminating an employee.

A) Document the Discipline or Termination Appropriately

Despite the fact that almost every human resource manager recognizes the need for documentation, the lack of documentation regarding an employee’s discipline or termination still remains the most prevalent mistake of employers. Managers and human resource professionals must realize that they may have to explain a disciplinary action several years after it occurs (i.e., after the employee is actually terminated), and that the documentation is all that will remain when the relevant individuals are no longer with the company.

However, documenting alone is not enough. Poorly prepared documentation may hurt an employer’s case. At a minimum, therefore, the documentation should include: (1) the date of the event, (2) the printed name and signature of the party preparing it, (3) the subject of the corrective action, and all parties who participated in, or witnessed, the event, (4) a statement that the
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Document is being placed in the employee’s personnel file, (5) the employee’s signature (or, if the employee refuses to sign, that the employee was offered the opportunity to sign but refused), and, if not terminated, (6) a statement informing the employee of the consequences of failing to improve his or her conduct. Additionally, the employee should be given an opportunity to respond in writing. The response will commit the employee to a version of the event that will be difficult for the employee to change later and it will also give the employee a feeling that they are being treated fairly.

Significantly, documentation of an employee’s work or performance deficiencies must be done on a regular and consistent basis. In other words, “write ups” must be implemented in a consistent and fair fashion. Simply documenting the work performance of just one employee (as opposed to other problem employees) may reveal that the employer is treating the subject employee differently, especially if there are not similar “write ups” of other similarly-situated employees. Therefore, properly training managers and supervisors how to “write up” employees and under what circumstances an employee should be written up is critical in appropriately disciplining an employee.

B) Conducting Effective Internal Investigations

Certain types of disciplinary matters will warrant an investigation into the relevant facts and events before a decision is made by the employer. The primary ingredient to a successful investigation is preparation. Initially, goals should be set and the investigator charged with gathering the facts and determining the merits of the complaint should be selected.

Once the investigation is commenced, the investigator should review the personnel history of the potential interviewees to help clarify their relationships with each other. Certainly, the investigator should interview the complainant, the accused and any other key witnesses or third parties that are disclosed during the investigation. Remember that the goal of the interview is to get as much information as possible from the employee being interviewed. The investigator should commence the interview with a brief introduction that includes the reason for the interview, as well as a disclosure that the employee will not be retaliated against for providing truthful information. Additionally, the interviewer should start by stating that the company has a legal obligation to investigate the incident. Ideally, the interviewer should have a witness present to take notes and corroborate evidence. The interviewer would be wise
to also maintain an air of confidentiality without making a direct promise of confidentiality. The interviewer should remain neutral and never appear to take sides. After concluding the interview, the interviewer should review his or her notes to make sure that he or she obtained all the information that he or she set out to obtain (which is another reason why preparation is so important).

For discrimination claims, the EEOC has promulgated specific regulations that address how to conduct an effective investigation. These guidelines recommend that an employer’s response be “immediate and appropriate,” and that any investigation be done promptly and thoroughly “upon learning of alleged […] harassment in the work place.” Further, the employer should make follow-up inquiries to ensure that the harassment has not resumed (or that the victim has not experienced retaliation).

In situations in which the misconduct involves a complex fact pattern or serious misconduct (such as illegal or threatening activities), employers should not hesitate to suspend the employee pending the investigation. This will allow the employer to interview witnesses and make an informed decision without distractions.

See Chapter X for more detailed information on properly investigating complaints of harassment, discrimination and/or retaliation.

C) The Decision Making Process – Be Consistent

After all the interviews have been conducted and the evidence gathered, the investigator must make a determination as to the merits of the complaint. The investigator should look into the details of the statements, evaluate credibility and consider corroborating evidence. The investigator will formulate conclusions and those conclusions should be carefully documented. Such conclusions should be reported to the decision makers so that prompt action can be taken. Remember that an employer has a legal obligation to take quick, remedial action, including protecting the complainant from further discrimination or retaliation, disciplining the accused, providing training and revising company policies, if necessary.

It is paramount that any action taken in response to a complaint be consistent. Particularly in discrimination cases, consistency in imposing disciplinary measures for the same or similar types of infractions is critical. If the company
does not treat like cases in a like fashion, the employee adversely affected will have the ability to argue that he or she was treated in an unlawful manner, or based upon a protected classification.

The need for consistency does not prohibit some variation in discipline according to the circumstances of the particular case; however, when a manager decides to grant leniency to one employee after terminating another employee for the same or similar offense, the basis for the different treatment must be carefully documented. If the decision-maker is aware of a similar situation where another employee was treated less harshly, the decision-maker would be prudent to set forth in detail the precise basis for the differential treatment (e.g., the employee terminated had 10 write ups more than the employee not terminated, etc.).

Once the decision is made, it should immediately be communicated to the complainant so that he or she is prepared for the action to be taken. The appropriate remedial action, of course, depends on the seriousness of the allegations and circumstances. Also, once a decision is reached, the employer should only inform those individuals who have a need to know.

The employer should prepare a report of the investigation, including all investigative materials such as witness statements, documents, affidavits, all of which should be preserved in a confidential file. This step is important because the employer may be required to demonstrate when and how it investigated the complaint of harassment.

D) What to Do Once an Employee Announces Their Resignation

Unfortunately, employees frequently resign to go work for competitors. This is likely to happen irrespective of whether they have signed a restrictive covenant. Therefore, it is important for employers to know what to do (and how to react) when an employee decides to leave to work for a competitor.

(Prevent Further Access to Company Information)

Once an employee advises his or her employer of a departure, it is critical to assume the worse and that the employee will do everything to compete, even unfounded. The employee should be immediately relieved of any duties which would expose the employee to confidential information or the employer’s customers. Passwords and e-mail accounts should be disabled. The employee
should be banned from access to areas where confidential information is kept. The company should also request that the employee return all company-owned equipment such as laptops, cell phones or PDAs that would contain confidential business information, as well as all documents received from or generated during his or her employment. For example, in certain circumstances, an employee will have documents and information at their home which need to be immediately retrieved.

(Preserve Electronic Evidence)

Employees who are terminated or voluntary leave employment sometimes take or delete the employer’s trade secrets or confidential information. Such conduct could be catastrophic for the company. Therefore, it is critical that employers preserve all evidence of the employee’s pre-resignation activities. This includes maintaining a log of all copying and downloading of company information or communications about the move to a competitor.

Electronic evidence plays a prominent role in many unfair competition cases, so a former employee’s computer or handheld device is often the best place to start. Computer forensic experts can often determine when such events have occurred, provided the employer has not itself corrupted the information. However, careless or improper efforts to extract information from a computer can destroy or compromise critical computer evidence. In fact, the well-intentioned manager who logs onto a former employee’s computer to investigate their conduct could render the evidence useless and irretrievable if done improperly. Starting up or even the routine use of anti-virus software can alter electronic data on the computer. Therefore, forensic experts recommend that a terminated employee’s computer be immediately disconnected from both the power and network and preserved for forensic review. Employers should essentially quarantine the computers, PDAs and cellular phones of departing employees so that a technology expert or computer forensic analyst can extract the data properly, if needed.

(Determine What Information the Employee Actually or Potentially Knew)

An employer should also take steps to try and determine what trade secrets or confidential information the departing employee may have in his or her possession. For example, was the employee present at meetings where company strategy was discussed? An employer should further determine whether there is any documentation confirming the employee’s presence or if any written
documents were provided which the employee may still have in his or her possession. If so, the employer should clearly request that information back and confirm that the employee has no more copies.

Additionally, when it comes to customers, an employer may want to document in some fashion what customers the employee worked with so that the employer has an idea of what customers to be concerned about after the employee leaves to work for a competitor.

_(Interview Co-Workers)_

Often, departing employees talk to their co-workers regarding their plans to leave the company. In these conversations, the departing employee may share their post-employment intentions, reveal prior misconduct or perhaps attempt to recruit co-workers to the detriment of the employer. Interviewing co-workers, therefore, could reveal a treasure trove of helpful information to the employer to protect itself and to assert any contractual rights it may have vis-a-vis the departing employee.

**E) Exit Interviews**

Exit interviews are useful regardless of the reason for the employee’s departure from the employer. Therefore, preparation by the employer for an exit interview is very important. An employer should take all necessary measures to ensure that the exit interview or discharge meeting is conducted in a fair manner. In advance, the company should prepare a written separation notice stating the reasons for the employee’s discharge, which is hopefully consistent with the investigator's conclusions as detailed in the prior sections. The separation notice should state the specific reason for the employee's termination. Keep in mind that an employer's stated reasons for the employee's termination must be able to be substantiated; otherwise, the employer’s inability to substantiate the reason for the employee's termination will undoubtedly lead to a lawsuit. The individual conducting the exit interview should maintain his or her objectivity and avoid any heated arguments over the circumstances of the termination. If the employer thinks that the employee may become violent, it would be prudent to have a safety and security individual readily accessible or present.

The following are some general instructions that an employer should communicate to the departing employee as soon as possible after learning of the departure, but no later than the exit interview:
1. To the extent there is an employment agreement with a restrictive covenant, it is imperative that the employer reinforce and highlight the departing employee’s obligations under the restrictive covenant.

2. As a general matter, all work done by the employee for the employer is for the benefit of the employer. As such, an employer should instruct departing employees not to take any documents or computer files with them when they leave. This includes everything from notes, correspondences, scratch paper, lists to forms.

3. Depending on the nature of the employee’s job, there may be employer information at the employee’s home or car. Therefore, the employer should instruct the departing employee to check his or her home or property for any company property (including computers and PDAs, credit cards, etc.) and to return the property immediately. A record should also be kept as to what has been returned by the departing employee.

4. The employee should be told to return all company property, such as computers, laptops, PDAs, and cell phones and the employer should keep a record of all items that have been returned from the employee.

5. The departing employee should be directed not to copy or duplicate any client lists or other company property on their computer or rolodex.

6. The departing employee should be instructed not to contact any clients to let them know that they are departing while still employed at the employer.

7. Employers should also reinforce the rule that employees are to dedicate all their efforts to the employer while they are still employed (i.e., they cannot be calling on customers for their new employer).

8. The employee should be directed to communicate all customer calls, leads and business opportunities to the employer while they are working for the employer. It is advisable to require the departing employee to prepare memoranda of the status of all projects and/or business opportunities of which they are aware or became aware of prior to their departure.

9. The employee should be told not to delete anything from any computer without the prior express and written approval of their supervisor. Even though most deleted computer data can be recovered by computer forensic examiners, it is best to keep information as accessible as possible.
In addition to the foregoing, keep in mind that the employee must usually be paid any earned wages, compensation or other benefits promptly after his or her termination. Many times, this can be done at the exit interview. Otherwise, inform the departing employee that their final paycheck and any earned vacation or other benefits will be sent to them at the next payroll date.

Many of these guidelines can be incorporated into a standard Exit Interview Checklist that can be used with every departing employee and placed in his/her employee file as a record of what information was gathered and discussed at the exit interview. Attached to the Appendix as Exhibit 4 (Pages 152-158) is a non-exhaustive checklist of steps employers should consider when terminating an employee.

F) Severance Agreements and Releases

Some companies have reacted to increased litigation by attempting to secure releases from employees who are either discharged or resign under disciplinary pressure, particularly if they believe that the employee may bring a lawsuit against them in the future. Such severance or separation agreements must be supported by “consideration” which is something of value that the employee is otherwise not entitled to as a result of the termination. Employees should also be given time to consider and execute severance documents since they have to be made knowingly and voluntarily. For example, in order for an employee to properly waive his or her rights under the Age Discrimination in Employment Act, very strict requirements must be met and the employee must be given time to not only review the agreement but also time to revoke the agreement, if they so choose, after their execution of the agreement. Finally, keep in mind that certain rights cannot be waived, such as an employee’s right to file a workers’ compensation claim or to collect unemployment insurance benefits.

In light of changing employment laws, it is always advisable to contact an employment attorney before providing a departing employee with a severance agreement or release, especially since one invalid provision could invalidate the entire agreement or release.

G) Final Compensation Obligations – Illinois Wage Payment and Collection Act

No matter the circumstances surrounding an employee’s termination, the company is still obligated to compensate an employee for all wages and
other compensation earned through the date of termination. Specifically, under the Illinois Wage Payment and Collection Act, Illinois employers must pay all final compensation of a separated employee no later than the next regularly-scheduled payday. Final compensation includes wages, bonus payments, vacation, commissions and any other compensation that is earned by the employee through contract or otherwise (e.g., severance, holiday, sick pay, etc.).

A frequent question that comes up when terminating an employee is, if the employee has company property (such as a laptop) that they won’t return or the employee damages certain property, whether the employer can deduct the value of the property from the employee’s final compensation. The quick answer is “no.” The employer is still obligated to pay final compensation and is unable to deduct any amounts from the final compensation unless the employee gives express written consent contemporaneous with the deduction. There are some limited valid deductions such as wage assignments, but otherwise the employer must pay a terminated employee’s final compensation.

Significantly, the Act also allows employees who do not receive their final compensation to recover damages from any corporate officer or agent of the employer who knowingly permits the employer to violate the Act. And, due to recent amendments to the Act, the penalties and potential damages to employers and owners for violating the Act are significant. For example, a violation of the Act can lead to a Class A or B misdemeanor and a felony conviction for repeated violations. If an employee prevails, he or she will also be entitled to the final compensation, plus damages equal to two (2) percent of the underpayment amount for each month past the date on which the wages were due, as well as attorneys’ fees and costs. In light of these potential damages, the best course of action is to pay the terminated employee his or her final compensation.

**H) Health Insurance Continuation Obligations**

There are four laws that may affect Illinois employers regarding an employer’s obligations to offer departing employees (and their beneficiaries) continued health insurance coverage: the Consolidated Omnibus Budget Reconciliation Act, Illinois Group Insurance Continuation for Terminated Employees, Illinois Spousal Continuation, and the Illinois Dependent Continuation law. These laws are discussed more fully below.
(COBRA Coverage)

In 1986, Congress passed Consolidated Omnibus Budget Reconciliation Act (“COBRA”). COBRA law requires covered employers (20 or more employees) offering group health plans to provide employees and certain family members of such employees the opportunity to continue health insurance coverage under the group health plan. The coverage is only available in a number of specific instances.

Under COBRA, a group health plan is defined as an employee welfare benefit plan providing medical care to participants or beneficiaries directly or through insurance, reimbursement, or otherwise (such as a trust, health maintenance organization, self-funded pay-as-you-go basis, reimbursement or combination of these). The term “employees” includes an individual who is (or was) provided coverage under a group health plan by virtue of the performance of services by the individual for 1 or more persons maintaining the plan. The term “employees” also includes self-employed individuals.

To be eligible for continuation coverage under COBRA, one must be a qualified beneficiary. A qualified beneficiary is an individual covered by a group health plan on the day before a qualifying event and is an employee, the employee’s spouse, or an employee’s dependent child.

Qualifying events are certain events that would cause an individual to lose health coverage, except for COBRA continuation coverage. The qualifying events for employees are: (1) voluntary or involuntary termination of employment for reasons other than “gross misconduct;” and (2) reduction in the number of hours of employment.

The qualifying events for spouses are: (1) voluntary or involuntary termination of the covered employee’s employment for any reason other than “gross misconduct;” (2) reduction in the hours worked by the covered employee; (3) covered employee’s becoming entitled to Medicare; (4) divorce or legal separation of the covered employee; and (5) death of the covered employee. The qualifying events for dependent children are the same as for the spouse with one addition: loss of “dependent child” status under the plan’s rules.

An employer must offer qualified beneficiaries COBRA coverage in writing within 30 days after the qualifying event and the qualified beneficiary must
be provided at least 60 days to elect health benefit continuation. While the periods of COBRA coverage varies depending on the qualifying event (e.g., termination, reduced hours, etc.) and the beneficiary (e.g., employee, spouse or dependent child), the minimum period of time COBRA applies is 18 months following the qualifying event.

*(Illinois Continuation Law)*

The Illinois Continuation Law protects individuals who lose their group health insurance coverage with an employer group of any size due to termination of employment. The Illinois Continuation Law applies to employees who have been covered by a group insurance plan for at least three months before termination. Coverage is available whether termination is voluntary or involuntary. The continuation benefits must be offered upon termination of employment unless termination is due to theft or commission of work-related felony.

Terminated employees are not eligible for continuation benefits under the Illinois Continuation Law if the employee is covered by Medicare or any other group health plan. Further, continuation benefits will terminate if the former employee becomes eligible for Medicare while such employee is receiving benefits under the Illinois Continuation Law.

Unlike COBRA, the employee must be given written notice of this option at the time of termination, or by mail to the employee’s last known address. The employee must elect the option within 10 days after the later of: (1) termination, or (2) receiving notice of the right to continued health insurance. In no event, however, may the employee elect continuation of coverage more than 60 days after termination.

*(Illinois Spousal Continuation Law)*

The Illinois Spousal Continuation Law protects a covered spouse and dependent children who lose health insurance coverage due to death or retirement of the employee. The spousal continuation benefits apply to employer groups of any size, insurance companies and HMOs.

The Illinois Spousal Continuation Law covers divorced or widowed spouses and covered dependent children, spouses (age 55 or older) of retired
employees, and covered dependents. Spouse and dependents must be covered on the day prior to the qualifying event. The qualifying events only include death, retirement of or divorce from the employee. Medicare entitlement is not included as the qualifying event.

(*Illinois Dependent Child Continuation Law*)

The Illinois Dependent Child Continuation Law protects dependent children who lose their group health insurance coverage with an employer group of any size due to the attainment of the limiting age under the policy or the death of the insured parent Medicare entitlement of the insured parent is not included. The Illinois Dependent Child Continuation Law applies to employers offering fully insured group and accident health plans and to employers offering fully insured HMO coverage. The law does not apply to self-insured employers, self-insured health and welfare benefit plans and insurance policies or trusts written in other states.

I) **Handling References for Terminated Employees**

Handling references for former employees is becoming increasingly difficult. For example, not disclosing an employee’s violent conduct can expose the company to liability if the employee thereafter injures someone at the next employer. On the other hand, disclosing something about a former employee that is arguably untrue could lead to defamation and other claims from the former employee. In light of this conundrum, all employers must decide how to handle requests for references for discharged employees and there may not be a “one size fits all” answer.

Recently, there has been a wave of litigation against former employers as a result of not disclosing certain behavior of their former employees to the employee’s subsequent employer. A typical situation is where an employer terminates an employee for repeated physical violence. Thereafter, his subsequent employer asks for a reference of that employee, whereby the employee’s violent tendencies are not disclosed (or better yet, they state that the employee was a good employee). Thereafter, the former employee ends up physically harming a co-worker at his new employer. In this situation, the subsequent employer may have a claim against the former employer.

The line between disclosing too much about a former employee (and exposing the company to a defamation lawsuit) and not saying anything at all is a
fine line. To potentially get around this, perhaps consider the following two examples:

**Bad Reference** Mr. Smith was terminated from the company for physically assaulting his co-worker on a business trip.

**Better Reference** Mr. Smith was terminated from the company after an investigation into allegations that he physically assaulted a co-worker on a business trip.

To minimize potential liability, many companies have adopted a “name, rank and serial number” policy, providing only the dates of employment, title, job duties and perhaps the salary of the former employee. Under this policy, the company should not respond to questions about work performance, divulge the reasons for the employee’s departure, or provide any personal information regarding the employee.

Moreover, only a single individual or small group of individuals should be authorized to respond to reference requests for terminated employees. This ensures that the policy is implemented consistently and correctly. To make sure this occurs, employees should be trained on who to refer references to at the company. The designated person should also not respond to any reference request until written authorization is received from the former employee. Additionally, with the increased use of applications such as LinkedIn, a policy prohibiting or limiting employees practice of making recommendations to any current or former employee may be prudent. In other words, you will want to avoid a supervisor giving a glowing recommendation to an employee who was just terminated for poor performance. Finally, all requests for references should be documented by including the name of the party requesting the information, the purpose for which the reference is requested and the information being provided. This ensures that the employee cannot later sue the company for disclosing the reference information.

**J) Unemployment Insurance Guidelines**

Unemployment insurance is a state-operated insurance program designed to partially replace lost wages when an employee loses a job through no fault of their own. If eligible, the program ensures that an employee will have some income for a period of time while they are looking for a job. Since even one
claim can significantly increase a company’s unemployment insurance rate, it is important for employers to understand the process and to take steps, if applicable, to maximize the chances that a terminated employee will not qualify for unemployment insurance.

(Voluntary Departures)

Generally, a resignation or voluntary departure from employment disqualifies a claimant from obtaining unemployment insurance benefits. However, what is truly voluntary is sometimes not clear. A voluntary departure from a position without good cause connected to the work normally disqualifies the claimant from receiving benefits. Therefore, the critical issue becomes whether the applicant left with or without good cause. For example, a substantial reduction in hours or pay may justify a voluntary resignation and preserve a claimant’s entitlement to benefits. Similarly, a hostile work environment can constitute good cause to resign from employment and shall entitle an applicant to benefits. In the end, while employees who resign are generally ineligible for benefits, it becomes a very fact specific inquiry as to the background circumstances of the resignation if they end up filing a claim for unemployment insurance benefits.

(Establishing Misconduct)

An employee’s termination as a result of misconduct disqualifies the employee from unemployment insurance benefits. Misconduct is defined as a willful and deliberate violation of a reasonable employer policy, provided that the violation harmed the employer. Usually, the burden is on the employer to establish misconduct. Employees terminated for poor performance or incompetence generally qualify for benefits since those situations generally do not rise to the level of misconduct.

An employee generally cannot commit misconduct unless the employee knows that a reasonable rule or policy is being violated. In this regard, it is crucial for employers to apprise their employees of work rules and policies and document instances of rule violations so that the employee’s prior knowledge of the applicable rule violation leading to their termination is undisputed. These steps are important not only to successfully protest a claim for unemployment insurance benefits but also to avoid other employment related lawsuits such as wrongful termination.
In the event a hearing is held regarding a claimant’s right to unemployment insurance, it is important to have individuals with firsthand knowledge of the claimant’s termination and the circumstances surrounding the termination. Almost all hearings where an employer fails to provide a witness with direct, firsthand knowledge results in a decision granting benefits to the claimant.
CHAPTER XIV

MAINTAINING A UNION-FREE COMPANY

Recent years have seen an increase in union activity, as well as a more engaged and proactive National Labor Relations Board (“NLRB”). Unions are also looking to organize workers in new industries. This will only significantly increase in the years to come if the NLRB maintains its existing composition. Because of this, the importance of effective union-free strategies cannot be overemphasized. As discussed below, there are a number of permissible things that employers can, and need to, do from the beginning of starting the company in order to increase the chances of maintaining a union-free workplace. However, before implementing any union-free strategy or policy, it is strongly suggested that an employer discuss them with competent legal counsel to ensure that the employer’s actions are permissible and lawful.

A) Establishing the Foundation for a Union-Free Environment

Since one of the leading causes of union organization at companies is a result of employment-related problems and poor workplace atmosphere, a company should initially conduct an employment audit to identify and address employment-related problems. Additionally, each employer should establish management credibility by communicating with employees regularly and encouraging employees to suggest ways to improve their jobs. Such communications should include not only an explanation of the policies and procedures that directly affect the employees, but also the conditions of the employer’s business and the state of the industry in which the employer competes. Too often employees have little knowledge of the policies and benefits available to them, so effective communication of those policies and benefits is a crucial factor in remaining union-free. Similarly, managers and supervisors must be thoroughly educated about the employer’s policies so that they will be able to effectively answer employee questions. Such training will also convey the message that the employer values its employees.

Mr. Tremblay gratefully acknowledges the assistance of Mark A. Spognardi in the preparation of this Chapter, as it has been partially adapted from portions of an article authored by Mr. Spognardi and previously published in the Employee Relations Law Journal.
Another way of establishing a union-free environment is to have proper dispute resolution channels. Employers facing union organizing drives are often perceived by employees as having no effective procedure for resolving internal disputes. This lack of dispute resolution provides the union with an effective tool to gather the necessary votes for an election. These dispute resolution channels may take the form of suggestion boxes, toll-free telephone “hot-lines,” “open door” policies, or more formalized complaint procedures. No matter what the complaint or procedure for handling complaints, all employers must treat complaints seriously and they must properly investigate and deal with the complaints fairly and uniformly.

A final way to establish a proper union-free foundation is to implement employee appreciation mechanisms. Frequently, it is the unhappy or under appreciated workforce that seeks out union assistance. It is therefore critically important to develop ways to validate employees and their efforts. Aside from bonuses or other monetary incentives, those efforts should include service awards, recognition in employer magazines or publications, letters of commendation and appreciation, parties, picnics and other functions where employees are recognized for their contributions.

B) Permissible Pre-Petition Union Free Strategies

There are several lawful measures that an employer can take prior to the existence of union activity in order to discourage employees from voting to unionize. These measures include implementing union-free declarations, no-solicitation/no distribution rules, and employer property access restrictions. The failure of an employer to implement the foregoing measures prior to the start of union organizing will make it extremely difficult for the employer to legally justify their sudden implementation after the union appears on the scene. Therefore, these measures should be implemented long before union activity commences.

First, prior to any union organizing drive, management should adopt and publish a declaration opposing unionizing and stating that the employer believes that unionization is not in the best interests of the employees. Among other places, this statement may be included in the employee handbook, posted on bulletin boards at the company and/or discussed with new employees during their initial orientation. Note, however, that any statement, whether written or oral, should be qualified to inform the employees that union activity is not prohibited and will not lead to disciplinary action or termination.
Second, management should adopt and implement a no-solicitation/no-distribution rule in its workplace. Under such a rule, the employer may lawfully prohibit oral solicitation during “working time” (which does not include breaks, lunches or other non-working periods on the employer’s property). The employer may also prohibit the distribution of union literature by employees during working time and in working areas where work is performed. However, a no-solicitation/no-distribution rule must be adopted and implemented prior to the onset of any union activity or else the rule will likely be held to be an unlawful prohibition of union activity. Also, once the rule is implemented, it must be enforced in a consistent, nondiscriminatory fashion. Therefore, an employer must enforce the rule for all union and non-union solicitations and distributions (which would include solicitations, for example, from charities) and it is strongly recommended to confine all solicitations, union or otherwise, to non-working time.

Third, an employer should also implement rules governing off-duty employee access, as well as access by non-employees. The purpose of an off-duty access rule is primarily to restrict solicitations and distributions by off-duty employees in work areas and interior non-work areas of the company. Again, this rule must be implemented fairly and uniformly and must not allow non-employees access for reasons other than company business. Moreover, the union must be able to reach employees through other reasonable efforts of communication, such as home visits, telephone calls, off-premises meetings and letters.

C) Legal Guidelines for Employer Communications and Actions During a Union Campaign

Once it becomes apparent that organizing activities are being conducted, management must be very careful about what it does and says with respect to the organizing activity. All supervisors and managers must be immediately educated about lawful or unlawful statements and actions that could subject the employer to unfair labor practice liability. These immediate prohibitions are generally discussed below.

Spying and Surveillance – It is unlawful for an employer (or its agents) to spy or surveil (or create the impression of spying or surveilling) on its employees’ union activities. This would include eavesdropping, following and monitoring employees’ attendance at union meetings, as well as taking photographs and video of employees’ union activities. However, the prohibitions against spying and surveillance do not prohibit an employer from observing what employees do in plain view, or listening to employee comments which are communicated in the employer’s presence.
Promises or Grants of Benefits – It is also unlawful for an employer to expressly or impliedly promise benefits to employees, such as wage increases, benefits, or other favorable terms of employment, in order to encourage its employees to reject unionization. An employer must even be careful about giving standard pay increases or better benefits during union activity since it will undoubtedly have an impact on the union election. The general rule is that the employer has a duty to conduct its business as if the union were not present. Therefore, if a tangible benefit is granted to the employees during union activity, the employer must show that the grant of benefits was motivated by considerations other than union activity (for example, the grant of benefits was decided before union activity commenced or that it was consistent with past practice). On the other hand, it is lawful for the employer to educate employees about existing wages and benefits, as well as to compare wages and benefits of employees without union representation with its own employees’ wages and benefits. It is common during meetings for employees to ask their managers whether the employer intends to improve some term or condition of employment if they vote against the union. The employer must be careful that its managers and supervisors do not fall into the trap and expressly or impliedly make a promise of betterment in response. Instead, the managers should inform the employees that it is prohibited by federal law from making promises during the union campaign, and it will not do so.

Interrogations – The interrogation of employees is unlawful if it has a reasonable tendency to restrain, coerce or interfere with employees in their rights to engage in union activity. Common examples of unlawful interrogation include questioning employees about whether they signed a union authorization card, what they think or feel about the union, what other employees think about the union, how an employee or other employees intend to vote, and what issues are motivating employees to seek unionization. That being said, it is lawful for management to listen to what employees volunteer to them. Therefore, management must be trained to carefully listen to employees volunteering information and to encourage the disclosure of information without unlawfully questioning the employee.

Threats, Retaliation and Reprisal – It is clearly unlawful for an employer to threaten employees with an adverse change in their terms or conditions of employment because they support the union. Examples of unlawful threats include threats of discharge, layoff, plant closure or loss of wages and benefits because of the unionization. Examples of unlawful retaliation and reprisal
includes taking any discipline or adverse action against an employee for taking part in union activity. It is, however, permissible for an employer to lawfully inform employees about the negative consequences of unionization or to provide employees with its prediction about how unionization would adversely affect the employer’s operations, as long as the message is based on objective facts which show that the negative consequences of unionization are beyond the employer’s control, or based on decisions made prior to union activity.

D) **Lawful Employer Union-Free Campaign Tactics**

The employer’s campaign to maintain a union-free environment will generally center on captive audience speeches, small group meetings, one-on-one discussions with employees and providing written campaign material. However, there are many other tactics that employers can use during a union campaign to minimize the risk of the employees voting to be represented by a union.

Employers can distribute to its employees written material such as “Fact Sheets,” “Q&A” leaflets, and “Did You Know…” leaflets before and during the union campaign in order to stimulate discussion among the employees and management. These written materials should be written in plain English to ensure that they will be read and understood. Before such materials are distributed, they must be reviewed and understood by management so that they can be conversant and capable of answering questions by employees related to the materials. These written materials can be posted in common areas, mailed to employee’s homes or placed in the employee’s paychecks.

Employers can also lawfully provide employees with food and drink during meetings and discussions during the union campaign. Employers can also put together a commercial or custom videos that employees can watch during their breaks. Employers may also prepare sample ballots with the “Vote NO” box marked with an “X” in order to clearly demonstrate to employees how to vote against union representation. However, if the employer reproduces the official sample ballot in order to demonstrate to the employees how to vote, it must clearly be marked on its face as a sample ballot and that the employer, not the NLRB, was responsible for preparing it.

Raffles are also legitimate campaign techniques as long as all employees are eligible to win so long as they vote, and so long as the raffles are not
conditioned on winning on how employees vote or the outcome of the election. In a sense, this is a “get out and vote” tactic to encourage the employees to vote in the union election. A disclaimer is strongly recommended stating that participation is voluntary and has no bearing on the outcome of the election, or how the employee votes.

Finally, pro-company buttons, T-shirts, caps and other nominally valued promotional materials are lawful campaign tools. However, management should not be the individuals distributing such materials since it risks allegations of unlawful interrogation. Instead, it is recommended that the employer make the promotional material available in common areas, so that employees are able to take them if they want.
CHAPTER XV

APPENDIX OF EXHIBITS
COMPREHENSIVE LIST OF EMPLOYEE HANDBOOK POLICIES

Employment Policies
- EEO/Affirmative Action
- Immigration and Employment
- “No Match” Letter
- Interviewing and Selection
- Requisition and Recruitment
- Reference Requests
- Access to Personnel Files
- Contingent/Temporary Workers
- Criminal History Records
- Background Checks
- Pre-employment Physical Examinations
- Orientation
- Internship
- Duty of Loyalty
- Employee Status/Classification
- Probationary/Orientation Period
- Conflict of Interest
- Indemnification of Employer by Employee
- Indemnification of Employee by Employer
- Part-Time Employment
- Temporary Employees-Independent Contractors
- Employment of Relatives/Nepotism
- Fraternization
- Union Activity
- Employment of Former Employees
- Layoffs and Recalls
- Employment at Will
- Non-Competition
- Confidentiality/Trade Secrets
- Job Sharing
- Promotions
- Performance Appraisal
- Re-Employment of Veterans
- Disability Accommodation
- Employment Contracts
- Moonlighting
- Telecommuting
- Job Posting

Attendance and Time Off Policies
- Absenteeism
- Tardiness
- Hours of Work
- Leave of Absence
- Holidays
- Vacation
- Sick Time
- Family and Medical
- Medical/Maternity
- Paid Time Off (PTO)
- Unpaid Time Off
- Uniformed Service/Military Leave
- Bereavement/Death in Family
- Jury/Witness Duty
- Education
- Inclement Weather
- Plant Closing
- Flex Time
- Return to Work
- Military Family

Exhibit 1
**Compensation Policies**

- Overtime
- Wage and Salary Administration
- Merit Increase
- Call-In Pay
- Deductions from Pay
- Garnishments
- Loans
- Pay Advances
- Bonus Pay
- Commissions
- On-Call Pay
- Travel Pay
- Training Wage
- Shift Pay

**Employee Benefit Policies**

- Medical Insurance
- Pension Plans
- 401(k) Plan
- Dental Insurance
- Unemployment Insurance
- Workers’ Compensation
- Moving Expenses
- Business and Travel Expenses
- Entertainment Expenses
- Child/Dependent Care
- Drug and Alcohol Rehabilitation
- COBRA
- Elder Care
- Product or Service Discounts
- Education Reimbursement
- Short-Term Disability
- Long-Term Disability
- Leave Banks

**Discipline and Rules Policies**

- Matching Gift Program
- Automobile Usage
- Commute Reimbursement
- Harassment
- Sexual Orientation
- Sexual Harassment Training
- Retaliation
- Work Rules
- Disciplinary Procedures
- Solicitation
- Proselytizing
- Smoking
- Employee Cafeteria
- Telephone Use
- Cellular Phone Use
- Beepers/Pagers
- Visitors
- Bulletin Boards
- Parking
- Drugs and Alcohol
- Drug Screening/Testing
- Fitness for Duty
- Grooming
- Privacy
- Employee Lockers
- Voice Mail
- Electronic Mail
- Viruses
- Facsimile
- Mail
- Internet/Intranet
- Software
- Extracurricular Activities
- Gambling
- Off-Duty Conduct
- Community Involvement
- Workplace Contraband
- Confidentiality
- Trade Secrets

**Safety, Security and Health Policies**

- Workplace Safety Programs
- Protective Equipment
- Accident Reports
- Emergencies
- Fire Prevention
- Annual Physical Exams
- Access to Medical Records
- Workers’ Compensation
- Contagious Disease (including AIDS)
- Hazard Communications
- Video Display Terminals (VDT’s)
- Motor Vehicle Safety
- Ergonomics
- Cellular Phone Safety
- Security Rules and Regulations
- Investigations
- Government Investigations
- Violence
- Tornado/Hurricane Evacuation

**Termination Policies**

- Voluntary vs. Involuntary Terminations
- Exit Interviews
- Severance Pay
- Retirement
- Unemployment Compensation
- Resignation/Notice
- COBRA

**Communication and Media Policies**

- Arbitration and Grievance Procedures
- Media Relations
- References
- Blogging
- Social Networking

**Miscellaneous Policies**

- Business Ethics
- Monitoring Telephone Calls
- Monitoring Internet Usage
- Confidentiality of Information
- Purchasing
- Recycling
- Transfers
- Resignation
- Lost and Found
- Access to Records
- Record keeping
- Record Retention
- English Only
- Employee Recognition
- Athletics and Recreation
- Breastfeeding
- Blood Donation
- Purpose of Handbook
- Employee Acknowledgment

**Exhibit 1**
APPLICANT INTERVIEWING GUIDE

WHAT AN INTERVIEWER MAY ASK DURING AN INTERVIEW

1. Questions regarding any information on the application for further review (provided application is in keeping with legal requirements).
2. Why did you leave your former employment?
3. What kind of references would you receive from your former employers?
4. What did your prior job duties consist of?
5. What did you like/dislike about your prior jobs?
6. What kind of job duties are you interested in?
7. What hours, days are you available or unavailable to work?
8. What do you feel is relevant to the position you are applying for?
9. Was there a job bidding procedure? Were job opening posted? Was there cross training?
10. How large a facility did you work for? Did the organization have a Personnel Department? How did it work? What duties did the Personnel Department perform? Did you make use of it?
11. What did you think of your prior supervisors? Any problems with past supervisors? Any problems with past supervisors? Did you get along with them? What kind of person was your prior supervisor: a strict disciplinarian, easy-going? What kind of supervisor do you like to work for?
12. How were employee problems and complaints solved at your prior job? Did you think it was a good procedure? How would you like employee problems and complaints handled if you were employed by this organization?
13. What were your wages at your prior job? How frequently were increases given, what were they based upon merit, productivity, or something else? Were they cents per hour or percentage increases? How many increases did you receive, if based upon merit?
14. Were you ever promoted in your prior jobs? On what basis were you promoted: length of service, merit?

Exhibit 2
15. Did you receive a shift differential at your prior job? How much? Was it a percentage or cents per hour?

16. What benefits did you receive at your prior job? Did you pay any part of your insurance coverage? Was this money automatically deducted from your paycheck? How were you advised by the prior employers as to your benefits: insurance booklets, employee memos, bulletin board notices, handbook? How frequently were benefits changed?

17. How much do you expect an employer to communicate to you and keep you involved as to what is going on? How would you want this communication to take place?

18. What is your greatest strength? How can that help you as an employee at this company?

19. What is your greatest weakness? What have you done over that past year to work on that weakness?

20. Discuss gaps in the applicant’s employment history.
APPLICANT INTERVIEWING GUIDE

WHAT AN INTERVIEWER SHOULD NOT ASK DURING AN INTERVIEW

1. Do not ask the applicant how old he or she is.
2. Do not ask the applicant his or her birth date.
3. Do not ask the applicant how long he or she has resided at his or her present address.
4. Do not ask the applicant what his or her previous address was.
5. Do not ask the applicant what church he or she attends or the name of his or her priest, rabbi or minister.
6. Do not ask the applicant what his or her father’s surname is.
7. Do not ask the female applicant what her maiden name was.
8. Do not ask applicants whether they are married, divorced, separated, widowed or single.
9. Do not ask applicants who resides with them.
10. Do not ask applicants how many children they have, or whether they plan on having children.
11. Do not ask the ages of any children of applicants.
12. Do not ask who will care for children while the applicant is working.
13. Do not ask how the applicant will get to work, unless owning a car is a job requirement.
14. Do not ask questions about the applicant’s credit score.
15. Do not ask about illnesses or family-related illness or history.
16. Do not ask the applicant where a spouse or parent works or resides.
17. Do not ask the applicant if he or she owns or rents his or her place of residence.
18. Do not ask the applicant the name of his or her bank or any information as to amount of any loans outstanding.
19. Do not ask the applicant whether he or she ever had his or her wages garnished or declared bankruptcy.
20. Do not ask the applicant whether he or she was ever arrested.

Exhibit 3
21. Do not ask the applicant whether he or she ever served in the armed forces of another country.

22. Do not ask the applicant how he or she spends his or her spare time or what club he or she belongs to.

23. Do not ask the applicant what foreign languages he or she can speak, read or write (unless a job requirement).

24. Do not ask the applicant if he or she is “for” or “against” unions, or whether the applicant was ever a union member.

25. Do not ask the applicant if he or she has ever filed a claim for workers’ compensation benefits.

26. Do not ask any questions about the applicant’s sexual orientation.

27. It is also generally advisable not to discuss political issues.

28. Do not ask questions that are sexually offensive or suggestive.

29. Do not ask an applicant’s feelings about working with people of different races.

30. Do not ask the applicant whether he or she has ever filed a discrimination lawsuit against a former employer.

31. Do not ask questions about how many sick days the applicant took at his or her prior employer.
EMPLOYEE TERMINATION CHECKLIST

☐ Legal Ramifications of Termination:

☐ Rationale for termination reviewed and documented
☐ Risks such as discrimination evaluated
☐ Risk/benefit analysis completed
☐ Potential for violence or extreme emotional reaction by terminated employee evaluated
☐ Final decision reviewed with Human Resources

☐ Notify Human Resources:

☐ Notify HR: As soon as you are aware of and/or receive a letter from an employee that notifies you of the employee's intention to terminate employment, or you terminate an employee, notify your Human Resources or related office.
☐ Official Notice: If an employee tells you of his/her intention to leave your employment, ask them to write a resignation letter that states they are resigning and their termination date.

☐ Remove Company Access / Return of Property:

☐ Disable employee building or property access: Effective on the termination date, whether immediate in a firing situation or at a mutually agreed upon end date, you need to terminate the employee’s building access:

☐ Disable entry codes
☐ Disable card swipe
☐ Change locks
☐ Consider changing security codes

☐ Return of Property: Effective on termination date, whether immediate in a firing situation or at a mutually agreed upon end date, you need to recover all company property:

☐ Blackberry/PDA
☐ Cell Phone
☐ Card Key
How to protect your business from liability and comply with state and federal employment laws

- Other Keys
- Company Car
- Parking Pass
- Company Credit and/or Gas Cards
- Telephone Calling Cards
- Home Computer (if provided by Company)
- Company Laptop
- Printer/Copier/Scanner/Fax Machine
- Customer list and contact information
- Identification Badges
- Any other Company owned materials

- Computer Related Issues / Information Systems:

  - **Notify the Network Administrator:** As soon as you know that an employee is leaving, notify the Network Administrator of the date and time on which to terminate the employee’s access to computer and telephone systems.
    
    - Notify Network Administrator of date to terminate computer access
    - Notify Network Administrator of date to terminate telephone access
    - Make arrangements to have employee’s email reviewed
    - Lock access to system and backup data prior to or during the notification meeting
    - Remove access to external Company databases and/or remote access software
    - Review and change all passwords prior to or during the notification meeting (i.e., access to computer system, online banking or other remote access financial services, etc.)
    - Transfer/cancel employee’s e-mail account
    - Set automatic e-mail notification to alert sender that employee is no longer employed
    - Server access (web etc.) denied / deleted
    - Voice mail message changed and/or deleted
    - Determine if any Company information is located on employee’s home/personal computers, and, if so, request that employee delete that information and certify that such information has been deleted

Exhibit 4
If misconduct is suspected or at issue, consider an immediate “quarantine” of the employee’s computer or other electronic device and have a computer forensic professional inspect the computer to ascertain whether any documents or files were improperly accessed and/or transferred by the employee.

- **Compensation Issues:**
  - **Wages**
    - Determine what “wages” are owed
    - Consider past practices, verbal commitments, any written documents or e-mail correspondence, what is stated in the offer letter/employment agreement, Company policies or any handbook, etc.
    - Determine when wages must be paid following termination
    - Determine if deductions are necessary for unpaid loans, wage overpayments, lost or stolen Company property and whether such deductions are allowed by law
    - Discontinue any automatic payroll deposits

  - **Vacation**
    - How much vacation has the employee earned?
    - How much vacation has been used?
    - Is the Company required to pay employee for accrued but unused vacation?
    - What is the Company’s policy (handbook, offer letter, past practice, etc.)?
    - What is required by the law of the state in which (a) the Company operates and (b) the employee resides?

  - **Continued Health Insurance Coverage Notice**
    - Confirm whether health insurance provider allows coverage through the end of the month of termination
    - Confirm that health insurance provider allows employee to be continued under group plan if continued insurance coverage is to be offered in connection with termination
    - Coordinate preparation of COBRA Continuation Coverage Election Notice or state law equivalent with health insurance provider
Notify group health plan of employee’s termination within 30 days
Provide terminated employee with COBRA election notice letter within 14 days after group health plan administrator receives notice of termination

**Employee Benefits**

- Prepare information regarding rollover of any 401(k) plans and other benefit information and notify carriers/providers of termination
- Life/Disability Insurance — discontinue premium payments and notify carrier(s) of termination
- Determine if any action should be taken regarding any applicable medical reimbursement or dependant care reimbursement plan

**Repayment of Advances / Expenses**

- Any unpaid payroll advances will be subtracted from the employee’s final check
- Any unpaid expenses for company business purposes (turned in on an expense report), unpaid commissions and bonuses will be paid in the final pay check.

**Expense Reports**

- Obtain executed copy of Employee’s final expense report and place in Employee’s file.

**Options/Restricted Stock/Other Securities of the Company (If applicable)**

- Were any securities granted?
- What is outstanding? What is vested? What is forfeited?
- Does anything additional vest as a result of the termination?
- How long does the employee have to exercise any option to purchase?
- Does the Company have any repurchase obligations? If so, will the Company exercise those rights? If so, when is the deadline?
- Is a notice regarding the employee’s rights and obligations required? If not, will any reminder be given?
- **Severance Payment:**
  - Will terminated employee receive a severance payment
    - If so, determine amount
    - If so, when and how will be paid
    - If so, should a severance agreement and release be used
    - If a severance agreement is used, should employee reaffirm post-employment obligations

- **Confidentiality and Non-Compete Agreements:**
  - Review any confidentiality agreement that the exiting employee signed to make certain the employee understands what is expected
  - Review any non-disclosure agreement that the exiting employee signed to make certain the employee understands what is expected
  - Review any non-compete agreement that the exiting employee signed when commencing employment to make certain the employee understands what is expected
  - Consider creating a list of protected accounts/information known by employee
  - Review any non-solicitation agreement that the exiting employee signed to make certain the employee understands what is expected
  - If exiting employee never signed any of the above, review Company Employee Handbook provisions (if applicable) about not sharing company confidential information or trade secrets and remind the employee that any breach of this confidentiality will be addressed

- **For Sales Employees:**
  - *Account Protection*
    - Account transition plan defined and ready for execution prior to termination or last day of employment
    - Notify employee’s contacts / customers / suppliers, etc. of termination and new contact person at Company
    - Assign Company representative to immediately contact active clients
    - Create list of “protected” accounts developed for non-compete issues
Review terminated employee’s calendar to ensure upcoming matters are covered
Email auto reply message crafted and in place or email redirected to new sales representatives
Paper files reviewed and secured while employee is being terminated
Does employee’s termination need to be communicated to any third parties

Financial Repercussions

Plan for tracking, calculating and paying outstanding bonus
“Bonus due” report prepared for terminated employee
A “collections” report generated and assigned for collections

Exit Interview Considerations:

Is security needed for the exit interview
Discuss appropriate details regarding termination:
  - effective date
  - business reasons for termination
  - pay and benefits after termination, if any
  - unemployment insurance eligibility
Review confidentiality, non-compete or other applicable agreements or restrictive covenants
Discuss inventions, if any
Terms of severance and benefits continuation discussed
Severance agreement and release provided (if applicable)
Final paycheck distributed or inform of date to be distributed
Company property returned or scheduled for return
Arrangements made for retrieval of employee’s personal property under supervision
Confirm employee’s address for future mailing of information
Provide employee with a contact person and information for questions arising after the meeting
Post Termination:

- Document details of exit meeting and place in personnel file
- Place copy of executed Severance / Release Agreement in Employee’s file (if applicable)
- Remove employee from Company website (if applicable)
- Place completed checklist in employee’s file
- If misconduct is suspected, “quarantine” the employee’s computer and have a computer forensic specialist audit the computer
CHAPTER XVI

ARNSTEIN & LEHR’S LABOR AND EMPLOYMENT PRACTICE GROUP

As part of its commitment to providing comprehensive business law and litigation services to its clients, Arnstein & Lehr LLP offers a full-service Labor and Employment Law Practice Group. The Practice Group’s members have extensive experience in counseling clients and litigating before administrative agencies and state and federal courts in the following areas of labor and employment law: union-management relations, unfair labor practice proceedings under the National Labor Relations Act, collective bargaining, contract administration, grievance and arbitration proceedings, employment discrimination and affirmative action, wrongful discharge, retaliation, ERISA and employee benefits, restrictive covenants, occupational safety and health, wage and hour law, drug and alcohol testing, disability-related issues, employment-related immigration, and general personnel and human resource administration.

The firm’s Labor and Employment Law Practice Group is engaged in a nationwide practice, representing both private and public sector employers. Clients include union and non-union companies and range in size from large, publicly-held Fortune 500 corporations to small, closely-held and not-for-profit businesses. We cover a wide variety of industries, including manufacturing, retail, service, engineering, transportation, health care, condominium association, higher education, banking and finance, printing, technology, government and municipal, recreation, hotel and restaurant, food and beverage and building and construction.

The objective of the Practice Group, like that of the firm generally, is to provide legal services to clients in an effective, timely and economic manner. The Practice Group’s members are particularly cognizant of the cost-sensitive nature of labor and employment related legal services, and we work closely with clients to address their billing, staffing and budgetary needs and concerns, together with their underlying legal problems.
SPECIFIC AREAS OF EXPERIENCE

Litigation Services

A substantial part of the litigation of the Practice Group consists of proceedings before state and federal courts, administrative agencies, and arbitration tribunals across the country. The litigation practice encompasses virtually all of the substantive areas of labor and employment law, including both jury and non-jury trials and appellate proceedings before state and federal courts of appeal, state supreme courts and the U.S. Supreme Court.

The Practice Group’s members have extensive experience in the following litigation:

- Discrimination, harassment and retaliation cases involving age, race, sex, national origin, religion, disability, and other protected characteristics and activities
- Class actions alleging violations of overtime, minimum wage and child labor
- Wrongful termination, retaliatory discharge, breach of contract, invasion of privacy, fraud and similar common law suits
- Unfair labor practice and representation cases before the National Labor Relations Board
- Suits to compel arbitration or to enjoin strikes, picketing and handbilling
- Grievance and arbitration proceedings arising under collective bargaining agreements
- Litigation involving the ADA, FLSA, ERISA, FMLA, USERRA, WARN Act and similar laws
- Suits for employee benefits, trust fund contributions, pension fund withdrawal liability, and breach of fiduciary duties under ERISA and related laws
- Citation proceedings and audits before the Occupational Safety and Health Commission
- Minimum wage, overtime, and related wage and hour suits
- Litigation involving executive compensation
• Suits alleging breach of non-competition and confidentiality agreements and related injunction proceedings

• Claims for unemployment compensation benefits and contributions before Departments of Employment Security

Client Counseling and Other Non-Litigation Services

Although litigation is a substantial and necessary part of the Practice Group’s services to its clients, its members also provide ongoing consultation to assist clients in solving day-to-day problems and, where possible, to avoid litigation. The Practice Group’s counseling and other non-litigation services include the following:

Employment Discrimination, Civil Rights and Affirmative Action. The Practice Group represents clients in administrative investigations and enforcement proceedings involving allegations of discrimination, harassment and retaliation based upon age, race, sex, national origin, religion, disability or other protected classifications, prepares affirmative action plans for government contractors, and generally counsels clients concerning compliance with federal, state and local equal employment opportunity laws.

ERISA and Employee Benefits. An important part of the Practice Group’s client counseling services relate to employee benefits. Attorneys develop and draft pension, profit sharing, severance, and other welfare benefit plans and the corresponding summary plan descriptions and wrap documents. They also provide general consultation regarding such matters as plan administration, withdrawal liability, COBRA, and other entitlements of terminated employees.

Occupational Safety and Health. The Practice Group counsels clients regarding hazardous substances and exposures in the workplace, compliance with employee and community “right to know” legislation, and compliance with OSHA standards and record-keeping requirements. This includes representing clients in connection with OSHA and NIOSH safety and health inspections and audits and assisting clients in developing and implementing safety rules, committees and programs.

Wage and Hour Laws. The Practice Group assists clients on compliance with state and federal minimum wage, overtime, child labor and equal pay laws, as well as the wage-related claims by terminated employees. In addition, the Group represents clients in connection with administrative investigations
and compliance proceedings by government enforcement agencies, and develops and drafts commission arrangements, sales incentive plans, and other compensation programs.

Union-Management Relations. Members of the Practice Group counsel clients in connection with union organizing campaigns and NLRB elections, negotiate and draft collective bargaining agreements, and advise clients with respect to the interpretation and administration of those agreements. They provide client consultation in such areas as strike planning and prevention, relocation of unionized operations, subcontracting of bargaining unit work, and the purchase or sale of unionized businesses. They also provide invaluable advice in double breasting operations.

Business Immigration. With the increasingly international nature of corporate enterprises and the push for changes in immigration laws, businesses are more frequently facing issues involving foreign or undocumented workers. In this regard, the Practice Group members counsel clients regarding compliance with immigration law, employment verification, record-keeping and anti-discrimination requirements. They also represent clients in connection with INS inspections, and help clients secure lawful permanent resident or non-immigrant status for their employees, managers and corporate officers.

Mergers, Acquisitions, Reductions in Force and Early Retirement Programs. The Practice Group assists clients comply with state and federal plant closing laws, statutory bargaining obligations and employment discrimination laws, and avoidance of unintended liabilities under employee benefit plans and union contracts. They also assist clients involved in mergers, acquisitions and relocations to develop and implement effective communication programs with employees, union representatives, community groups, and local governmental agencies.

Protecting Intellectual Property, Business Relationships and Other Competitive Advantages. Our members assist clients maximize their ability to protect their competitive advantages from outsiders and former employees. The Practice Group also frequently drafts restrictive covenants, advises clients on security measures and litigates claims that frequently arise in this area.

Employment Contracts and Policies. The Practice Group’s members draft and review employment contracts, confidentiality agreements, covenants not-to-compete, independent contractor agreements, employee handbooks, supervisor
manuals, separation agreements and releases, employment applications, and related employment policies and forms.

**Drug Testing, Safety and Workplace Privacy.** The Practice Group has extensive experience in developing substance abuse and testing programs for public employers, government contractors, schools and universities, and other private employers in highly regulated industries, as well as in industry and service organizations generally. The Group’s members also counsel and represent clients in connection with many workplace safety and privacy issues, such as monitoring employee internet usage and preventing workplace violence.

**General Personnel Administration and Supervisory Training.** The Practice Group is often used by clients for consultation on a broad range of personnel matters, such as lawful and effective employment interviews, hiring and recruitment practices, absentee control programs, performance appraisal programs, leave of absence policies, discipline and discharge policies, and internal complaint procedures. The Group also provides on-site training for supervisors and managers on relevant areas of labor and employment law and personnel administration.

**Labor and Employment Audits.** Members of the Practice Group conduct periodic audits of our clients’ labor, employment and related corporate policies and practices. These comprehensive “check ups” are designed to judge the sufficiency of clients’ legal compliance efforts, identify and minimize exposure to liability under state and federal labor and employment laws, gauge and reduce susceptibility to union organizing efforts, identify means of reducing costs and improving safety in the workplace, and providing information for the development of short and long-term plans concerning wage and benefit administration, collective bargaining, staffing needs, and organizational restructurings.

**THE PRACTICE GROUP’S MEMBERS**

The Labor and Employment Law Practice Group consists of experienced labor and employment attorneys who understand the needs of business and the realities of litigation.

In addition, the Practice Group’s members frequently present lectures and seminars on labor and employment-related topics for clients, bar associations, chambers of commerce, and special industry and professional organizations.
They also frequently author articles on a variety of workplace legal issues and participate in the development and drafting of labor and employment laws and regulations at both state and federal levels.

The Practice Group is currently made up of the following attorneys:

James C. Brady, Fort Lauderdale
Jenifer H. Caracciolo, Chicago
Robert T. Cichocki, Chicago
Norman P. Jeddeloh, Chicago
Katelyn R. Letizia, Chicago
Randall L. Sidlosca, Miami
Harley Storrings, Miami
Jay P. Tarshis, Chicago
E. Jason Tremblay, Chicago
David S. Wayne, Chicago
CHAPTER XVII

ABOUT THE AUTHOR – E. JASON TREMBLAY

Mr. Tremblay is a partner in Arnstein & Lehr’s Litigation Department. He focuses his practice in employment and commercial litigation and counseling. In the commercial area, Mr. Tremblay represents both plaintiffs and defendants in a broad range of complex business and tort litigation matters, including matters involving breach of contract, breach of fiduciary duty, fraud, interference with contract, shareholder disputes and insurance coverage. In the employment area, Mr. Tremblay has extensively addressed, through counseling, negotiation and litigation, a broad range of key issues critical to the evolving workplace. He has particular expertise representing employers in both federal and state court, as well as administrative tribunals, in a wide variety of lawsuits, including the enforcement of restrictive covenants, Title VII, ADA and ADEA discrimination and retaliation claims, FMLA interference claims, trade secret, and unfair competition matters. He frequently reviews and drafts employment and independent contractor agreements, severance agreements, employment policies and employee handbooks. Mr. Tremblay represents a diverse client base, including financial institutions, colleges and universities, municipalities and companies in the information technology, printing, manufacturing, distribution, food and beverage, transportation, consulting and retail industries.

Professional Activities and Achievements

Mr. Tremblay graduated from law school with high honors and received the CALI Award for Academic Excellence in Legal Writing. Mr. Tremblay was a judicial extern for then Presiding Magistrate Judge Arlander Keys in the United States District Court for the Northern District of Illinois. He also served as a certified mediator through the Center For Conflict Resolution and mediated numerous cases involving landlord-tenant disputes, juvenile court referrals and employment discrimination. Throughout law school, Mr. Tremblay also served as a law clerk with the Office of the General Counsel at the Illinois Institute of Technology. He is currently an active member in the Illinois State Bar Association (including a member of the Labor and Employment Section Council), the American Bar Association, the GOA Regional Business Association, the Small Business Advocacy Council and several other regional chambers of commerce.
Recent Publications and Lectures

In addition to this Toolkit, Mr. Tremblay has authored an e-book chapter entitled “Ten Easy Steps Employers Can Take To Avoid Employment-Related Liability” for ExecSense — the world’s largest publisher of webinars, e-books and digital knowledge.

He also wrote six columns on various employment law issues for Inside Counsel – Business Insights for Law Department Leaders.

Mr. Tremblay has authored the following articles in the past several years:

• “Medical Marijuana Comes to Illinois — What It Means for Illinois Employers” for ISBA Labor & Employment Law Newsletter
• “New Law Prohibits Credit Checks by Most Illinois Employers” for General-Counselor.com
• “Government Set To Crack Down on the Use of Independent Contractors” for General-Counselor.com
• “Cleary Act Reminder – Why the Penn State Scandal Matters to the Academy” for Arnstein & Lehr’s Higher Education Update
• “Pending Federal Employment Legislation: Employers Beware!” for Arnstein & Lehr’s Employment Law Update
• “Avoiding Employment-Related Litigation in 2009 and Beyond: 14 Preventative Measures Every Employer Should Complete” for HR Advisor
• “Department of Labor’s New Regulations Under the Family and Medical Leave Act” for Arnstein & Lehr’s Employment Law Update
• “Employment Eligibility Verification Form I-9 Changes Again” for Arnstein & Lehr’s Employment Law Update
• “12 Steps to Avoid Employment Related Liability” for Employment Law360
• “Properly Investigating Complaints of Harassment-How to Limit a Company’s Exposure” for Business Law Today
• “Responding Effectively To Harassment Claims” for Employment Law360
• ”Department of Labor’s New Regulations Under the Family and Medical Leave Act” for Arnstein & Lehr’s Employment Law Update
• “FMLA is Amended to Extend Leave of Absence for Military Families” for Arnstein & Lehr’s Employment Law Update
• “The Illinois Human Rights Act Now Provides Employees With Access to a Jury Trial in State Court” for Arnstein & Lehr’s Employment Law Update
• “Properly Investigating Complaints of Harassment: How to Avoid Turning a Weak Harassment Claim Into a Strong One” for Employment Law360
• “Beware When Employees Call in Sick: Employers’ Growing Obligations Under the FMLA” for Arnstein & Lehr’s Employment Law Update
• “The Impact of New Federal Class Action Legislation on Employment Litigation” for Arnstein & Lehr’s Employment Law Update

Lectures and Seminars

Mr. Tremblay recently presented a 4-part seminar series entitled “Employment Law for Businesses.” Some of the issues discussed were worker classification and independent contractor developments, wage and hour compliance strategies, the importance of employment audits, and steps employers can take to protect their trade secrets and competitive advantage.

Mr. Tremblay has also presented the following seminars:

• “The New ADA Amendments Act – What Employers Need to Know”
• “Implications of the Americans With Disabilities Act When Responding to Threats of Student Violence”
• “How to Protect Your Company’s Competitive Advantage With or Without Restrictive Covenants”

He frequently presents seminars to industry groups on a wide range of labor and employment topics such as cost-effective steps employers can take to protect their assets, avoid litigation and comply with labor and employment laws.

Education

Chicago-Kent College of Law (J.D. with high honors, 2000; Order of the Coif)
Franklin and Marshall College (B.A., 1996)
University of Aberdeen, Scotland (1995)

Bar Admissions

State of Illinois; U.S. District Court, Northern District of Illinois (including Trial Bar); U.S. District Court, Central District of Illinois; U.S. Court of Appeals, Seventh Circuit
NOTES
“Whatever the issue or matter, my commitment is to provide you with legal services of the highest quality in a professional, timely and cost-effective manner.” — E. Jason Tremblay

Mr. Tremblay is a partner at Arnstein & Lehr LLP. For over 14 years, he has advised and represented companies, large and small, on all aspects of the employment relationship, including litigating on behalf of employers in both state and federal courts, as well as in administrative tribunals, in a wide range of employment-related disputes.

While Mr. Tremblay is prepared to aggressively litigate on behalf of his clients, he is always looking for ways to proactively avoid lengthy and costly litigation. In this regard, he frequently counsels his clients on a variety of employment and labor matters involving employment contracts, handbooks and policies. Mr. Tremblay regularly conducts employee training, seminars, investigations and preventative employment audits. He also routinely lectures and publishes articles and legal updates on a wide range of employment and labor law topics relevant to employers.

In addition to handling employment and labor matters, Mr. Tremblay also provides sound business and commercial advice for his clients in order to deliver practical solutions to complex legal and business issues. For example, he has extensive experience counseling companies on steps they can take to protect their assets and to maintain their competitive advantage. In this capacity, Mr. Tremblay regularly serves as general counsel and “trusted advisor” for many companies throughout the country.

This book represents one of the many tools that Mr. Tremblay shares with his clients and prospects to help them avoid litigation and manage their risk.